

*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

2005

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

# DECISIONS OF ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS<sup>1</sup>

### A. DECISIONS OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL<sup>2</sup>

#### 1. *Judgement No. 1231 (22 July 2005): Applicant v. the Secretary-General of the United Nations*<sup>3</sup>

TERMS AND CONDITIONS OF EMPLOYMENT—DECISION TO ARM SECURITY OFFICER IS A POLICY DECISION WITHIN THE DISCRETION OF THE SECRETARY-GENERAL—LIMITED REVIEW OF DISCRETIONARY DECISIONS—BURDEN OF PROOF IN DISCRIMINATION CLAIMS—TRANSFER AND CONVERSION OF STATUS OF EMPLOYMENT

The Applicant entered the service of the Organization as a Security Officer at the S-1 level on 19 September 1983. Her contract was subsequently extended and, on 1 October 1985, she was granted a permanent appointment. At the time of the events which gave

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<sup>1</sup> In view of the large number of judgements which were rendered in 2005 by the administrative tribunals of the United Nations and related intergovernmental organizations, only those judgements which address significant issues of United Nations administrative law or are otherwise of general interest have been summarized in the present edition of the *Yearbook*. For the full text of the complete series of judgements rendered by the tribunals, namely, Judgements Nos. 1223 to 1281 of the United Nations Administrative Tribunal, Judgements Nos. 2375 to 2479 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 330 to 344 of the World Bank Administrative Tribunal, and Judgements No. 2005-1 to 2005-4 of the International Monetary Fund Administrative Tribunal, see, respectively, documents AT/DEC/1223 to AT/DEC/1281; *Judgments of the Administrative Tribunal of the International Labour Organization: 98th and 99th Sessions*; *World Bank Administrative Tribunal Reports, 2005*; and *International Monetary Fund Administrative Tribunal Reports, Judgments No. 2005-1 to 2005-4*.

<sup>2</sup> 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 United Nations Secretariat or of their terms of appointment. In addition, the Tribunal's competence extends to the United Nations Joint Staff Pension Fund (including cases from all specialized agencies that participate in the Fund and which have accepted the jurisdiction of the Tribunal in Pension Fund cases), the United Nations Programmes and Funds, such specialized agencies and related organizations that have accepted the competence of the Tribunal (the International Maritime Organization and the International Civil Aviation Organization), the staff of the Registries of the International Court of Justice, the International Tribunal for the Law of the Sea, and the staff of the International Seabed Authority. For more information about the United Nations Administrative Tribunal and the full texts of its judgements, see [http://untreaty.un.org/UNAT/main\\_page.htm](http://untreaty.un.org/UNAT/main_page.htm).

<sup>3</sup> Spyridon Flogaitis, Vice-President, presiding; and Jacqueline R. Scott and Goh Joon Seng, Members.

rise to her Application, she held the S-3 position of Security Officer, Security and Safety Service (SSS).

The Applicant had expressed religious objections to carrying a firearm in 1989, but was subsequently able to overcome them and carried a weapon for some years. On 15 August 1997, however, she informed her supervisor that she could no longer reconcile carrying firearms with her religious convictions. On 23 November 1999, the Applicant, who had completed the training to be a Fire Officer, submitted a request for assignment to the Fire Unit. It would appear that no action was taken on this request.

On 9 November 2000, the Office of Human Resources Management prepared a “Note for the File” documenting various efforts made to resolve the Applicant’s case, including a conciliation session and an offer of either “exceptional terms of agreed termination” or a transfer outside the SSS, subject to conversion of her status to General Service and a review of her status after one year. Thereafter, on 17 January 2001, the Applicant was furnished with a draft Memorandum of Understanding which set out the terms for her transfer to the General Service category and indicated that the resulting loss in income would be borne by her.

On 29 August 2001, the Applicant lodged an appeal with the Joint Appeals Board (JAB). In a majority report dated 29 August 2002, the JAB recommended that, in the event of a transfer to the General Service category, the Applicant should be paid a personal transitional allowance, decreasing progressively from US\$ 540 a month to zero over a period of three years, and that the review of her contractual status should take place after at least two years of service. The dissenting member of the JAB recommended that she be transferred or reassigned to the Fire Unit. On 23 September 2002, the Applicant was informed that the Secretary-General was not in agreement with the recommendations of either the majority or the dissenting member of the JAB, but would permit her “a final opportunity” to elect one of the options offered to her in November 2000. She was cautioned that, in the absence of a decision from her within one month, the Administration would “commence the procedures for terminating [her] appointment for failure to meet the performance standards required of a Security Officer”. On 30 October, the Applicant opted for a transfer to the General Service category, “in order to protect [her] employment with the Organization”. On 30 June 2003, she filed her Application with the Tribunal.

In its consideration of the case, the Tribunal recalled its jurisprudence that the terms and conditions of employment with the United Nations “are not necessarily limited to those set out in writing” but “may be expressed or implied and . . . gathered from correspondence and surrounding facts and circumstances”. It found that the terms and conditions of the Applicant’s employment, including the requirement that she be willing and able to bear firearms when required, were set forth both in writing and in the “surrounding facts and circumstances”.

With respect to the written terms of the Applicant’s employment, the Tribunal took note of the following provisions of the Handbook of the SSS, a copy of which was provided to the Applicant upon recruitment:

*“Section 5.06—Firearms—Issue and Control Procedures*

(a) *Authority to Carry Firearms*—Personnel of the [SSS] who are authorized by the United Nations and who are issued firearms will carry such weapons only when they are on duty. Under normal circumstances, firearms will be carried by senior supervisory

personnel, by investigators, by personnel on special assignment, and by security officers manning posts specially designated as armed posts.”

The Tribunal considered that the use of the word “will” in the first sentence of section 5.06 made it apparent that the Applicant could be required to carry a firearm, subject to the limitations of the clause. Moreover, it found that the inclusion of the phrase “under normal circumstances” implied that in other, less normal circumstances other officers would be called upon to carry a weapon. Finally, as it fell within the reasonable discretion of the Respondent to designate posts as armed posts, the Tribunal determined that every officer, including the Applicant, might be called upon to bear arms.

With respect to the surrounding circumstances of her employment, the Tribunal held that based on the very nature of her position as a Security Officer, the Applicant knew, or should have known, that carrying a firearm, when required, was a condition of her employment. Rejecting the Applicant’s argument that carrying a firearm ought not to be a pre-requisite to performing security functions, the Tribunal found that the decision to arm security officers is a policy decision, within the discretionary authority of the Secretary-General, and that it was not the Tribunal’s role to substitute its views for those of the Secretary-General or the General Assembly on how best to manage the Organization.

Insofar as the Applicant’s claims that the Respondent’s decision had been arbitrary and discriminatory were concerned, the Tribunal recalled its longstanding jurisprudence that it would not substitute its judgement for that of the Secretary-General in personnel matters unless his discretion was shown to have been vitiated. The *onus probandi* is on the staff member making such allegations and, in this case, the Applicant had not provided the necessary proof in order to meet her burden.

Accordingly, the Tribunal rejected the Application in its entirety.

2. *Judgement No. 1234 (22 July 2005): Applicant v. the Secretary-General of the United Nations*<sup>4</sup>

APPOINTMENTS OF LIMITED DURATION (ALD)—NO RIGHT OF RENEWAL OF ALD—NO REQUIREMENT OF NOTICE OF TERMINATION UNDER ALD EXCEPT IN COUNTERVAILING CIRCUMSTANCES—CREATION OF LEGITIMATE EXPECTATION OF CONTINUED EMPLOYMENT—DISGUISED DISCIPLINARY SANCTION—BURDEN OF PROOF IN CLAIMING HARASSMENT AND DISCRIMINATION—RESPONSIBILITY OF ORGANIZATION FOR ACTS TAKEN BY INDIVIDUAL STAFF MEMBERS—PRIVILEGE OF THE ORGANIZATION TO CONSIDER DISCIPLINARY PROCESS AGAINST STAFF MEMBERS

The Applicant entered the service of the United Nations at the G-3 level as a clerk in the Finance Service, United Nations Office in Geneva (UNOG), in September 1990. His contract was subsequently extended until March 1996. In August 1997, he entered the service of the Office of the United Nations High Commissioner for Human Rights (OHCHR). At the time of the events which gave rise to his Application, he held the P-2 level position of Administrative Officer in the Office for Human Rights Field Operation in the Former Yugoslavia in Zagreb. His employment was governed by a series of appointments of limited duration, with an ultimate expiry date of 31 December 2000.

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<sup>4</sup> Julio Barboza, President; Kevin Haugh, Vice-President; and Dayendra Sena Wijewardane, Member.

In 2000, the Applicant and his supervisor, the Chief of OHCHR Croatia, disagreed on a number of matters. On 23 August, the Applicant submitted a formal complaint, accusing his supervisor of harassment and mismanagement and requesting that an investigation be carried out by an independent panel or internal auditors. On 20 September, the Chief a.i., OHCHR Administration, offered to transfer the Applicant to the Administration Section in Geneva for the remainder of his ALD. She also offered him a general temporary assistance (GTA) post at the GL-6 level as of 1 January 2001. The Applicant accepted her offer and was reassigned to Geneva with effect from 19 October.

In October and November 2000, two investigators from the Office of Internal Oversight Services (OIOS) conducted an investigation at the Zagreb Office and at the OHCHR headquarters in Geneva. Thereafter, on 11 December, the Applicant was informed that his ALD would not be extended and that, for budgetary reasons, he would not be offered a contract in 2001. He separated from service on 31 December 2000. On 8 February 2001, the Applicant requested administrative review of the decisions taken by the Chief of OHCHR Croatia and the Chief a.i., OHCHR Administration.

In its report dated 26 April 2001, OIOS noted that the Applicant had not acted in accordance with his general obligations as an international civil servant and recommended that a copy of the report be placed in his official status file “in order to prevent any future recruitment with the Organization”.

On 1 May 2001, the Applicant lodged an appeal with the Joint Appeals Board (JAB). In its report of 14 April 2003, the JAB found that the non-renewal of the Applicant’s ALD had not been a retaliatory measure, nor was it tainted with prejudice or motivated by extraneous factors, as it formed part of the arrangement agreed upon by the Applicant and OHCHR. However, the JAB held that the offer of the new GTA contract, that had not been clearly presented as being contingent upon the receipt of necessary funding, had created for the Applicant a legitimate expectation for continued employment. Whilst it did not find documentary evidence of a link between the on-going OIOS investigation and the withdrawal of the offer of GTA employment, the JAB found that the reason given to justify the withdrawal of the offer was not supported by evidence. Accordingly, the JAB concluded that the Administration had violated the Applicant’s right to fair and equitable treatment and recommended that he be paid compensation of two months’ net base salary. The JAB also concluded that it was not competent to address the complaints of harassment.

On 30 July, the Applicant was informed that the Secretary-General had accepted the JAB’s conclusion and recommendation. On 17 September, he filed his Application with the Tribunal.

In its consideration of the case, the Tribunal first addressed the Applicant’s contention that the decision not to renew his ALD was an act of reprisal, vitiated by prejudice and arbitrariness. The Tribunal recalled its longstanding position that while fixed-term contracts carry no right of renewal and require no notice of termination, exceptions to this rule may be found in countervailing circumstances. In the Applicant’s case, however, the Tribunal did not need to investigate the existence of such countervailing circumstances, as it found it evident from the file that he had agreed to transfer to Geneva “on the promise of a new, different appointment upon the expiration of his existing contract”. The Tribunal noted that it found the Applicant’s case “peculiar”, as he simultaneously protested “both the non-renewal of his ALD *and* the rescission of the express offer of a GTA post . . .

options [which] were mutually exclusive". In sum, the Tribunal agreed with the JAB that the Applicant had implicitly agreed to the non-renewal of his ALD.

Likewise, the Tribunal agreed with the JAB that the Applicant did enjoy "a legitimate expectation of continued employment", by virtue of the Administration's express promise of a GTA position. The Tribunal remarked upon the fact that this promise was unusually well-documented and that it was clear that there was a meeting of the minds of all parties concerned. The Tribunal considered that the most likely reason for the Administration's decision to renege upon its express promise was related to the initial findings or approach taken during the OIOS investigation, a hypothesis more persuasive than a sudden, unexpected lack of funding, especially as the Respondent did not substantiate his allegation regarding the unavailability of funds with any evidence at all. It considered such action on the part of the Administration to be clearly improper, denying the staff member of his rights of due process and effectively imposing a disguised disciplinary sanction upon him. In view of the circumstances of the case, the Tribunal determined that a larger award of compensation than that recommended by the JAB was warranted, and awarded the Applicant an additional four months' net base salary.

With respect to the Applicant's claims that he was a victim of harassment and discrimination, the Tribunal recalled its consistent jurisprudence that the person making such allegations bears the burden of proving his case, and held that the Applicant had not succeeded in discharging this burden. The Tribunal also rejected the Applicant's pleas to "establish the personal liability and individual accountability" and to "consider disciplinary process" against OHCHR staff members, as well as to "create an investigative panel . . . to determine the professional and personal accountability and individual liability" of the OIOS investigators involved in the case. The Tribunal recalled that such action was the privilege of the Organization and that the Applicant had no legal right to have such action initiated. Moreover, it held that the Applicant's injury was imputed to the Organization, which is responsible for the actions taken by individual staff members, and that the Judgment of the Tribunal had provided him with sufficient satisfaction.

3. *Judgement No. 1236 (22 July 2005): Applicant v. the Secretary-General of the International Maritime Organization (IMO)*<sup>5</sup>

WITHDRAWAL OF REQUEST FOR EARLY RETIREMENT—CREATION OF LEGITIMATE EXPECTATION—FAILURE OF IMO TO ACT IN GOOD FAITH—RELEVANT DATE OF RECEIPT OF COMMUNICATIONS—DISCRIMINATION AND UNFAIR TREATMENT

The Applicant entered the service of IMO at the P-3 level as a Translator in the Spanish Translation Section, Conference Division, on 14 April 1986. His contract was subsequently extended and he was granted a permanent appointment. At the time of the events which gave rise to his Application, he held the P-4 position of Senior Translator/Reviser.

On 4 May 2001, the Applicant gave notice to the Organization, indicating that he would like to take early retirement with effect from 1 September. On 9 May, the Personnel Section confirmed that separation procedures had been initiated and that his last day in office would be 31 August. On 30 May, however, the Applicant responded that his request

<sup>5</sup> Julio Barboza, President; Spyridon Flogaitis, Vice-President; and Jacqueline R. Scott, Member.

had been motivated by his desire to relocate to Spain with his daughters, which was conditional upon his receipt of judicial approval to take the children out of English jurisdiction. He noted that, if he did not receive such approval, he would have to consider staying longer in London and would “request to postpone the date of [his] separation from service to 31 December 2001”, his normal date of retirement. On 5 July, the Director, Conference Division, telephoned the Applicant asking him to indicate his decision. On 6 July, the Applicant wrote to the Personnel Section, requesting that his retirement date be 31 December 2001 but, on 19 July, he was informed that his separation date had been confirmed to be 31 August.

On 20 July 2001, the Applicant requested review of IMO’s refusal to permit him to rescind his request for early retirement. On 30 August, he lodged an appeal with the IMO Joint Appeals Board (JAB). In its report, the JAB concluded that, in view of the fact that his 30 May memorandum did not receive a response, the Administration’s telephone call of 5 July could be considered a recognition that he was still entitled to choose which date he wished to retire. However, the JAB found that the lack of communication between 30 May and 6 July fell short of expectation and both parties should have sought clarification, and concluded that, taking into account the respective responsibilities of the Applicant and the Personnel Section, and given the facts presented, it could not support the Applicant’s appeal. On 19 July 2002, the Secretary-General of IMO transmitted a copy of the report to the Applicant and informed him that he agreed with the JAB’s conclusion and had decided to accept its unanimous recommendation. On 31 October 2003, the Applicant filed his Application with the Tribunal.

In its consideration of the case, the Tribunal took note of the Applicant’s claim that staff members in similar situations had been dealt with more benevolently by the Administration. The Respondent had attempted to distinguish those cases from that of the Applicant on the basis that “the separation process and consequential measures taken by the Administration affecting other members of staff had not yet started”. The Tribunal found that the Respondent had proven neither the veracity of this statement with respect to the other cases, nor that any measures taken in the Applicant’s case were irreversible. It held that, if the Administration had intended to adopt a more rigorous position regarding the Applicant’s case, in apparent contrast with others, it should have immediately responded to his 30 May memorandum, indicating that it was—or would soon be—too late to halt his early retirement. Moreover, the Tribunal found that the 5 July telephone call supported the conclusion that there was an apparent understanding among staff members that IMO exercised a flexible approach towards the withdrawal of requests for early retirement. Finally, the Tribunal was concerned by the fact that the Applicant’s letter of 6 July did not receive an immediate response and was apparently not forwarded to the necessary decision-makers for some days. The Tribunal took the opportunity to recall that, as a general principle, it has decided that the relevant date for receipt is the date of first reception of the communication by the Organization, rather than the date upon which the decision-making party or specific unit may open the letter.

In conclusion, the Tribunal distinguished the Applicant’s case from the more general situation addressed in Judgement No. 990, *Abu Sirdaneh* (2000), in which it held that as a “notice period is in favour of the Agency”, it did not accommodate “a unilateral right to withdraw a resignation at any time within the notice period”. In view of the specific circumstances of the Applicant’s case, the Tribunal held that IMO had proceeded in such a

manner as to give him a legitimate expectation that he could withdraw his request for early retirement and that it failed to act in good faith towards him. Accordingly, the Tribunal awarded the Applicant three months' net base salary as compensation for the unfair and discriminatory way in which he was treated.

4. *Judgement No. 1239 (22 July 2005): Applicant v. the Secretary-General of the United Nations*<sup>6</sup>

LAUNCH AND WITHDRAWAL OF A PROCEDURE FOR TERMINATION OF PERMANENT APPOINTMENT FOR UNSATISFACTORY PERFORMANCE—ABOLITION OF POST ON THE BASIS OF COST REDUCTION EXERCISE—APPLICANT'S RIGHTS VIOLATED BY FAILURE TO FINALIZE THE PROCEDURE FOR TERMINATION OF APPOINTMENT

The Applicant entered the service of the United Nations Development Programme (UNDP) in Nairobi as an Accounts Clerk at the GS-6 level on 1 October 1981. Her contract was subsequently extended and, effective 1 April 1986, she received a permanent appointment.

Between 1994 and 1999, the Applicant's performance evaluations deteriorated. On several occasions, her supervisor's ratings, which ranged from "2" to "3", were downgraded by the UNDP Management Review Group. On 31 December 1999, the UNDP Resident Representative informed her that he intended to propose termination of her permanent appointment for unsatisfactory service. A Joint Review Board (JRB) was constituted to consider her case but, on 25 May 2001, the Chairperson of the JRB advised UNDP that the Board considered the matter to be one of attitude or behavioural issues rather than professional under-performance, and suggested that an alternative to full JRB proceedings be pursued. Subsequently, the Senior Legal Adviser, Office of Legal and Procurement Services, UNDP, recommended that the JRB process be completed in accordance with the Personnel Manual. However, no further action was taken in this regard.

In the interim, on 29 January 2001, the Applicant was notified that UNDP intended to abolish the post she encumbered, under a Country Office cost reduction exercise. On 15 June, she was advised that her appointment would be terminated within three months but that she was expected to submit her name for any available and suitable posts and that UNDP would assist in identifying possible opportunities. On 5 July, the Applicant requested administrative review of the proposal to terminate her permanent appointment for unsatisfactory service and the decision to terminate her appointment on the basis of the cost reduction exercise.

On 13 September 2001, the Applicant was notified that her permanent appointment would be terminated on 30 September under the auspices of the cost reduction exercise and that, as the efforts made to terminate her appointment for unsatisfactory service had thus been overtaken, UNDP was considering withdrawing its recommendation for such termination.

On 16 November 2001, the Applicant lodged an appeal with the Joint Appeals Board (JAB). In its report of 21 July 2003, the JAB found that the cost reduction exercise "was undertaken in a fully transparent manner with the full participation of the Staff Union"

<sup>6</sup> Spyridon Flogaitis, Vice-President, presiding; and Brigitte Stern and Goh Joon Seng, Members.

and there was no evidence that the Applicant “was treated differently from the other eleven staff members whose contracts were terminated”. Moreover, the JAB found that the actions of UNDP had not violated the Applicant’s rights under staff rule 109.1 (c) (i). However, the panel felt that the Applicant’s rights had been seriously violated by the Respondent’s failures with respect to the JRB proceedings which it considered should have been finalized expeditiously. Accordingly, the JAB recommended that she be paid compensation in the amount of nine months’ net base salary. On 10 September, the Applicant was informed that the Secretary-General had accepted the reasoning and conclusion of JAB, and had decided to pay her the recommended compensation. On 26 November, the Applicant filed her Application with the Tribunal.

In its consideration of the case, the Tribunal established that the Applicant had two principal claims: first, that UNDP had manipulated the cost reduction exercise in order to “get rid of her” after its attempt to do so on the basis of unsatisfactory performance had failed; and, second, that the decision not to conclude the JRB review violated her rights and left a “black cloud” hanging over her head affecting her future employment.

The Tribunal held that the Applicant had not provided sufficient evidence to support her claim that the decision to terminate her appointment for abolition of post was motivated by prejudice, discrimination or improper motive, and recalled that she bore the burden of proving such allegations. Moreover, the Tribunal was not persuaded that the cost reduction exercise itself was motivated by improper or collateral motives, noting that the Applicant was one of a number of affected staff members.

Nonetheless, the Tribunal took note of the Senior Legal Adviser’s assessment of the situation with respect to the JRB proceedings and agreed with the JAB that, in failing to finalize the JRB review, UNDP had violated the Applicant’s rights. The Tribunal held that the Applicant had received sufficient compensation for this violation but ordered that the adverse reports placed before the JRB be expunged from her personnel files. The Tribunal rejected all remaining pleas.

*5. Judgement No. 1242 (22 July 2005): Applicant v. the Secretary-General of the United Nations<sup>7</sup>*

SUMMARY DISMISSAL—INVESTIGATION OF ABUSE OF POWER AND SEXUAL HARASSMENT ALLEGATIONS DURING AN INVESTIGATION OF PROCUREMENT FRAUD—RIGHTS OF DUE PROCESS IN INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS—RIGHT TO BE INFORMED OF CHARGES—RIGHT TO BE INVOLVED IN PROCEEDINGS—RIGHT TO TEST THE CREDIBILITY OF INCRIMINATING EVIDENCE—UNDP/ADM/97/17 OF 12 MARCH 1997—UNDP/ADM/93/26 OF 18 MAY 1993

The Applicant Mwantuke entered the service of the United Nations Development Programme/World Food Programme (UNDP/WFP) as an Accounts Clerk on 1 April 1995. At the time of the events which gave rise to his Application, he held the G-4 level position of Finance Clerk, WFP Tanzania Country Office in Dar es Salaam. The Applicant Mkini entered the service of UNDP/WFP as a Clerk/Typist on 2 May 1983. At the time of the

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<sup>7</sup> Kevin Haugh, Vice-President, presiding; and Brigitte Stern and Dayendra Sena Wijewardane, Members.

events which gave rise to his Application, he held a permanent contract and occupied the G-6 level position of Finance Examiner in the same Country Office.

In February 1999, a preliminary investigation undertaken by the Office of the Inspector and Investigations (OEDI), WFP, uncovered evidence of procurement fraud and allegations of sexual harassment by the Applicants. In April, a second investigation undertaken by the Inspector General of WFP revealed additional allegations of abuse of power. By letters dated 23 and 24 February 1999, the Applicants were informed that they should “stay away from the office premises until further notice”. On 27 May 1999, OEDI issued a report entitled “Investigation of Allegations of Procurement Fraud, Sexual Harassment and Abuse of Power—Country Office Tanzania” which set out details of the procurement fraud in which the Applicants were implicated and cited the owner of a private company as having admitted his role in bribing the Applicants. In addition, it concluded that a number of female employees, the identity of whom was not revealed, had been sexually harassed by the Applicants and that the Applicants had abused their power in relation to their colleagues. As a result, OEDI recommended that “appropriate action” be taken. On 18 June 1999, the Applicants were provided with a copy of the OEDI report and informed that it constituted *prima facie* evidence of serious misconduct and that they were summarily dismissed with immediate effect.

The Applicants subsequently requested that their cases be reviewed by a United Nations Development Programme/United Nations Population Fund/United Nations Office for Projects Services Disciplinary Committee. In separate reports, both dated 11 June 2002, the Disciplinary Committee upheld the findings of procurement fraud and abuse of power on the basis that the record contained “sufficient corroborative evidence”, and found that the allegations of sexual harassment were serious enough to warrant consideration within the totality of the evidence which the Administration had to consider in summarily dismissing the Applicants. It noted that even though the allegations of sexual harassment were not investigated according to the sexual harassment policy, in view of the fact that the allegations came up during the investigation of the procurement fraud, this did not amount to a violation of due process. The Disciplinary Committee agreed with Counsel for the Administration that the Administration has discretion to summarily dismiss a staff member without bringing formal charges. Accordingly, it recommended that the decisions to summarily dismiss the Applicants be maintained. On 11 July 2002, the Applicants were provided with the Disciplinary Committee’s reports and informed that the Officer-in-Charge of UNDP had decided to accept its recommendations and to take no further action on their appeals. On 27 January 2004, the Applicants filed their respective Applications with the Tribunal.

In its consideration of the cases, the Tribunal determined that the Applications were sufficiently related as to merit joinder and thus proceeded to consider both cases in one judgement. It did not address the substance of the allegations against the Applicants but focused its attention on the rights of due process in investigations and disciplinary proceedings. It recalled that much of its jurisprudence has been devoted to ensuring that what is generally termed as due process is safeguarded in respect of staff at all levels and locations, noting that

“[c]oncern for, and principles of, due process as a basic requirement is reflected in every system of law and constitutes a theme which runs through the whole of the United Nations system from General Assembly resolutions, Declarations and Covenants at the

highest level, through the Staff Regulations and Rules which set out the standards to be observed in an international civil service, to the more particular and focused policy statements and administrative issuances which lay down the procedures to be observed within individual organizations”.

The Tribunal reviewed the relevant provisions of UNDP/ADM/97/17, of 12 March 1997, entitled “Accountability, Disciplinary Measures and Procedures”, which contains, *inter alia*, an outline of the basic requirements of due process to be afforded to a staff member who is the subject of allegations of unsatisfactory conduct. It found that, from the earliest stages, the Applicants’ rights under this Circular were violated as it is required that a staff member “shall be informed of the reason for [his] suspension”, but the Applicants were given no information whatsoever at the time they were suspended or the reasons why, even though the preliminary investigation was well under way.

Moreover, whilst UNDP/ADM/97/17 distinguishes investigations which are administrative in nature from those which are disciplinary, providing for due process only in the latter, the Tribunal found it clear that once a particular staff member or staff members become identifiable, disciplinary investigations should be initiated by a formal letter setting out the specific allegation or allegations and the staff involved has to be accorded necessary due process protections. Paragraph 2.2 provides that:

“All procedures and actions relating to investigation must respect the rights and interest of the Organization and potential victims, as well as of any staff member subject to or implicated by an allegation of misconduct. Allegations, investigative activities and all documents relating to the action shall be handled in a confidential manner. If an allegation of misconduct is made, an affected staff member shall be notified in writing of all allegations and of his/her right to respond, provided with copies of all documentary evidence of the alleged misconduct and advised of his/her right to the advice of another staff member or retired staff member as counsel to assist in preparing his or her responses.”

Holding that these basic requirements of due process apply to all investigations of a disciplinary nature, the Tribunal concluded that the Applicants had not been afforded such protection.

With respect to witness statements, the Tribunal remarked that whilst the report of the first, preliminary investigation did not form part of the record, it was clear that the second investigation report had relied largely upon the testimony of several individuals. The Tribunal noted that when the Applicants were interviewed by the investigators, it appeared they had not been provided with written notification of the charges against them let alone any specificity as to detail said to be connected with these charges or with any of the evidence alleged to implicate them and that there was no evidence on record that, prior to their dismissal, they were given any meaningful opportunity to present their cases or to question the credibility of the evidence that had been collected. The Tribunal held that the failure to provide an opportunity for the Applicants to be meaningfully involved, and to participate, in these proceedings resulted in a fundamental defect which must vitiate the decision of summary dismissal based thereon. Moreover, this fundamental unfairness was not capable of being rectified by the Disciplinary Committee which was an exercise merely of reviewing the record of the earlier investigation so that the opportunity which had been denied to the Applicants was never made good. The Tribunal also registered other criticisms of the Disciplinary Committee review: delay in the proceedings; it was held in New York with neither Applicant present; and it made findings which were essentially ones of

credibility when the Applicants had never enjoyed a proper opportunity of putting their case forward.

With respect to evidence provided by the witnesses, the Tribunal pointed out that as witness statements were not kept, the record merely reflected the investigators' accounts of such testimony. It rejected the Respondent's contention that witnesses' identities were withheld out of concern for their safety, finding that the circumstances did not justify the exceptional waiver of such a fundamental requirement as to be given the chance to test the credibility of incriminating evidence.

Finally, the Tribunal took note of the fact that the Applicants' cases were not referred to the Grievance Panel on Sexual Harassment in accordance with the terms of UNDP/ADM/93/26 of 18 May 1993.

Having clarified that it was not in a position to consider the merits of the serious allegations made against the Applicants but had proceeded solely on the inadequacy of the procedures which had been adopted, the Tribunal ordered the rescission of the decisions to summarily dismiss the Applicants, awarding, in the alternative, compensation in the event the Secretary-General would decide to compensate each Applicant without taking further action, of one year's net base salary.

*6. Judgement No. 1244 (22 July 2005): Applicant v. the Secretary-General of the United Nations<sup>8</sup>*

DISCIPLINARY MEASURE FOR IMPROPER TAX REIMBURSEMENT—DISCREPANCY BETWEEN FINDINGS OF NEGLIGENCE BY THE JOINT DISCIPLINARY COMMITTEE (JDC) AND FINDINGS OF MISCONDUCT BY THE SECRETARY-GENERAL—SERIOUS MISCONDUCT WITHIN THE MEANING OF STAFF RULE 110.1—DISCRETION OF THE SECRETARY-GENERAL IN DISCIPLINARY MATTERS—ABUSE OF DISCRETION—CONCLUSIONS NOT SUPPORTED BY EVIDENCE—PROPORTIONALITY BETWEEN THE DISCIPLINARY MEASURE AND THE OFFENCE

The Applicant entered the service of the Organization as a Messenger, Mail Operations Section, at the G-1 level on 20 September 1991. His contract was subsequently extended. At the time of the events which gave rise to his Application, he held the TC-2 level position of Mover.

For the tax years 1996 to 1998, the Applicant, who was required to pay United States income tax, claimed reimbursement from the Organization and submitted to the Income Tax Unit copies of tax returns which made use of the standard deduction. On the returns filed with the United States Internal Revenue Service (IRS), however, he itemized his deductions, thereby decreasing his overall tax liability. For the tax year 1999, he submitted the same returns to the Income Tax Unit and to the IRS but failed to report the fact that the IRS subsequently adjusted the return, reducing his tax liability. The Applicant received refunds for each of these tax years, totalling US\$ 10,132, but did not notify the Income Tax Unit accordingly. Upon enquiry, it became apparent that the discrepancies had occurred after the Applicant bought a house as he had been advised by his accountant that the Organization was not entitled to receive the benefit of the itemized deductions he could claim for mortgage interest and real estate taxes.

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<sup>8</sup> Julio Barboza, President; and Jacqueline R. Scott and Dayendra Sena Wijewardane, Members.

On 27 July 2001, the matter was referred to the *ad hoc* Joint Disciplinary Committee on Tax Cases. In its report of 20 December, the JDC concluded that the Applicant and his accountant lacked understanding of the United States tax law and of the United Nations' tax reimbursement system, and that the Applicant had never intentionally "double filed" his tax returns for the purpose of defrauding the Organization. Nonetheless, the JDC noted that he had a personal, non-transferable responsibility to comply with the provisions governing tax reimbursement by the United Nations in addition to an obligation to comply with certifications and undertakings made by him in seeking reimbursement, and that he was responsible for choosing and relying upon the advice of others, and for the negligent manner in which he handled his claims for tax reimbursement. Accordingly, the JDC recommended that the Applicant be fined US\$ 500 and issued a one-year written censure for his lack of due care in carrying out his responsibilities in filing tax reimbursement claims for the years 1996 to 1999.

On 26 March 2002, the Applicant was informed that the Secretary-General did not agree with the finding of the JDC that he had not intended to defraud the Organization and found his non-compliance with his obligations to be "inexcusable". The Secretary-General, having concluded that the Applicant's conduct fell short of the standard of conduct expected of an international civil servant and amounted to serious misconduct within the meaning of staff rule 110.1, warranting disciplinary action, had decided to impose the disciplinary measure of demotion by one grade with no possibility for promotion. On 30 January 2004, the Applicant filed his Application with the Tribunal.

In its consideration of the case, the Tribunal recalled that it has consistently upheld the Secretary-General's broad discretion in disciplinary matters; specifically, in determining what actions constitute serious misconduct and what attendant disciplinary measures may be imposed, but that the exercise of such discretion is subject to review by the Tribunal based upon the unique facts and circumstances of each particular case.

In the Applicant's case, the Tribunal found that the JDC had thoroughly investigated the matter and that its findings of fact—including its finding that the Applicant did not have the intent to defraud but that he was negligent in exercising due care—were borne out by the evidence. As a result, the Tribunal found the Respondent's disagreement with the JDC on this matter "especially perplexing", noting that this JDC was a specialized body whose sole purpose was to adjudicate tax cases. The Tribunal concluded that the fact of intent, as found by the Respondent, was not reasonably justified or supported by the evidence and that, therefore, his characterization of the Applicant's conduct as serious misconduct was legally incorrect and amounted to abuse of his discretion.

The Tribunal agreed with the JDC that the Applicant had a personal and non-transferable responsibility with respect to the filing of his taxes and the certifications relating thereto, but held that demotion without the possibility of promotion was disproportionate to the Applicant's offence and that the imposition of such an extreme disciplinary measure amounted to further abuse of the Respondent's discretion. In this regard, the Tribunal found that the Applicant's unconditional agreement to reimburse the Organization, without availing himself of the tax amnesty programme, supported the conclusion that he had been genuinely unaware of his wrongdoing.

Having found the decision of the Respondent to demote the Applicant with no possibility of promotion disproportionate, the Tribunal specified that it took the view and

expected that the Applicant should be put back in a position to continue with his career with reasonable prospects as to his future and made its order on that basis. Accordingly, it ordered the rescission of the decision of the Secretary-General to demote the Applicant with no possibility of promotion, fixing the amount of compensation payable, in the event the Secretary-General would decide that the Applicant should be compensated without further action being taken in his case, at two years' net base salary at the rate in effect at the date of Judgement.

*7. Judgement No. 1246 (22 July 2005): Applicant v. the Secretary-General of the United Nations<sup>9</sup>*

RIGHTS OF DUE PROCESS IN INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS—REQUIREMENT OF WRITTEN NOTIFICATION OF ALL ALLEGATIONS OF MISCONDUCT AND DOCUMENTARY EVIDENCE—RIGHT TO COUNSEL—ADMINISTRATIVE INVESTIGATION DIFFERENT FROM DISCIPLINARY INVESTIGATION—ADMINISTRATIVE INVESTIGATION WHEN NO SPECIFIC ALLEGATION OF MISCONDUCT IS REPORTED OR STAFF MEMBER IS IDENTIFIED—GENERAL ASSEMBLY RESOLUTION 44/218B OF 29 JULY 1994—UNDP/ADM/97/17

The Applicant, who had served with the United Nations for 15 years, transferred to the United Nation Population Fund (UNFPA) on a one-year fixed-term appointment at the P-5 level as the UNFPA Representative of Uzbekistan and concurrent Country Director for the five Kattuk countries on 1 March 1999. His fixed-term contract with UNFPA was subsequently renewed.

On 10 October 2000, four female staff members signed a note for the file in which they alleged that the Applicant had acted inappropriately at a party held during an official trip to Kazakhstan in August 1999.

In December 2001, an informal panel was sent to Uzbekistan to investigate an alleged theft from the office safe. When the panel produced its report, an attached "Addendum" thereto referred to "a widespread atmosphere of intimidation", possible sexual harassment and open conflict. At his request, the Applicant was provided with a copy of the report but he was not given a copy of the Addendum.

On 5 June 2002, the Applicant was summoned to New York to discuss the content of the Addendum. He was offered an agreed separation package which he declined. On 21 June, he was informed that he was being suspended with full pay pending an investigation into allegations of sexual and other harassment and insubordination. On 22 July, he was advised that he had 48 hours to leave Uzbekistan.

In September 2002, a fact-finding team established to investigate the matter travelled to Tashkent and then Paris, where the Applicant was located. The team later alleged that he had refused to cooperate; the Applicant responded that his rights of due process had not been respected. In its report, the team concluded that the Applicant had

"created an intimidating, hostile or offensive work environment . . . ; that this behaviour both in and out of the office was completely inappropriate in a professional environment, constituted an abuse of authority, and tended to bring the Organization into disrepute,

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<sup>9</sup> Spyridon Flogaitis, Vice-President, presiding; and Jacqueline R. Scott and Dayendra Sena Wijewardane, Members.

contrary to the requirements of the Staff Regulations and the United Nations Standards of Conduct for the International Civil Service”.

The Applicant was provided with the report on 26 November.

On 10 February 2003, the Applicant was charged with four counts of misconduct: harassment, including sexual harassment, of three female colleagues; creation of a hostile work environment; conduct unbecoming a senior international official; and insubordination. On 22 April, the case was referred to the United Nations Development Programme/United Nations Population Fund/United Nations Office for Projects Services Disciplinary Committee as a matter of serious misconduct and, on 9 June, the Applicant was so advised. In its report of 24 October, the Disciplinary Committee concluded that the first three charges were well founded but that the charge of insubordination was not. It recommended that the Applicant be separated from service in accordance with staff rule 110.3 (vii), without notice or compensation in lieu thereof. On 3 November, the Applicant was informed that the Administrator of UNDP considered his “actions and attitudes” to constitute misconduct and that he had decided to accept the Disciplinary Committee’s recommendation and to separate the Applicant accordingly. On 28 January 2004, the Applicant filed his Application with the Tribunal.

In its consideration of the case, the Tribunal did not address the substance of the allegations against the Applicant, but focused its attention on rights of due process in investigations and disciplinary proceedings. Recalling that it has repeatedly demonstrated its concern about the importance of procedure, due process and fairness to all, the Tribunal reviewed the relevant legal provisions and noted that General Assembly resolution 48/218 B of 29 July 1994 requests the Secretary-General, *inter alia*, “to ensure that procedures are . . . in place that protect . . . due process for all parties concerned and fairness during any investigations, [and] that falsely accused staff members are fully cleared”. In the Applicant’s case, this resolution was further developed by UNDP/ADM/97/17 of 12 March 1997, entitled “Accountability, Disciplinary Measures and Procedures”, paragraph 2.1.a of which states:

“The Organization shall investigate the circumstances of any losses, damage or apparent impropriety where no specific allegation of misconduct is reported or individual staff member(s) identified. . . . Such investigations are administrative in nature and distinguished from disciplinary investigations initiated by a formal letter of allegation and where staff participating in or otherwise involved shall be accorded necessary due process protections.”

Thereafter, paragraph 2.2 provides:

“All procedures and actions relating to investigation must respect the rights and interest of the Organization and potential victims as well as of any staff member subject to or implicated by an allegation of misconduct. . . . If an allegation of misconduct is made, an affected staff member shall be notified in writing of all allegations and of his/her right to respond, provided with copies of all documentary evidence of the alleged misconduct and advised of his/her right to the advice of another staff member or retired staff member as counsel to assist in preparing his or her responses.”

In the Applicant’s case, allegations regarding his behaviour were first expressed when the note for the file was signed in October 2000. The informal panel investigating a possible theft in late 2001 extended its investigation to other matters, including complaints about

the Applicant. Not only was he not advised of this turn of events, the Addendum detailing the panel's findings and concern was kept from him. The Tribunal noted that it was only after the Applicant had refused an agreed separation package and had been required to leave Tashkent at very short notice that a formal investigation into his possible misconduct was initiated and that, even thenceforth, he was denied due process. The Tribunal considered it peculiar that the Applicant was pressed to leave office before the investigation was ever conducted and, more generally, found that the Applicant was deprived of his rights of due process.

In the opinion of the Tribunal, as soon as a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees. It found that the Applicant was probably identified as a possible wrongdoer as early as October 2000 and was certainly identified as such upon the release of the Addendum to the investigation report. From that point onwards, he was entitled to rely upon the provisions of UNDP/ADM/97/17, which states that investigations are administrative only when no specific allegation of misconduct is reported or individual staff member identified. The Tribunal held that the Applicant's rights of due process included being notified of allegations in writing; provided with all documentary evidence; and, permitted to have counsel. Recalling its jurisprudence that, in some cases, procedural irregularities at an early stage have an inevitable direct impact on the decisions in the following stages and may not be retroactively cured, the Tribunal held that the Applicant's was such a case. Accordingly, it awarded him compensation of six months' net base salary at the rate in effect at the time of his separation from service.

8. *Judgement No. 1249 (22 July 2005): Applicant v. the Secretary-General of the United Nations*<sup>10</sup>

TERMS AND CONDITION OF EMPLOYMENT—TACIT RENEWAL OF APPOINTMENT OF LIMITED DURATION—REFUSAL OF RESIGNATION SIMULTANEOUS TO A SUMMARY DISMISSAL

The Applicant entered the service of the United Nations Interim Administration in Kosovo (UNMIK) as a Civil Affairs Officer at the P-3 level on 3 March 2000. His appointment of limited duration (ALD) was renewed until 31 October 2000 when, pending an investigation of alleged financial irregularities, he was suspended with pay. Thereafter, his appointment was extended on a monthly basis until 28 February 2001.

In a note to the file dated 4 March 2001, the Chief Civilian Personnel Officer, UNMIK, stated that, the previous day, he had been notified that the Secretary-General had decided to summarily dismiss the Applicant. According to the note, the Applicant was informed of this decision on 4 March. On 5 March, however, the Applicant hand-delivered a memorandum dated 1 March to the Chief Civilian Personnel Officer, which stated that his contract extension had expired on 28 February and he did not wish to accept further extensions. The Chief Civilian Personnel Officer indicated that he could not accept the Applicant's resignation as he had been summarily dismissed. Thereafter, on 1 April, UNMIK reiterated that the Applicant was still a staff member when he was summarily dismissed on 4 March

<sup>10</sup> Julio Barboza, President; and Jacqueline R. Scott and Goh Joon Seng, Members.

and that his emoluments would be paid through that date. The Applicant subsequently returned the Organization's check for the period in dispute.

On 18 April 2001, the Applicant requested administrative review of the decision by UNMIK that his appointment had not expired on 28 February. On 25 June, he lodged an appeal with the Joint Appeals Board (JAB). In its report dated 10 December 2003, the JAB "recognized that in practice . . . signatures of letters of appointment do not usually coincide with the effective date of appointment . . . [and] noted that the [Applicant's] letters of appointment were never signed on the actual date of appointment". It agreed with the Respondent that the Applicant's resignation was invalid as, whilst the memorandum was dated 1 March 2001, it was received on 5 March and in that intervening period the Applicant had been notified of his summary dismissal. The JAB questioned the timing of the Applicant's resignation and noted that, in any event, he could not reasonably nor legally submit a resignation letter as that supposed the existence of an appointment, which he claimed not to have as of 28 February 2001. Accordingly, the JAB made no recommendation in support of the appeal. On 19 December 2003, the Applicant was informed that the Secretary-General accepted the finding and conclusion of the JAB. On 22 January 2004, he filed his Application with the Tribunal.

In its consideration of the case, the Tribunal acknowledged that the contractual period specified in the Applicant's final letter of appointment ended on 28 February 2001 and that ALDs carry no expectations of renewal or conversion, and require no notice to be given by either party. However, whilst the Tribunal considered that "[t]he letter of appointment is the best proof of employment and its terms establish the obligations of each of the parties", it recalled its jurisprudence that "the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances". (Judgement No. 95, *Sikand* (1965)) The circumstances of the Applicant's employment made it apparent that, for the duration of the investigation into his potential misconduct, he had been suspended with pay and given monthly contracts. The Tribunal was satisfied that "both the Applicant and the Administration considered at the date of expiration of the Applicant's contract on 28 February that that contract was going to be renewed", noting that his monthly letters of appointment were regularly signed after the date of expiration of the prior contract and at least one letter of appointment appeared never to have been signed.

Thus, the Tribunal was satisfied that the Applicant's appointment was renewed on 28 February for another one-month period under the same terms, "and that such inference [could] be drawn, not only by the practice established between the Applicant and the Administration . . . , but also by the fact that both parties considered that action was required to terminate their relationship"—the Administration in summarily dismissing the Applicant and the Applicant in tendering his resignation.

Having determined that the Applicant was, indeed, employed at the time of his summary dismissal, the Tribunal found that the only reason he purported to refuse further employment beyond 28 February "was to avoid the consequences of the negative outcome of [the] investigation". Accordingly, it rejected the Application in its entirety.

9. *Judgement No. 1253 (22 July 2005): Applicant v. the United Nations Joint Staff Pension Board (UNJSPB)*<sup>11</sup>

ACQUIRED RIGHTS TO A PENSION—RETROACTIVITY OF AMENDMENTS TO THE UNITED NATIONS JOINT STAFF PENSION FUND (UNJSPF) REGULATIONS—ASSISTANCE IN IMPLEMENTING FAMILY SUPPORT COURT ORDERS—REASONABLE EXERCISE OF DISCRETION REGARDING THE AMOUNT DEDUCTED

The Applicant entered the service of the International Civil Aviation Organization (ICAO), thereby becoming a participant in the UNJSPF, on 1 November 1972. On 10 September 1999, he took early retirement from ICAO, electing to receive a partial lump-sum commutation of his pension and correspondingly reduced monthly pension benefits.

On 9 March 2001, UNJSPF was notified that the Applicant had not provided financial support to his ex-wife or their son since his divorce in 1987 and was supplied with a series of orders of support against the Applicant from the Québec Superior Court as well as a judgement holding him in contempt of court for non-payment thereof. On 4 May, the Applicant was asked to submit his comments as to why the Chief Executive Officer (CEO) of the Fund ought not to exercise his discretion pursuant to the amended article 45 of the UNJSPF Regulations in assisting in the implementation of the aforementioned court orders. The Applicant responded that as the current article 45 was not in existence when he retired, his acquired rights protected him against changes in the regulations which would adversely impact upon his pension. On 19 March 2002, the CEO advised him that, with effect from 1 May, 50 per cent of his monthly UNJSPF benefit would be remitted to his ex-wife, in order to satisfy his legal obligation to pay alimony and child support. On 1 April, the Deputy CEO reiterated these arrangements but repeated an earlier offer made by the Fund

“to consider sympathetically a . . . request . . . to change [the Applicant’s] UNJSPF benefit election from an early retirement benefit, with partial lump-sum commutation, into a one-time withdrawal settlement (that would sever [his] links to the UNJSPF and eliminate all other possible UNJSPF benefit entitlements)”.

The Applicant did not accept this offer.

On 22 August 2002, the Applicant appealed the decision to remit 50 per cent of his monthly pension to his ex-wife to the Standing Committee of the UNJSPB. The Standing Committee considered the case and, in its report of 11 July 2003, upheld the CEO’s decision, finding that it represented reasonable exercise of his discretion under article 45. On 24 July, the Applicant was advised accordingly. On 18 December 2003, he filed his Application with the Tribunal.

In its consideration of the case, the Tribunal first noted that article 45 of the UNJSPF Regulations had been amended in 1998 to enable a portion of a participant’s pension benefit to be paid directly to a former spouse or otherwise satisfy court-ordered or court-approved family obligations, where the participant requested that such action be taken. Article 45 was then further amended in 2000, to provide that

<sup>11</sup> Spyridon Flogaitis, Vice-President, presiding; and Brigitte Stern and Goh Joon Seng, Members.

“a. . . . the Fund may, to satisfy a legal obligation on the part of a participant or former participant, arising from a marital or parental relationship and evidenced by an order of a court or by a settlement agreement incorporated into a divorce or other court order, remit a portion of a benefit payable by the Fund to such participant for life to one or more former spouses . . .

b. To be acted upon, the requirement under the court order must be consistent with the Regulations of the Fund, as determined by the [CEO] of the Fund to be beyond any reasonable doubt, and on the basis of the available evidence.”

The Tribunal rejected the Applicant’s contention that he had an acquired right to a life-long non-assignable pension, finding that his acquired right was to a *pension* and that article 45 did not take, or purport to take, away the pension rights that accrued to him on his retirement. It noted that the pension systems of public international organizations operate under statutory rules which may change at the discretion of the Administration and held that

“[i]nsofar as the right to the pension obtained by the retired staff member is not touched, the acquired right of the participant is not infringed, especially when the measures taken are in order to accommodate outstanding family obligations of the retired staff member and they constitute a fair portion of the pension which does not overly deplete his monthly pension”.

Accordingly, the Tribunal held that UNJSPF had not violated the Applicant’s acquired right to a monthly pension payment.

With respect to the Applicant’s secondary contention that a 50 per cent deduction was arbitrary and capricious and, thus, not a reasonable exercise of the discretion conferred upon the CEO of the Fund, the Tribunal remarked upon the Applicant’s contumacious disregard for the court orders regarding his obligation to pay maintenance going back to 1987 and held that, in view of such disregard as well as his decision to commute a portion of his entitlements upon retirement, it was not persuaded that the decision of the CEO to remit 50 per cent of his reduced monthly pension entitlement was vitiated by arbitrariness, caprice or abuse of discretion.

Accordingly, the Tribunal rejected the Application in its entirety.

10. *Judgement No. 1268 (23 November 2005): Applicant v. the Secretary-General of the United Nations*<sup>12</sup>

DELAYS IN ADMINISTRATION OF JUSTICE—ADEQUACY OF COMPENSATION—HARM CAUSED BY THE ADMINISTRATION TO A STAFF MEMBER’S PROFESSIONAL REPUTATION—ISSUANCE OF CERTIFICATE OF SERVICE—PROPORTIONAL COMPENSATION

The Applicant entered the service of the International Criminal Tribunal for the former Yugoslavia (ICTY) as Forensic Project Officer for Bosnia and Croatia at the P-4 level on 1 May 2000. Prior to his appointment, he served with the Royal Canadian Mounted Police, leading the Canadian Forensic Team which participated in the 1999 Kosovo Exhumation Program of ICTY.

<sup>12</sup> Kevin Haugh, First Vice-President, presiding; Spyridon Flogaitis, Second Vice-President; and Dayendra Sena Wijewardane, Member.

On 8 February 2001, the Applicant's supervisors signed his Performance Evaluation Review (PER) for the period May through December 2000, giving him an overall rating of a "very good performance". Thereafter, his fixed-term appointment was extended until 1 November by letter of appointment dated 3 May. On 16 May, however, he was notified that his contract would be terminated thirty days hence. The next day, the Applicant requested administrative review of the decision to terminate his appointment. Thereafter, he requested suspension of action and, on 12 June, the Joint Appeals Board (JAB) recommended in his favour. As the Secretary-General accepted this recommendation and suspended implementation of the contested decision, the Applicant was paid his salary for the duration of his fixed-term appointment.

On 28 June 2001, the Acting Chief of Investigations, ICTY, produced a four-page memorandum purporting to provide a detailed account of the Applicant's shortcomings. Notwithstanding his positive PER, he had allegedly been "discovered to be unreliable, not trustworthy, not a team player and . . . found to be causing problems for the scientific work of the team". No documentation was provided either to substantiate these allegations or to indicate that the Applicant had been offered any guidance or the opportunity to correct his performance.

On 4 September 2001, the Applicant lodged an appeal on the merits of his case with the JAB. In an "Interim report" dated 14 May 2002, the JAB rejected the Respondent's argument that because the administrative decision had been suspended, the Applicant suffered no injury, finding that it would be naive to believe that his professional reputation and opportunities for employment had not been harmed. It concluded that the Applicant had been denied due process in the decision to terminate his performance and stated that it

"could not exclude the possibility of a more reprehensible action by the ICTY Administration, that is, that the termination of [the Applicant's] appointment [was] intended to silence [him] or sully his reputation as part of an attempt to cover up an embarrassing situation—or, perhaps, scandal—in the exhumation projects".

JAB recommended that a Certificate of Service be issued to the Applicant; that he be paid three months' net base salary for the denial of his rights of due process; that the case file and its report be sent to the Under-Secretary-General, Office for Internal Oversight Services (OIOS) for appropriate action; and, upon receipt of the OIOS report or six months from the date of signature of the report, whichever was earlier, the Panel be reconvened so that it could make further informed recommendations on a number of additional issues raised. On 2 December, the Under-Secretary-General for Management responded to the Secretary of the JAB:

"Since the Secretary-General takes decisions based on final reports by the JAB, no decision is taken at this time regarding the recommendations for the issuance of a Certificate of Service and the payment of compensation. . . . While the same considerations apply to the recommendation for an OIOS investigation, . . . it is further noted that the OIOS, under its mandate, ultimately decides for itself whether to investigate a matter, including in circumstances where the particular project has finished since November 2001 and the project personnel are no longer in the service of [ICTY]. The Board may wish to bear these issues in mind when considering its final report in this case."

On 13 May 2003, the JAB issued its "Final report", stating that it had no doubt that the treatment by ICTY of the Applicant was reprehensible and that the memorandum

of the Under-Secretary-General for Management, coming after six months and 16 days and repeated requests from the JAB Secretariat, was unacceptable. Accordingly, the JAB reiterated its recommendation that a Certificate of Service be issued to the Applicant and that he be paid three months' net base salary as compensation, and further recommended that he be paid compensation equivalent to three years' net base salary for the damage to his professional reputation which had been exacerbated by the delays in dealing with his case. On 21 July, the Applicant was informed that the Secretary-General had taken note of the conclusion made by JAB that his due process rights had been violated by the contested decision and had decided to accept its recommendation to pay him three months' net base salary. However, he had not accepted the recommendation to pay three years' compensation, but had decided to pay the Applicant an additional US\$ 3,000 in compensation for the delays in his case. Finally, as a Certificate of Service was an "entitlement" under staff rule 109.11, and did not require legal action, the Applicant was informed that such a certificate would be issued upon his request. On 28 April 2004, the Applicant filed his Application with the Tribunal.

In its consideration of the case, the Tribunal observed the

"general principle of administrative law [that] any administrative decision must be judged upon its legality on the basis of evidence and documentation pre-existing its issuance, and therefore, any *ex post facto* elements cannot offer a basis for legalizing the impugned act".

Insofar as the Administration had accepted responsibility, at least in part, and had paid compensation for the violation of the Applicant's rights of due process and the delays in his case, the Tribunal clarified that

"[f]or the Administration to be liable to pay further compensation, that is for having damaged the Applicant's reputation by ending his contract prematurely, it needs to be proven that the Applicant suffered damage, that this is the responsibility of the Administration, and what the value of the reparation of that damage would be".

The Tribunal noted the Applicant's contention that his reputation was harmed because the news of his separation from service immediately circulated world-wide, but found that he had failed to prove that the Administration did anything to divulge that information to the general public, or that it participated in any public debate about those facts. In this regard, the Tribunal accepted that his termination could have harmed the Applicant's reputation and considered that it was most important for a Certificate of Service to be issued to the Applicant. In addition, the Tribunal ordered the Respondent to remove any adverse material inserted after the decision to terminate the Applicant's appointment from his Official Status file.

Finally, the Tribunal held that the only truly harmful action taken by the Administration was in the delays in dealing with this case, as for a period of more than four years the Applicant's scientific reputation was "imprisoned" in the late proceedings. It recalled that it had repeatedly condemned the Administration for delays causing damage to staff members fighting for justice but found no evidence that the Administration had deliberately harmed the interests of the Applicant. Thus, whilst it concluded that the compensation paid by the Administration for the delay in the Applicant's case was insufficient because of its impact upon his professional reputation, it also concluded that the compensation proposed by the JAB was not proportionate. The Tribunal determined that US\$ 10,000 was sufficient compensation and made its order accordingly.

*11. Judgement No. 1273 (23 November 2005): Applicant v. the Secretary-General of the United Nations*<sup>13</sup>

LACK OF THE MEDICAL CLEARANCE REQUIRED FOR A FIELD MISSION—SUPERVISOR’S NEGLIGENCE OF HIS DUTIES AND RESPONSIBILITIES REGARDING THE WELL-BEING AND SAFETY OF STAFF MEMBERS DURING A FIELD MISSION—ILLNESS ATTRIBUTABLE TO THE PERFORMANCE OF OFFICIAL DUTIES—COMPENSATION FOR POST TRAUMATIC STRESS DISORDER—COMPENSATION FOR LOSS OF SENIORITY

The Applicant entered the service of the Organization as a Secretary at the G-3 level on 24 May 1993. Her appointment was subsequently extended and she was promoted to the G-4 level.

In May 1996, the Applicant and her supervisor went on mission to the Democratic People’s Republic of Korea (DPRK). Prior to her departure, she had scheduled an appointment with the Medical Service for the required medical clearance but had not attended the appointment, later claiming her supervisor had instructed her not to do so. Whilst in DPRK, the Applicant began to feel ill. She continued working and did not seek medical advice. On 25 May, she experienced two cardiac syncopes whilst in transit to Beijing. She was hospitalized in Beijing, but released on 27 May. The next day, she had a third cardiac syncope and was hospitalized in the Intensive Care Unit, following which a private doctor indicated she “should be returned with a medical escort to her home in New York for a full cardiological work-up”. The Applicant was released from the hospital on 14 June and, accompanied by a nurse, left for New York three days later.

On 13 January 1999, the Applicant wrote to the Office of Human Resources Management indicating that on her first day back in the office her supervisor had discharged her as his secretary, with the result that she had lost an opportunity for promotion.

On 15 January 1999, the Applicant submitted a claim to the Advisory Board on Compensation Claims (ABCC) for reimbursement of medical expenses resulting from the illness incurred during her 1996 mission. The Secretary of ABCC initially responded that the illness was not related to the performance of her duties on behalf of the United Nations. However, ABCC subsequently found that,

“although the illness was not medically attributable to the performance of official duties, the claim could be considered compensable for procedural reasons as the claimant had not received medical clearance prior to her departure on official business, as is the established procedure, and . . . may not have received the proper level of medical treatment immediately upon the onset of her illness”.

Accordingly, the ABCC recommended that her illness be recognized as attributable to the performance of official duties and that all medical expenses certified by the Medical Director as reasonable and directly related to the illness be reimbursed. It also recommended that the Applicant’s request for compensation for post traumatic stress disorder and permanent loss of function be reviewed by the Medical Service. These recommendations were approved on behalf of the Secretary-General on 13 January 2001.

In the interim, on 24 July 2000, the Applicant had requested administrative review of the decisions affecting her terms of employment, specifically the procedures for dealing

<sup>13</sup> Julio Barboza, President; Spyridon Flogaitis, Vice-President; and Dayendra Sena Wijewardane, Member.

with serious illness or injury whilst in the service of the Organization. On 23 October, she lodged an appeal with the Joint Appeals Board (JAB). In its report dated 26 December 2003, the JAB

“condemn[ed] in the strongest and harshest terms the behavior of [the Applicant’s supervisor] throughout this episode. From the day he instructed [her] not to take time off for medical clearance . . . , to work demands made by him during [her] illness in the DPRK, to his refusal to recognize the seriousness of her condition in Beijing, his decision to leave her behind under the somewhat remote care of the Resident Representative, a.i., his failure to follow-up with his department and the [United Nations] Medical Service of the need for evacuation, to his frigid reception when she finally returned to Headquarters, he displayed remarkable irresponsibility and insensitivity.”

Moreover, it found that there was a complete failure by the Organization, and its agents, to take proper and timely action in a life-threatening situation. The JAB recommended compensation of three years’ net base salary in addition to reimbursement of the Applicant’s medical and psychiatric expenses. However, the Panel rejected the Applicant’s contention that her removal from her position as secretary to her supervisor had resulted in a delayed promotion, dismissing it as “mere speculation”.

On 25 May 2004, the Applicant filed her Application with the Tribunal. On 28 July, she was informed that

“[w]hile the Secretary-General empathizes with your situation and recognizes that being ill in a hospital in a foreign country was undoubtedly frightening for you, he regrets not being able to agree with the JAB that the Organization acted negligently in its handling of the matter”.

thus he had decided not to accept the majority of the conclusions of the JAB or its recommendation in this regard. He agreed, however, that the Applicant should have been evacuated from China immediately and had decided to pay her three months’ net base salary as compensation. Insofar as the Applicant’s claim regarding her delayed promotion was concerned, the Secretary-General agreed with the JAB that this was mere speculation and had decided to take no further action in the matter.

In its consideration of the case, the Tribunal reviewed three distinct periods: the pre-mission and DPRK period; the time in Beijing; and, the Applicant’s return to New York. With respect to the first of these periods, the Tribunal found evidence that her supervisor had asked her to cancel her appointment with the Medical Service on one occasion but had not prevented her from rescheduling. It considered that her lack of medical clearance was a rather serious omission but one which did not support the Applicant’s legal case. During the early stages of her illness, the Tribunal found that the supervisor had given her too much work and had not paid much attention to her symptoms, but that these symptoms were similar to those of influenza and that the Applicant was relatively young and in apparent good health.

In contrast, however, the Tribunal took a dim view of the actions of the Applicant’s supervisor in Beijing, determining that he grossly neglected his duties and responsibilities regarding the well-being and safety of the staff members entrusted to his care during a field mission. The Tribunal noted that he had the authority to order her medical evacuation in accordance with circular PD/1/92, but that he chose not to do so, leaving her in a hospital where she could hardly communicate with the doctors and other hospital personnel due to language difficulties and where medical treatment was unreliable. In view

of the geographical and medical circumstances, the Tribunal found that his conduct was negligent, entitling the Applicant to compensation. Moreover, the Tribunal accepted that the vicissitudes suffered by the Applicant during this period were the cause of her later post traumatic symptoms, for which she was also entitled to compensation.

Insofar as the third period was concerned, the Tribunal recognized that the Applicant was treated with insensitivity by her supervisor and by most of the Organization upon her return to New York. It noted that when she was reassigned to an inferior post, she lost two years in seniority, and held that this entitled her to additional compensation.

In sum, the Tribunal awarded the Applicant compensation of two years' net base salary and recommended expedition of her claims for compensation for post traumatic stress disorder and permanent loss of function.

12. *Judgement No. 1276 (23 November 2005): Applicant et al v. the Secretary-General of the United Nations*<sup>14</sup>

RIGHT TO FULL AND FAIR CONSIDERATION FOR CONVERSION TO PERMANENT APPOINTMENT—ACQUIRED RIGHT BY STAFF MEMBERS SHOULD NOT BE DENIED DUE TO THE NEGLIGENCE OF THE ADMINISTRATION—DIFFERENTIATION BETWEEN COMPETITIVE AND QUALIFYING RECRUITMENT EXAMINATIONS—GENERAL ASSEMBLY RESOLUTION 51/226 OF 3 APRIL 1997

The named Applicant and 18 other staff members filed a joint Application with the Tribunal. The Applicants were General Service staff members of the Chinese, French, Russian and Spanish Text Processing Units in the Department for General Assembly and Conference Management, who had been internationally recruited by the Organization between September 1987 and June 1997, following official examinations.

In April 1997, the General Assembly adopted resolution 51/226, paragraph 19 of which requested the Secretary-General

“to offer or to continue to offer probationary appointments to all staff members who have passed a competitive recruitment examination and to consider all such staff members for conversion to permanent appointment after completion of the period of probationary service”.

In a memorandum dated 13 April 1998, the Office of Human Resources Management (OHRM) confirmed that this text was “broad enough to encompass staff recruited through a competitive examination, both at the Professional and at the General Service level”. Thereafter, the Examinations and Tests Section was asked to analyse the tests and examinations administered to General Service staff members in order to determine whether any qualified as “competitive recruitment examination[s]” and, on 18 November 1999, the Section indicated that only the examinations for accounting and statistical clerks and for editorial and language reference assistants would qualify.

On 7 April 2000, the Applicants requested administrative review of the decision not to consider them for conversion to permanent appointments. By a letter dated 14 June, OHRM responded that as the tests for text processors were “qualifying”, rather than “competitive”, the Applicants were not eligible for conversion to permanent appointments. On 19 and 27 July, the Applicants lodged an appeal with the Joint Appeals Board (JAB). In its

<sup>14</sup> Julio Barboza, President; Spyridon Flogaitis, Vice-President; and Brigitte Stern, Member.

report dated 31 December 2003, the JAB concluded that five of the French language Applicants had undertaken competitive examinations, as the letters containing their results specified that the successful candidates were ranked based on merit, but that the other Applicants had apparently taken qualifying examinations. Finally, due to the absence of documentation for the Applicants from the Chinese and Russian text processing units, the JAB concluded that it could not find in their favour. Accordingly, it recommended that the five French language Applicants be favourably considered for permanent appointment.

On 28 May 2004, the Applicants filed their Application with the Tribunal. On 16 August, they were informed that the Secretary-General was unable to accept the conclusions and recommendation made by the JAB concerning the five French language Applicants on either legal or policy grounds, as the lack of documentation available for other Applicants was not a sufficient reason to discriminate between similarly situated staff and to accord them unequal treatment. Moreover, the Secretary-General considered that

“[t]he nature of the examinations undertaken by all [Applicants] was the same in each case, that is . . . to demonstrate that [they] could meet pre-established minimum requirements in the fields of typing, grammar and direct dictation. [Their] suitability as staff in the text processing units was measured against a standard of competence, as opposed to . . . being compared to other candidates and selected as being the best person for the position.”

In its consideration of the case, the Tribunal first determined that the General Assembly had not intended to limit the category of staff members eligible for conversion to permanent appointment to professional staff members who had successfully taken the National Competitive Examinations, as the resolution employed the broader term “competitive recruitment examination”. It remarked that the OHRM memorandum of 13 April 1998 indicated that the Administration also considered that the resolution encompassed staff members at both the General Service and Professional levels.

Thereafter, the Tribunal scrutinized whether the Applicants had been recruited through competitive examinations. It took note of the fact that the examinations in question were originally characterized as competitive by the Organization as evidenced by the various circulars issued to announce them, each of which bore the heading “competitive examination”, and found that this did not support the Administration’s subsequent characterization of the examinations as qualifying rather than competitive. Moreover, the Tribunal found that the terms were not incompatible as, whilst

“[a] minimum standard may be fixed in order for candidates to qualify and pass an exam[,] . . . those who qualify still may—and should—be ranked by merit. Likewise, if there are fewer vacancies than qualifying persons, some have to be eliminated, and comparison between exam results is inevitable. So, a supposedly ‘qualifying’ examination may be transformed, by force of circumstances, into a competitive one.”

Having reviewed the circulars in question, the Tribunal held that the examinations had, indeed, been competitive. It disagreed with the conclusion made by the JAB that only some of the examinations could be considered competitive, on the basis that the Administration had called for competitive examinations in the case of all Applicants, and

“[w]hether or not the . . . examinations were actually conducted in a competitive manner [was] not for the Tribunal to examine: they should have been so conducted by the Administration, and the Administration should have taken all necessary measures to assure competitiveness as the first criterion of selection of candidates”.

In consequence, the Tribunal held that it could not now permit the Administration to take refuge in the negligence of its own responsibility and deny the Applicants a right granted by the General Assembly resolution. Moreover, the Tribunal emphasised that it was the responsibility of the Administration to maintain the necessary records of examinations as the Administration must keep reliable records of the facts, which are important in the establishment of staff members' rights, and held that the Applicants could not be penalised by the absence of such data.

The Tribunal, having found in favour of the Applicants, clarified that it could not order the Respondent to grant each Applicant a permanent appointment, as their right was to full and fair consideration for conversion of their appointment. Accordingly, the Tribunal ordered the Respondent to consider the Applicants for conversion to permanent appointment and awarded them compensation of US\$ 7,000 each for the violation of their right to such consideration.

*13. Judgement No. 1281 (23 November 2005): Applicant v. the Secretary-General of the United Nations<sup>15</sup>*

RE-ABSORPTION FOLLOWING SECONDMENT—DISCRETIONARY AUTHORITY OF THE SECRETARY-GENERAL TO RECOGNISE PROMOTIONS GRANTED DURING SECONDMENT—BURDEN OF PROOF WITH REGARD TO ALLEGATIONS OF ARBITRARY DECISION—DURATION OF A SPECIAL POST ALLOWANCE (SPA)—ASSUMPTION OF HIGHER LEVEL FUNCTIONS—INTER-ORGANIZATION AGREEMENT CONCERNING TRANSFER, SECONDMENT OR LOAN OF STAFF AMONG THE ORGANIZATIONS APPLYING THE UNITED NATIONS COMMON SYSTEM OF SALARIES AND ALLOWANCES<sup>16</sup>

The Applicant entered the service of the Organization in January 1963 as a Bilingual Clerk-Stenographer at the G-3 level. Her contract was subsequently extended and, on 1 January 1965, she was granted a permanent appointment.

Effective 1 January 1986, the Applicant, who was then serving at the P-2 level, was seconded to the United Nations Industrial Development Organization (UNIDO) for two years. Thereafter, her secondment was extended approximately every two years and UNIDO promoted her to the P-3 and P-4 levels. With each extension, the United Nations premised its agreement on UNIDO consenting to absorb the Applicant at the end of her secondment. Nevertheless, this absorption did not take place and no efforts were made to enforce the provision. The Applicant's final period of secondment ended on 31 December 1998. She was re-absorbed by the United Nations at the P-3 level and was then placed against a P-4 position, where she served for the remainder of her career.

On 6 June 1999, the Applicant requested administrative review of the decision to re-absorb her at the P-3 level. On 3 August and on 23 September 1999, she lodged an appeal with the Joint Appeals Board (JAB). In its report dated 6 June 2002, the JAB held that, in accordance with the terms of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff Among the Organizations Applying the United Nations Common System of Salaries and Allowances, the decision to recognize the Applicant's promotions at UNIDO fell within the discretionary authority of the Secretary-General.

<sup>15</sup> Kevin Haugh, Vice-President, presiding; and Jacqueline R. Scott and Goh Joon Seng, Members.

<sup>16</sup> CEB/2003/HLCM/CM/7.

As the Applicant had not alleged, nor had the Panel found, that the decision to reabsorb her at the P-3 level was tainted by prejudice or procedural defect, the JAB concluded that it could not recommend her placement at the P-4 level. It did, however, recommend that she be given favourable consideration for any P-4 level post for which she might apply. On 28 July 2003, the Applicant was informed that the Secretary-General accepted the reasoning behind, and the recommendation of the JAB and had agreed that she should be given favourable consideration for any P-4 post to which she might apply and be found qualified.

The Applicant retired on 31 December 2003. On 30 June 2004, she filed her Application with the Tribunal.

In its consideration of the case, the Tribunal relied upon the “unambiguous” provisions of paragraph 9 (3) of the Inter-Organization Agreement, which provides that:

“The releasing organization will be under no obligation to recognize any change of official status of the staff member which may occur in the receiving organization, except in calculating payments under paras. 18 (b) [compensation for service-incurred illness, injury or death] and 20 [health and group life insurance] . . .”

The Tribunal held that it was clear that the United Nations, as the releasing organization, was under no duty to recognize the Applicant’s promotion granted while in UNIDO, the receiving organization.

The Tribunal reviewed the Applicant’s allegation that the Secretary-General’s decision not to recognize her promotion was “arbitrary, tainted by prejudice and procedurally flawed”. It recalled its consistent jurisprudence that the burden of proof is upon the person making such allegations, and found that the Applicant had failed to discharge her burden in this regard. Accordingly, the Tribunal was satisfied that the Secretary-General was well within his discretion to recognize one promotion and not the other, having no obligation to recognize either. Indeed, it noted that he could have decided to re-absorb the Applicant at the P-2 level.

The Tribunal next considered the Applicant’s contention that the decision to reabsorb her at the P-3 level but place her against a P-4 post for the remainder of her career was improper. The Tribunal found that the decision to reabsorb her at the P-3 level was an independent event and a proper exercise of the Secretary-General’s discretion, and that the decision to place her against a blocked P-4 level post, the incumbent of which was on mission, came some months later. It recalled that

“it has previously recognized that staff members are often called upon to perform services ‘of a character and at a level superior to those for which they have been appointed’. (See Judgement No. 336, *Maqueda Sanchez* (1984).) This is true particularly in circumstances such as these, where there was a dearth of suitable positions for the Applicant upon her return.”

Finally, the Tribunal addressed the Applicant’s contention that the fact that she had received SPA for much of her tenure against the P-4 post and that she remained against that post until her retirement provided evidence that she was improperly classified and compensated and that the Secretary-General’s decisions were arbitrary, tainted by prejudice and procedurally flawed. The Tribunal disagreed, noting that whilst

“the assumption of higher level posts by staff members and the payments of SPA as compensation for doing so are intended to be a temporary arrangement, the temporary avail-

ability of the post against which the Applicant was placed necessitated this continuing arrangement”.

Indeed, the Applicant could not be placed permanently on the post, as the availability was only for as long as the incumbent remained on mission. Once again, the Tribunal found that the Applicant had not discharged the burden of proof she bore in substantiating her contention that the Secretary-General’s decision was flawed.

For the reasons set forth above, the Tribunal rejected the Application in its entirety.

## B. DECISIONS OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION<sup>17</sup>

### 1. *Judgment No. 2389 (2 February 2005): B. H. v. Universal Postal Union (UPU)*<sup>18</sup>

ENTITLEMENT TO HOME LEAVE—INTERNATIONALLY RECRUITED STAFF—HOME COUNTRY AND COUNTRY OF RESIDENCE—OBJECT OF HOME LEAVE IS NOT TO ALLOW MATERIAL BENEFIT BUT TO HELP MAINTAINING LINKS WITH HOME COUNTRY—POSSIBILITY OF HOME LEAVE IN A COUNTRY OTHER THAN THE COUNTRY OF NATIONALITY—CONSISTENCY WITH STAFF REGULATIONS AND RULES

The Complainant was born in 1948 in the Federal Republic of Germany, the country whose nationality he has retained. He left the Federal Republic of Germany in 1951 and resided in various countries until he settled in Switzerland in 1963.

On 14 November 1994, the Complainant joined UPU under a short-term contract and was given a permanent appointment effective 1 April 1998. At the time he was recruited,

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<sup>17</sup> The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the International Labour Organization and of the other international organizations that have recognized the competence of the Tribunal: International Labour Organization, including the International Training Centre; World Health Organization, including the Pan American Health Organization; United Nations Educational, Scientific and Cultural Organization; International Telecommunication Union; World Meteorological Organization; Food and Agriculture Organization of the United Nations, including the World Food Programme; European Organization for Nuclear Research; World Trade Organization; International Atomic Energy Agency; World Intellectual Property Organization; European Organization for the Safety of Air Navigation (Eurocontrol); Universal Postal Union; European Southern Observatory; Intergovernmental Council of Copper Exporting Countries; European Free Trade Association; Inter-Parliamentary Union; European Molecular Biology Laboratory; World Tourism Organization; European Patent Organisation; African Training and Research Centre in Administration for Development; Intergovernmental Organisation for International Carriage by Rail; International Center for the Registration of Serials; International Office of Epizootics; United Nations Industrial Development Organization; International Criminal Police Organization (Interpol); International Fund for Agricultural Development; International Union for the Protection of New Varieties of Plants; Customs Cooperation Council; Court of Justice of the European Free Trade Association; Surveillance Authority of the European Free Trade Association; International Service for National Agricultural Research; International Organization for Migration; International Centre for Genetic Engineering and Biotechnology; Organisation for the Prohibition of Chemical Weapons; International Hydrographic Organization; Energy Charter Conference; International Federation of Red Cross and Red Crescent Societies; Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization; European and Mediterranean Plant Protection Organization; International Plant Genetic Resources Institute; International Institute for Democracy and Electoral Assistance; International Criminal Court; International Olive Oil Council; Advisory Centre on WTO Law; African, Caribbean and Pacific Group of States; the Agency for International Trade Information and Cooperation (since March 2005); and the European Telecommunications Satellite Organization and the International Organization of Legal Metrology (since November 2005). 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/>.

<sup>18</sup> Michel Gentot, President; and Seydou Ba and Claude Rouiller, Judges.

he had been residing for more than thirty years in Switzerland, where he held a settlement permit of indefinite duration and where he still resided at the time of the Judgment. Upon his recruitment to UPU, the Complainant received a category D identity card, which is issued to international civil servants by the Swiss Federal Department of Foreign Affairs.

In 2002, the Complainant asked for his name to be added to the list of staff eligible for home leave. His request was accepted in office notice 15/2002 of 11 March 2002. Following an objection by the Director of Finance, his eligibility for home leave was reviewed and, in a letter of 21 June 2002, the Director General informed the Complainant that the addition of his name to the list “had been made by mistake and [was] not in compliance with article 4.4 of the Staff Regulations of the International Bureau of the UPU”. He explained that, since the Complainant was a resident in Switzerland at the time of his recruitment, he was considered as “locally recruited”. The Director General therefore rescinded the decision concerning the Complainant’s eligibility for home leave. Subsequent to a request by the Complainant that the decision be reconsidered, the Director General decided to undertake a detailed review of the rules and regulations concerned. However, on 3 April 2003, the Director General confirmed his decision to remove the Complainant’s name from the list and explained that although the Complainant was in fact considered as “internationally recruited”, he had not needed to become an expatriate in order to take up his duties at UPU in view of the fact that he was resident in Switzerland prior to his appointment and, thus, did not meet the conditions for eligibility for home leave.

On 1 May 2003, the Complainant filed an appeal with the Joint Appeals Committee, which agreed with the Director General’s conclusion and recommended in its report of 5 June 2003 that the appeal be rejected. On the basis of that recommendation, the Director General rejected the appeal in a letter of 10 June 2003, which constitutes the impugned decision. The Complainant filed his Complaint with the Tribunal on 5 September 2003.

In its consideration of the case, the Tribunal recalled that entitlement to home leave is governed by article 4.5 of the Staff Regulations of the International Bureau of UPU and by staff rule 105.3. Its scope has been set out in detail in Administrative Circular (PER) No. 12/Add.1 of 14 June 1993. It was observed that **internationally recruited staff members** are eligible for home leave provided, in particular, that while performing their official duties they continue to reside in a country other than that of which they are nationals. Home leave does not apply to staff members performing their official duties in their home country.

It was further recalled that the object of home leave is not primarily to make a monetary concession to staff members and is justified by the fact that it is to the advantage of international organizations that their staff members maintain links with their home country. This country is normally, but not necessarily, that of the staff member’s nationality; it could be the country with which he has the closest connection outside the country in which he is employed. Thus, the Director General, in exceptional circumstances, may authorize a staff member to take home leave in a country other than the country of his nationality, provided that the latter can show that he maintained his normal residence in that other country for a prolonged period preceding his appointment, that he continues to have close family or personal ties in that country and that his taking of home leave there

would not be inconsistent with staff regulation 5.3, which denies home leave to staff members whose home country is the country of their official duty station or who continue to reside in their home country.

While the Defendant acknowledged that the Complainant was considered as “internationally recruited”, it was of the view that he did not make Germany his “home” since, at the time of his recruitment, he had been settled in Switzerland for many years and had maintained only occasional ties with his family in Germany. By residing continuously in Switzerland, the Complainant had established his home in his country of residence, regardless of his nationality. Moreover, the term “normally” appearing in several provisions regarding the grant of home leave clearly allowed the possibility of exceptions. Finally, the Defendant asserted that it was “wrong to maintain . . . that the home leave country is defined solely on the basis of nationality”, since the concept of residence must also be taken into account.

The Complainant contended that this position was not in keeping with the provisions of the staff regulations and rules under which, according to him, all internationally recruited staff members who were not Swiss nationals were eligible for home leave, at least if they maintained links with the country of their nationality.

The Tribunal observed that the purpose of home leave is to enable staff members who, owing to their work, spend a number of years away from the country with which they have the closest personal or material ties to return there in order to maintain those connections. It thus considered regulation 5.3 self-explanatory. It noted that regulation 4.5 reflects the same reasoning, insofar as it provides that a staff member may lose entitlement to home leave if, following a change in his residential status, he is, in the opinion of the Director General, deemed to be a permanent resident of any country other than that of his nationality, provided that the Director General considers that the continuation of such entitlement would be contrary to the purposes for which the benefit was created.

In considering the Complaint, the Tribunal was not convinced that the Complainant’s ties to his country of nationality had been so uninterrupted and so close as to make him eligible for home leave. It noted that it is not sufficient for entitlement to home leave that internationally recruited staff members be serving in a country other than that of which they are nationals; they must also meet the other required conditions.

For the above reasons, the Tribunal dismissed the Complaint.

2. *Judgment No. 2392 (2 February 2005): H. J. T. v. International Fund for Agricultural Development (IFAD)*<sup>19</sup>

CONTESTATION OF NON-SELECTION FOR A POSITION—DISCRETIONARY AUTHORITY IN PROMOTING STAFF—REQUIREMENT OF TAKING INTO ACCOUNT THE CRITERIA OF INTERNAL CANDIDACY, GENDER AND GEOGRAPHIC REPRESENTATION WHEN SELECTING A CANDIDATE—LIMITED REVIEW OF DISCRETIONARY DECISIONS—DUTY OF ORGANIZATION TO PROVIDE ITS STAFF AN EFFICIENT INTERNAL MEANS OF REDRESS—REQUIREMENT TO PROVIDE REASONS FOR NON-SELECTION—UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 53/119 OF 5 FEBRUARY 1999

<sup>19</sup> Michel Gentot, President; James K. Hugessen, Vice-President; and Mary G. Gaudron, Judge.

The Complainant, an Austrian national, joined IFAD in 1984 as Project Controller at the P-4 level. She was subsequently promoted to the post of Country Portfolio Manager at the P-5 level in 1991 and obtained a contract of indefinite duration. She retired in May 2004, at which time she held a post of Senior Portfolio Management Adviser at the P-5 level.

On 18 June 2000, the Complainant applied for the post of Director. On 15 September, the Complainant was informed that she had been short-listed for the post and would be invited for interviews. On 27 October, the Assistant President in charge of the Programme Management Department wrote a memorandum where he summarized the main qualifications of three of the applicants, including the Complainant, and concluded that he was refraining from making a recommendation at that stage and was seeking a decision from the Appointments and Promotions Board (APB). He also stated that:

“The [Programme Management Department Directors] as a team gave a marginal advantage in favour of [the Complainant]. However, when asked individually, each candidate was favoured by at least one Director. In my assessment, the candidates have quite different characteristics from each other and none is absolutely outstanding over the others.”

On 9 November 2000, the APB selected by consensus an external candidate for the post. The Complainant was informed of this decision on 17 January 2001 and, on 31 January, she requested a review of that decision. Having received no response, she appealed to the Joint Appeals Board (JAB) on 24 March 2001. Following some unsuccessful attempts at mediation, the reply to the appeal was not filed until 28 February 2002. On 8 April 2002, the JAB suspended its activities for almost a year, resuming them in February 2003.

On 14 July 2003, the JAB submitted its report in which it detected some irregularities in the selection procedures and suggested, without making a clear finding to that effect, that IFAD had acted in bad faith. The JAB recommended that IFAD recognize the Complainant as a fully qualified candidate for the post (but not that she be appointed to it); acknowledge that the Organization did not provide any written explanation as to why an external candidate was chosen; pay her damages in an amount equal to at least one year's salary; and grant her an appointment at the D-1 level.

On 13 October 2003, the President of IFAD rejected the finding of the JAB concerning bad faith and accordingly refused to award her damages or other compensation. This was the impugned decision.

In response to the Complainant's first plea regarding the lengthy appeals procedure, the Tribunal observed that while its jurisprudence permits a complainant to come directly to the Tribunal when the internal procedure takes too long, the fact that a complainant does not take advantage of this cannot be held against him or her. Likewise, whether the delay was due to the tardiness of IFAD or to the malfunctioning of the JAB was considered irrelevant in light of the Organization's duty to provide to the members of its staff an efficient internal means of redress. Therefore, the Tribunal decided that the Complainant was entitled to damages.

With regard to the Complainant's second plea, alleging that the selected candidate did not possess the educational qualifications set out in the vacancy announcement, the Tribunal held that it was well within the discretionary power of APB to recommend, and the President to appoint, a successful candidate whose academic qualifications were enough to qualify him in their judgment.

For matter of convenience, the Tribunal chose to consider the Complainant's next two pleas together as they related to an alleged failure to give her preference as an internal candidate and as a female, referring to United Nations General Assembly resolution 53/119 of 5 February 1999. The Tribunal recalled that it is well settled that preferences such as those mentioned must be given effect to where the choice has to be made between candidates who are evenly matched. On the other hand, it noted that they have no role to play where there is a significant and relevant difference between the candidates. Referring to the information provided by the members of the APB regarding its selection discussion, the Tribunal disagreed with the Complainant's claim that equality between the candidates was evidenced in the memorandum of 27 October 2000. The Tribunal further observed that, in addition to the criteria of gender and internal candidacy, the issue of equitable geographical distribution also had to be taken into account.

The Tribunal also stressed the discretionary nature of the impugned decision, thus subject to limited review. The Tribunal would only intervene if the decision had been taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence. It further held that it would exercise its power of review with special caution in such cases and would not replace the Organization's assessment of the candidates with its own. In the circumstances, the Tribunal found that the Complainant had not shown that the selection was vitiated by an error of a type which would entitle its intervention.

As regard the Complainant's contention that IFAD had not informed her of the reasons for rejecting her application, the Tribunal noted that this requirement is found in general terms in the Tribunal's case law but much more specifically in the Organisation's Human Resources Handbook. It further observed that the APB recommendation was silent on the matter and the evidence showed that, at best, the Complainant was given only partial and incomplete oral reasons for the failure to give her preference, long after the internal appeal proceedings had been exhausted and the Complaint to the Tribunal instituted. If reasons for a non-selection decision are to have any use at all they must be given in time for an unsuccessful candidate to decide what, if any, recourse should be sought. Hence, the Tribunal found the plea well founded.

For the above reasons, the Tribunal decided that IFAD should pay the Complainant € 10,000 in moral damages for the inordinate delay in the internal appeal procedures and the failure to provide timely reasons behind the recommendation of the APB, and costs in the amount of € 2,500, and that all other claims were dismissed.

### 3. *Judgment No. 2396 (2 February 2005): re T. B. v. Universal Postal Union (UPU)*<sup>20</sup>

METHODS OF INVESTIGATION OF ALLEGED MISCONDUCT—COMMUNICATIONS TO THIRD PARTIES—DEFAMATION—PRESUMPTION OF INNOCENCE—INJURY TO A STAFF MEMBER'S DIGNITY AND REPUTATION—EXHAUSTION OF INTERNAL REMEDIES—CONSTRUCTION OF AMBIGUOUS OR INCOMPLETE REGULATIONS AND RULES *CONTRA PREFERENTEM* AND IN FAVOUR OF THE STAFF

<sup>20</sup> Michel Gentot, President; and Seydou Ba and Claude Rouiller, Judges.

This case is the seventh Complaint filed by the Complainant in a long series of judicial procedures between him and UPU in the context of an investigation for misconduct by the Complainant and his subsequent dismissal.<sup>21</sup>

Having noted irregularities in the expense accounts drawn up by the Complainant for his missions abroad between October 2000 and December 2001, UPU initiated disciplinary proceedings against him on 16 May 2002. The Director General ordered a further enquiry into the events after receiving a confidential report from the Disciplinary Committee on 6 September 2002. During the investigation, the Complainant repeatedly refused to produce documents concerning his mission. Therefore, in order to verify the exact dates of the missions, requests for information were sent confidentially to airlines and to the general management of national postal administrations, by mail or by fax, bearing the signature of the Director General, the Deputy Director General or the Director for Economic and Regulatory Affairs.

The five faxes sent to the airlines followed the same model, starting with an explanation of the reasons for the request (investigation of suspected systematic fraud) and, with one exception, mentioned the Complainant by name. In a fax sent subsequently to the Director General of a national postal administration, the Director General of UPU emphasised that the information requested was confidential and should be sent to him by fax marked “confidential” to his personal number.

On 31 October 2002, the Complainant, who had received copies of the faxes and other documents relating to the investigation, filed an appeal with the Director General complaining of the “defamatory statements” the faxes contained. He added that the statements constituted unacceptable behaviour for which he intended to seek compensation. On 10 December 2002, the Complainant complained to the Director General that he had received no reply to his appeal. He added that “according to the relevant provisions of the Statute of the International Labour Organization Administrative Tribunal, [he could] appeal directly to the Tribunal if the administration of the organisation fail[ed] to take a decision on any claim within sixty days”. Having received no reply, he filed his Complaint on 15 February 2003.

The Tribunal first considered UPU’s main plea that the Complaint was irreceivable on several grounds in that the Complainant had not complied with the statutory internal appeal procedure and had not exhausted the available means of redress, as required by article VII of the Statute of the Tribunal. UPU further held that the communications in dispute did not constitute decisions causing injury which, in themselves, are open to challenge since they were not binding on the Complainant. It also argued that the Complainant had unduly extended the scope of the claims submitted in his internal appeal.

The Tribunal observed that, in view of the material circumstances, the first two objections were the only ones that needed to be addressed. In doing so, the Tribunal held them unfounded.

First, the Tribunal observed that the internal appeal procedure is governed by articles 11.1 and 11.2 of the Staff Regulations of the International Bureau of the UPU and staff rules 111.1 to 111.3. According to these provisions, prior to appealing against an administrative

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<sup>21</sup> The presentation of the relevant facts may be found in Judgment No. 2364 delivered on 14 July 2004 concerning the Complainant’s fourth Complaint.

decision a staff member must address a letter to the Director General requesting that the administrative decision be reviewed. If the staff member wishes to make an appeal against the decision in reply by the Director General, he must submit an application to the Chairman of the Joint Appeals Committee (JAC) within one month of the date of receipt of that decision. If no reply has been received from the Director General within one month of the letter being sent, the staff member must, within the following month, submit his application to the Chairman of the JAC. By agreement with the Director General, the staff member may dispense with an opinion of the JAC and apply directly to the Tribunal. There is, however, no provision for an internal appeal in the absence of an administrative decision.

The Tribunal recalled that regulations or rules that are ambiguous or incomplete should be construed *contra proferentem* and in favour of the staff (Judgment No. 1755 (9 July 1998): *Mr. Johannes Karl Wilhelm Goettgens v. the European Patent Organisation*). It further held that this rule applied not only to the provisions that were directly applicable to the case, but also to the rules which designate those provisions. In the light of the above, the Tribunal found that the Complainant could not be blamed for believing that his internal appeal had been implicitly rejected and that he was entitled to have direct recourse to the Tribunal in conformity with article VII, paragraph 3, of the Statute of the Tribunal, since the Administration had failed to take a decision on his appeal within the sixty days time limit.

The Tribunal further observed that it did not need to consider the question of whether or not the disputed faxes were decisions causing injury, since the Complainant's appeal was not in the main directed against the fact that the faxes had been sent. The chief objective of the appeal was rather to make good the injury which the content of the disputed faxes had allegedly caused him. The receivability of the Complaint could not be denied insofar as it related to that grievance and the Tribunal thus decided to consider whether the content of the faxes was such as to cause injury to the Complainant's dignity and reputation.

The Tribunal recalled that any administrative or disciplinary body of an organisation which consults a third party to obtain information concerning the professional behaviour of one of its staff members must naturally avoid impairing the latter's dignity and reputation. It must ensure that the presumption of his innocence is maintained, and if its action is such as to breach that presumption or the fundamental rights of the staff member, making that action confidential is of no avail.

The Tribunal found surprising how casually the disputed faxes were drafted and considered that the arguments put forward by the Defendant in its submissions in no way justified the action taken by its officials, whose manner of communicating with third parties was at best debatable. Nevertheless, it further observed that this did not mean that the Complaint should be allowed. The disputed wording had to be seen in the context of the faxes as a whole, which the sender could presume would be read with all the professional, objective care he might expect from the addressees, even though these were not the most senior managers of the companies and administrations to which they were sent. The wording was in fact within the limit which could not be exceeded by the Defendant without breaching the Complainant's fundamental rights.

In view of the above, having found that the Complainant's pleas were receivable but unfounded, it decided to dismiss the Complaint.

4. *Judgment No. 2408 (2 February 2005): re E. C. v. Organisation for the Prohibition of Chemical Weapons (OPCW)*<sup>22</sup>

DECISION OF NON-RENEWAL OF CONTRACT ON GROUND OF STAFF TURNOVER POLICY—JUDICIAL REVIEW OF DISCRETIONARY DECISIONS—IMPROPER MOTIVATION FOR NON-RENEWAL—ABUSE OF AUTHORITY AND WANT OF GOOD FAITH

The Complainant joined OPCW on 7 August 2000 as Head of the Budget and Finance Branch at the P-5 level under a three-year fixed-term contract. The present Complaint is a follow-up to the first Complaint addressed by the Tribunal in its Judgment No. 2324 delivered on 14 July 2004, in which the Tribunal ordered OPCW to pay the Complainant compensation for having placed her on special leave with pay under questionable circumstances.

The current Complaint challenges the decision not to renew the Complainant's contract, which was said to be based on a staff turnover policy recommended by the Executive Council of OPCW in March 2003 and adopted by the Conference of the States Parties in April of that year, and which resulted in her separation from service on 13 November 2003.

The Tribunal examined part of the Complainant's troubled employment history within OPCW, recalling the difficult and constantly deteriorating relationship between the Complainant and her supervisor, the Director of Administration. It recounted various communications between the Complainant and her supervisor relating to their mutual disagreements about methodologies used for financial calculations and substantive conclusions thereof, which included from both parties criticisms, and implicit insinuations by the Complainant of possible misconduct by the Director.

On 23 April 2003, the Complainant had a short meeting with the Director of Administration during which, according to her account, she was told that she was trying to ruin his reputation and that he would "make her life miserable, whatever be the cost". The following day, she received a letter from the Director in which he stated that he would "not tolerate another insinuation [. . .] about alteration of figures in accounts or reports".

At a meeting on 30 April 2003 with the Deputy Director-General, the Complainant indicated that she was prepared to accept a transfer to another post. On 15 May, the Complainant was informed by the Director of the Office of Internal Oversight that she was to be transferred to that office but that her contract would not be renewed in August. In the meantime, in a memorandum dated 13 May, the Director of Administration recommended that the Complainant's contract not be renewed because of material and significant changes in the scope and responsibility of her post and because she had "not performed in a manner which [was] acceptable".

On 19 May, the Complainant received a letter from the Acting Head of Human Resources informing her that, due to annual staff turnover requirements, her contract would not be extended, save for a limited period to ensure six months' notice before separation. On 11 July 2003, she wrote to the Director-General, requesting him to review the decision not to renew her contract. In the event that he was unable to grant her request, she

<sup>22</sup> Michel Gentot, President; James K. Hugessen, Vice-President; and Mary G. Gaudron, Judge.

asked for a waiver to submit a complaint directly to the Tribunal, without going through the Appeals Council. This request for a waiver was subsequently accorded. On 8 August, the Acting Head of Human Resources informed her that, having regard to the annual staff turnover requirement, her separation from service would take effect upon expiry of the sixth months' period. On 21 August, the Complainant filed a Complaint with the Tribunal challenging the decision of 8 August 2003.

While the Complainant recognised that decisions not to renew a contract fall within the Director-General's discretionary authority, she argued that the relevant decision was arbitrary and, as such, reviewable by the Tribunal. She also contended that the decision was tainted by an abuse of authority since it was made to satisfy the Director of Administration's personal grudge against her. The Complainant further argued that there had been a breach of the obligation to protect her dignity as a staff member and not to cause her unnecessary hardship.

Despite the assertions by OPCW that the impugned decision had been made pursuant to the staff turnover policy and for no other reason, the Tribunal noted that the recommendation not to renew the contract made no reference whatsoever to this policy. Rather, the recommendation was based on what was said to be the changed responsibilities of the Complainant's post, which would require it being advertised, and her unsatisfactory performance.

In its reply, OPCW asserted, on the one hand, that neither of the matters raised in the Director of Administration's recommendation were taken into account in the decision not to renew the Complainant's contract and, on the other hand, that, in reaching his decision, the Director-General took account of, amongst other things, her performance appraisal report. The Tribunal held that the apparent inconsistency would be explicable if a selection for the purpose of the turnover policy had to be made between staff members in the area in which the Complainant was employed. However, there was no suggestion that there had been any such selection, or any procedure of any kind, related to the staff turnover policy.

The Tribunal concluded that when the above matters were analysed in the context of the open and long-standing hostility between the Complainant and the Director of Administration, which was clearly made known to the Director-General, in the face of that hostility and in the absence of any relevant procedure or recommendation based on the staff turnover policy, the decision was taken to rid OPCW of the serious personal and professional conflict that existed between two senior members of the secretariat and to avoid the necessity of taking steps to resolve that conflict. Thus, the decision made under the cover of implementation of the staff turnover policy was considered to be both an abuse of authority and an act which demonstrated want of good faith.

In view of the above, the Tribunal decided that the Director-General's decision of 8 August 2003 was to be set aside, that OPCW should pay the Complainant the amount of net salary that she would have received from 15 November 2003 until 6 August 2004 had she been employed, moral damages for harm to her dignity and reputation in the sum of € 25,000, as well as € 3,000 in costs.

5. *Judgment No. 2459 (6 July 2005): F. C., M. F. G. and M. E. V.-C. v. United Nations Educational, Scientific and Cultural Organization (UNESCO)*<sup>23</sup>

PRINCIPLE OF NON-RETROACTIVITY OF REGULATION—FREEDOM OF ASSOCIATION—RECOGNITION OF ASSOCIATIONS—CHANGE IN CONDITIONS OF REPRESENTATIVENESS OF STAFF—JURISDICTION TO HEAR CLASS ACTIONS—COLLECTIVE PROCEDURES AND COLLECTIVE RIGHTS—NEW RULE SHOULD NOT BREACH THE PRINCIPLE OF GOOD FAITH NOR INFRINGE ON ACQUIRED RIGHTS—PROPORTIONALITY OF REGULATION—COMPATIBILITY WITH HIGHER RANKING RULES—CHALLENGE OF AN IMPLICIT REJECTION OF AN APPEAL

On 19 December 2000, 53 staff members established a staff association called *Syndicat des fonctionnaires internationaux de l'UNESCO*, (the Union). By a letter of 22 December, one of the Complainants acting on behalf of a “transition group”, submitted the constitution of the Union to the Director-General for official approval “[i]n accordance with rule 108.1 of the Staff Regulations and Staff Rules and item 2805 of the UNESCO Manual”.

While this request was being considered, the Director-General, on 27 March 2001, announced in a note to all staff an amendment of Manual item 2805 on the grounds that this rule introduced a distinction between “recognised associations” and “representative associations” which was incompatible with regulation 8.1. The concept of “recognized associations” was therefore removed from the amended Manual, according to which only “associations representative of the staff” would benefit in the future from the rights, facilities and subventions granted by the Administration. In order to be representative an association had to have as its members at least 15 per cent of serving staff members. Nevertheless, existing associations which under the old version of Manual item 2805 were “recognized” but not “representative” were entitled to retain the rights and facilities they previously enjoyed. On 28 March, the Deputy Director-General, referring to the note of 27 March, informed the “transition group” that the Director-General could not approve the constitution of the Union. On 24 April, the Deputy Director-General reiterated to the “transition group” that their Union would enjoy the statutory rights and facilities as soon as it met the conditions of representativeness laid down in the amended Manual item 2805.

On 25 May 2001, each of the three Complainants submitted a protest to the Director-General in accordance with article 7 (a) of the Statutes of the Appeals Board. They considered that the retroactive application of the new provisions of the Manual constituted a clear formal and substantive flaw and complained of discrimination against their Union. Having received no reply, they filed notices of appeal on 24 July 2001. In its report dated 3 July 2003, the Appeals Board recommended that the Director-General “find an equitable solution to resolve the dispute”.

On 19 December 2003, the Complainants filed three separate Complaints with the Tribunal in defence of their right of association. Since the three Complaints raised the same issues of fact and law and sought the same redress they were joined to form the subject of a single judgment.

The Complainants’ claims included the quashing of the Director-General’s note of 27 March 2001 and the Deputy Director-General’s decision of 24 April 2001, the restora-

<sup>23</sup> James K. Hugessen, Vice-President; and Seydou Ba and Claude Rouiller, Judges.

tion of their right to freedom of association and the application of Manual item 2805 in its 1991 version. None of the Complaints contained reference to a letter of 15 December 2003 by which the Director-General informed the Complainants of his decision to “initiate the discussions with a view to settling the dispute in accordance with existing rules, in particular Manual item 2805 amended on 27 March 2001”.

According to the Defendant these claims were irreceivable. It maintained that the Tribunal had no jurisdiction to hear class actions led by a union which moreover challenged a regulatory decision. In its view, the Complainants should have impugned the decision of 15 December 2003 and not the one of 24 April 2001. Insofar as they challenged the decision of 24 April 2001, it considered their Complaints to be time-barred because the internal appeals were lodged after the time limit stipulated in article 7 (c) of the Statutes of the Appeals Board.

The Tribunal observed that the Complainants had filed three separate complaints, each of them asserting that she was acting to defend her own personal freedom of association. This was sufficient to establish that, contrary to the Defendant’s view, the case did not in fact concern class actions which the Tribunal has no jurisdiction to hear.

It also held that the note of 27 March 2001, which the Complainants initially sought to have quashed, was a regulatory provision intended for all UNESCO staff. At the time of its adoption, such general provision affected the protected personal interests of individual employees only in theory. A staff member might challenge its lawfulness only by appealing against a decision applying the provision which actually caused present damage to his or her personal interests. The Defendant’s objection based on the legal status of this note was therefore in principle sound. However, the Complainants having insisted in their rejoinder that their intention was not to “censure” either the note of 27 March 2001 or the new version of Manual item 2805, it must then be assumed that the Complainants were simply seeking to have the decision of 24 April 2001 quashed, insofar as that decision was based on a text which ought not to have been applied to the requests they had lodged prior to its entry into force.

Regarding the Defendant’s claim that the Complaints were time-barred, the Tribunal observed that the report of the Appeals Board was referred to the Director-General at the latest on 11 August 2003, when it was sent to the Complainants. That referral was equivalent to a new filing of the protests which the Director-General had not dealt with, as a result of which the Complainants had brought their case before the internal appeal body. Yet, once again, the Director-General did not respond for over four months. The Complainants were justified to consider this lack of response as an implicit decision to reject their appeals. They were therefore entitled to challenge this decision directly before the Tribunal within the time limit allowed under article VII, paragraph 3, of the Statute of the Tribunal. The Complaints leading to the present judgment were therefore receivable to the extent that they may be considered to challenge that implicit rejection.

The Tribunal nevertheless held that there was no need to address either the question of whether as a result of the Director-General’s letter of 15 December 2003, the Complaints were premature or showed no cause of action, or the receivability issues raised by the Defendant as it considered the Complaints clearly unfounded.

The Complainants contended that the Administration had breached their freedom of association by basing its decision—in disregard of the principle of non-retroactivity—on

the provisions of the Manual in force at the time it took its decision and not on the provisions of the Manual in force at the time the application was made for recognition of the Union. The decision of 15 December 2003, which has not been challenged, was also based on the new text, despite the recommendation of the Appeals Board.

An administrative authority, when dealing with an appeal such as the one the Director-General had to consider in this case, must generally base itself on the provisions in force at the time it takes its decision and not on those in force at the time the appeal was lodged, subject to the principle of good faith and the protection of acquired rights. It is only if a clear provision of the new applicable rule excludes this approach or effects some change in existing legal status, rights, liabilities or interests from a date prior to its proclamation that the above rule will not apply. The Tribunal noted that in this case there was no provision that excluded the application of the new rule, and therefore its application did not breach the principle of good faith, nor did it infringe acquired rights. When the application was filed for recognition of the Union, it merely drew the Defendant's attention to the fact that Manual item 2805, in its 1991 version, was incompatible with higher ranking rules insofar as it instituted two categories of staff associations. The Defendant considered that this distinction jeopardised the general interests which the higher ranking rules were intended to safeguard. When this became clear and after weighing the interests at stake, the Organization consequently altered the provisions of the Manual concerning the recognition of associations. Had it not made this change, the Defendant would have been obliged to apply the earlier provisions and to "recognise" the Union in breach of the higher ranking rules.

The Tribunal further held that the contested amendment of Manual item 2805 observed the principle of proportionality. The new provisions in fact unreservedly recognised the right of staff members to be organised into associations in accordance with the principle of freedom of association. The new version merely restricted the representativeness of the associations, particularly through their right to participate in the decision-making process concerning staff and to submit observations. Furthermore, the Complainants put forward no cogent argument that showed that, in practice, the conditions for recognition of their association's representativeness rendered such recognition so unlikely that they necessarily amounted to a restrictive measure directed against freedom of association.

Thus, the decision to deal with the Complainants' application for recognition of the Union by reference to the new provisions of Manual item 2805 breached neither the principle of non-retroactivity nor the Complainants' individual right to freedom of association. In view of the above, the Tribunal dismissed the Complaints.

6. *Judgment No. 2468 (6 July 2005): B. Q. v. International Labour Organization (ILO)*<sup>24</sup>

TERMINATION OF A CONTRACT WITHOUT LIMIT OF TIME—PERFORMANCE APPRAISAL REPORTS—RESORT TO AN INDEPENDENT EXPERT ASSESSMENT—REQUIREMENT OF TRANSPARENT AND ADVERSARIAL PROCEDURES TO ASSESS THE PERFORMANCE OF INTERNATIONAL CIVIL SERVANTS—CLAIMS OF HARASSMENT—HOSTILE WORKING RELATIONS—INSUBORDINATION

<sup>24</sup> Michel Gentot, President; James K. Hugessen, Vice-President; and Mary G. Gaudron, Judge.

The Complainant was recruited by ILO in September 1982 as an Arabic language translator at the P-3 level. He obtained an appointment without limit of time starting 1 July 1989 and was promoted to the P-4 level as a translator/reviser in April 1993. In June 1994, after a reorganization of departments, the Complainant who had enjoyed considerable responsibility as the most senior linguist in his Arabic unit, was joined by a translator/reviser of equal grade, Mr. H. Working relations between the Complainant and Mr. H. were tense and, in 1997, the Complainant protested to his supervisor that the distribution of work was unfair, as he was having to translate whilst most of the revision work was being allocated to Mr. H. In January 1998, Mr. H left for a field assignment but returned in February 2000 as the Head of the Arabic unit at the P-5 level, thus becoming the Complainant's immediate supervisor.

The tensions between Mr. H and the Complainant resurfaced immediately, and in April 2000, the Complainant was issued a warning by the Chief of the Unit referring to his unwillingness to report directly to Mr. H., his refusal of particular items of work and his attempts to impose general conditions regarding the nature of work assigned to him. In addition, the Complainant's performance appraisal report for the period June 1997 to May 1999 had been written in September 2000 and, thus, mentioned the warning. In the following appraisal reports for the period of 1 June 1999 to 31 May 2001, the Complainant's performance was rated "not satisfactory".

In light of this, the Complainant concluded that consideration should be given to the possibility of transferring him. The Director supported this suggestion and advised the Human Resources Development Department (HRD) to act on this as a matter of urgency. However, following the negative 2001 appraisal report, an investigation by an independent expert was initiated, which confirmed the poor quality of work rendered by the Complainant, although some of the 14 documents used for the evaluation, which had been selected in this regard by Mr. H., could not be attributed for sure to the Complainant. On 27 February 2002, the Reports Board unanimously recommended that the Complainant's contract be terminated for unsatisfactory services.

In the meantime, in March 2001 the Complainant had submitted a grievance to the HRD alleging discrimination and harassment by Mr. H. and the Chief of the Unit.

The Complainant was informed of the proposal to terminate his contract on 26 June 2002 by a letter from the Director of HRD, which he appealed to a Joint Panel. It was decided that the appeal would be joined with the previously submitted harassment grievance. In a recommendation dated 23 September 2003, the Joint Panel concluded that no evidence had been produced regarding the harassment grievance and that the evaluation of the Complainant's performance at the material time "was not erroneous". However, the Panel recommended that in view of the special circumstances of the case, the Director-General consider alternatives to the proposal of termination, particularly a transfer.

On 27 October 2003, the Director-General, confirmed the decision of termination, effective on 31 January 2004, as no suitable vacancy had been identified for the Complainant. The harassment grievance was implicitly rejected. This was the impugned decision.

With regard to the Complainant's harassment grievance, the Tribunal agreed with the Defendant that the Joint Panel had taken all evidence into account when issuing its recommendation and had rightly concluded that the grievance could not be substantiated. Undoubtedly, serious problems arose from the tensions between the Complainant and his former colleague, who had become his supervisor, but the former's refusal to recognise the authority of the latter largely accounted for a situation which, however regrettable, did not constitute harassment.

Regarding the legality of the decision to terminate his appointment, the Complainant held that the Joint Panel's recommendation was unlawful because its assessment of his performance was based on the findings of the Reports Board, which rested on the outcome of an expert procedure that was not adversarial. He also argued that the Director-General had not given any reasons as to why he did not follow the Panel's recommendation that he be transferred. In his view, no fact concerning either the quality of his work or his productivity or conduct supported the conclusion that his performance was unsatisfactory.

The Defendant submitted for its part that no manifest error was committed when evaluating the work of the Complainant and that the Director-General had indeed followed the recommendation of the Joint Panel in trying to find a new post for him. On this last point, the Tribunal agreed with the Defendant that serious efforts had been made to identify posts for which the Complainant might have been suited. The Director-General was therefore not obliged to enlarge any further on the reasons he gave for his decision in this respect. Consequently, the Tribunal decided that the plea that insufficient reasons had been given for the decision failed.

The assessments which led to the conclusion that the Complainant's performance was unsatisfactory raised more delicate issues in the view of the Tribunal. The Defendant was not wrong to point out that, except in a case of manifest error, the Tribunal would not substitute its own assessment of a staff member's services for that of the competent bodies of an international organisation. Nevertheless, such an assessment must be made in full knowledge of the facts, and the considerations on which it was based must be accurate and properly established. The Tribunal, which paid considerable attention to these issues in the case of complaints concerning dismissal at the end of a probationary period or the non-renewal of fixed-term contracts on the grounds of unsatisfactory performance, must be even more vigilant where an organisation terminates the appointment of a staff member holding a contract without limit of time, which in principle should secure him against any risk of job loss or insecurity. This applied particularly in the present case, since the staff member concerned received on the whole satisfactory or even excellent appraisals over a period of 15 years.

While the considerations on which the Complainant's termination were based focused particularly on his conduct and while on this point it is difficult to detect any manifest error in the assessments made by the competent bodies of the organization, the Tribunal found that it was clear from the submissions that the quality of the Complainant's work and his productivity met with unfavourable assessments by the Reports Board that were endorsed by the Joint Panel. But the findings of the Reports Board concerning the Complainant's performance were mostly based on the conclusions of an independent expert, who had assessed the quality of the Complainant's translation and revision work

on the basis of 14 documents, of which only five could be considered to have actually been translated or revised by him and some of which related to periods when apparently the linguistic abilities of the Complainant were not in doubt. The Tribunal held that the procedures used to assess the performance of international civil servants must be both transparent and adversarial. While it may be accepted that in this case the Reports Board resorted to an independent expert to assess the accuracy of the evaluations appearing in performance appraisals drawn up in accordance with the applicable rules, this “expert assessment” should not have been undertaken in breach of the Complainant’s right to an adversarial procedure, which would have given him an opportunity to object in good time to the choice of documents used as a basis for the conclusions reached by the expert who, moreover, was appointed by a method which remains unknown. This failure to observe the principles which ought to have applied, even in the absence of any written rule, to an investigation which was being conducted outside the normal evaluation procedure, led to consequences which were clearly harmful to the Complainant. Furthermore, the fact that the Complainant’s productivity was low during the period following Mr H.’s appointment may be explained by the fact that he was given few documents to translate and even fewer to revise. As soon as that situation was remedied, the Complainant’s productivity was restored to a satisfactory level and did not remain below standard, contrary to what the organization maintained.

The Tribunal concluded that, even though the Complainant’s conduct towards his supervisor was not what might be expected of an international civil servant and would probably have justified preventive action on the part of the Organization, the reasons given to establish that the Complainant’s abilities and performance were unsatisfactory did not suffice to justify terminating his appointment for unsatisfactory services.

In view of the above, the Tribunal decided that the decision of the Director-General of ILO of 27 October 2003 was to be set aside, that the Complainant should be reinstated as from 1 February 2004 with all legal consequences, that the Organization should pay the Complainant 25,000 Swiss francs in moral damages, that it should also pay him 15,000 Swiss francs in costs, and that all other claims were dismissed.

7. *Judgment No. 2470 (6 July 2005): M. I. v. Food and Agriculture Organization of the United Nations (FAO)*<sup>25</sup>

INTER-ORGANIZATION AGREEMENT CONCERNING TRANSFER, SECONDMENT OR LOAN OF STAFF AMONG THE ORGANIZATIONS APPLYING THE UNITED NATIONS COMMON SYSTEM OF SALARIES AND ALLOWANCES<sup>26</sup>—DISCIPLINARY PROCEEDINGS FOR MISCONDUCT DURING SECONDMENT—DEMOTION DECIDED BY THE SENDING ORGANIZATION AS A RESULT OF MISCONDUCT CHARGES BROUGHT BY THE RECEIVING ORGANIZATION—APPEAL PROCEDURES TO TWO SEPARATE ADMINISTRATIVE TRIBUNALS FOR COMPLAINTS COVERING THE SAME FACTS—QUESTION OF FORUM CONVENIENS—JURISDICTION OF THE ADMINISTRATIVE TRIBUNAL RELATED TO THE ORGANIZATION HAVING EXERCISED DISCIPLINARY POWER OVER THE COMPLAINANT—*RES JUDICATA*

<sup>25</sup> Michel Gentot, President; and Florida Ruth P. Romero and Agustín Gordillo, Judges.

<sup>26</sup> CEB/2003/HLCM/CM/7.

The Complainant was seconded to FAO from the United Nations Development Programme for a two-year period, starting from 1 June 1999. At the material time she held the grade D-1.

In the context of a review of the FAO rental subsidy scheme, the Office of the Inspector-General investigated rental subsidy claims made by the Complainant between June 1999 and March 2000. It was found that her claims were based on a lease for the same apartment as that of her partner, a staff member of the International Fund for Agricultural Development. In the context of the investigation, the Complainant forged a cheque relating to the rent of this apartment. Disciplinary proceedings were conducted against her and as a result, it was recommended that she be dismissed for misconduct. However, at the end of the proceedings, as the Complainant was returning to the United Nations after having completed her assignment, it was considered that the purpose of safeguarding the integrity of FAO was no longer an issue, and the measure was not imposed. Nevertheless, the matter was reported to the United Nations, as required in paragraph 7 (a) of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances, by which at the end of an assignment, the receiving organization should provide information on the Complainant's conduct during secondment.

FAO submitted to the United Nations an "Administrative Details" statement concerning the Complainant, dated 24 May 2001. **The Complainant affirmed that on 28 May 2001, she had been informed through "informal channels" that the United Nations was to put her on suspension from duty. On 29 May, she returned the rental subsidy that FAO claimed she had improperly received. On 1 June, she returned to the service of the United Nations, where disciplinary proceedings were initiated against her. On 4 June, the Complainant was suspended from duty and, on 25 June 2002, she was demoted two grades on the grounds of misconduct specified in the statement of FAO and on her own admission of forging a cheque.**

In a letter of 10 August 2001, the Complainant appealed to the Director-General of FAO against the findings of the Office of the Inspector-General and the Organization's charge of misconduct. She further argued that FAO took "unreasonable and improper administrative actions" when it provided the United Nations with information concerning her misconduct at FAO. The Assistant Director-General of Administration and Finance Department dismissed her appeal in a letter of 9 October 2001. She appealed against this decision to the Appeals Committee of FAO on 24 December 2001, questioning in particular the transfer of information concerning her misconduct in the "Administrative Details" statement.

In the meantime, on 15 August 2002, she filed an Application with the United Nations Administrative Tribunal (UNAT) against the decision to demote her.

The Appeals Committee of FAO, in its report of 13 June 2003, concluded that all her claims for relief had failed as it was aware that the challenged decision was also part of the disciplinary proceedings initiated within the United Nations. The Director-General of FAO also rejected her appeal in its entirety.

On 5 December 2003, the Complainant filed her case before the International Labour Organization (ILO) Administrative Tribunal. She asked that the decision by the Director-General of FAO to reject her appeal be quashed, her record of service be rectified and this information be notified to the United Nations, the amount she reimbursed be restituted, as well as moral and material damages.

On 23 July 2004, UNAT handed down its Judgement<sup>27</sup> on the case filed by the Complainant, in which it upheld the demotion imposed upon her by the United Nations as a disciplinary measure for her misconduct while she was seconded to FAO.

The ILO Administrative Tribunal concluded in the present Complaint that while it had jurisdiction to consider claims brought by former employees against the defendant organization, in this case FAO, the present Complaint had already been adjudicated by another tribunal, UNAT. Indeed, UNAT, during its deliberation, **had considered whether** it was or not the *forum conveniens* and had found that, since FAO had declined to exercise disciplinary power regarding the Complainant and the United Nations had exercised it, UNAT was necessarily the appropriate jurisdiction. The ILO Administrative Tribunal entirely agreed with this view, and found that the facts that the Complainant challenged in the present Complaint were covered by the principle of *res judicata*.

Therefore, the ILO Administrative Tribunal rejected all the claims.

### C. DECISIONS OF THE WORLD BANK ADMINISTRATIVE TRIBUNAL<sup>28</sup>

#### 1. Decision No. 330 (13 May 2005): *Rodriguez-Sawyer v. International Bank for Reconstruction and Development*<sup>29</sup>

DEATH BENEFITS—DESIGNATION OF BENEFICIARY—STAFF RETIREMENT PLAN—IMPLIED REVOCATION OF BENEFICIARY DESIGNATION—TRIBUNAL'S AND BANK'S RELATIONSHIP TO NATIONAL LEGISLATION, WHETHER STATUTORY OR JUDICIAL—POWERS AND DUTIES OF BANK'S PENSION BENEFITS ADMINISTRATION COMMITTEE—PRESUMPTIONS AS TO DECEASED'S INTENTIONS

<sup>27</sup> See Judgement No. 1175, *Ikegame v. the Secretary-General of the United Nations* (2004). See also *United Nations Juridical Yearbook, 2004*, (United Nations publication, Sales No. E.07.V.1), chapter V, section A.2.

<sup>28</sup> The World Bank Administrative Tribunal is competent to hear and pass judgement upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the statute of the Tribunal as "the Bank Group"). The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to a claim upon a right of a member of the staff as a personal representative or by reasons of the staff member's death and any person designed or otherwise entitled to receive payment under any provision of the Staff Retirement Plan. For more information on the World Bank Administrative Tribunal and the full texts of its decisions, see <http://wbln0018.worldbank.org/crn/wbt/wbtwebsite.nsf>.

<sup>29</sup> Bola A. Ajibola, President; Elizabeth Evatt and Jan Paulsson, Vice-Presidents; and Robert A. Gorman, Francisco Orrego Vicuña, Sarah Christie and Florentino P. Feliciano, Judges.

The Applicant, the daughter of a deceased staff member, Mr. Fritz Rodriguez, of the International Bank for Reconstruction and Development (the Bank) appealed a decision of the Bank's Pension Benefits Administration Committee (PBAC) directing the payment of the deceased's death benefit under the Bank's Staff Retirement Plan (SRP) to his former second wife, Ms. Hafida Rodriguez.

Mr. Rodriguez joined the Bank in 1972. He had two children with his first wife, whom he divorced in May 1990, one of these being the Applicant. In September 1990, he married Ms. Hafida Rodriguez and formally designated her as his sole beneficiary to receive certain benefits payable upon his death. The standard form that he signed for this purpose, entitled "Change of Designation of Beneficiary", provided that he thereby revoked "all designations of beneficiaries, if any, heretofore made by me" with respect to SRP death benefits.

Mr. Rodriguez retired from the Bank in 1997 and divorced Ms. Hafida Rodriguez in December 1999. Their Separation and Property Settlement Agreement (Settlement Agreement) provided that he retained, in consideration of certain monetary transfers, "all of his right and interest in that [Bank] retirement plan and [Ms. Hafida Rodriguez] waives and releases any claim to any portion of same." These terms became part of the divorce decree granted by the Circuit Court for Montgomery County, Maryland.

Mr. Rodriguez died on 30 November 2002 without having revoked or revised the written designation of Ms. Hafida Rodriguez as the beneficiary of his SRP death benefit. Section 4.1 (b) of the SRP provides for the calculation and payment of a lump-sum benefit in the event of the death of a retired staff member not married on the date of death, and states that this death benefit "shall be paid to the beneficiary or beneficiaries designated by the participant or retired participant in a witnessed document received by the Benefits Administrator before the death of the participant or retired participant."

On 30 June 2003, the attorney for the Applicant and the Estate submitted a petition asking the PBAC to invalidate the designation of Ms. Hafida Rodriguez as beneficiary and have the death benefit paid directly to the Estate. In October 2003, the Benefits Administrator informed Ms. Hafida Rodriguez about her beneficiary status and of the request made by the Applicant and the Estate. On 22 March 2004, the Benefits Administrator informed the Applicant's attorney that the PBAC had decided that there was no basis to find Mr. Rodriguez beneficiary designation invalid on the account of the divorce decree and Settlement Agreement, as his written designation had not been changed and was thus to be honoured. Furthermore, the PBAC considered an inquiry into the deceased's intentions to be outside its scope of authority.

In its consideration of the case, the Tribunal noted that the relevant SRP provisions had not been challenged, and that the sole question before it consisted in whether the divorce decree and related Settlement Agreement had revoked Ms. Hafida Rodriguez designation as beneficiary.

The Tribunal observed that the laws of a member State, whether statutory or judicial, do not govern the Bank or an organ such as the PBAC. The Tribunal held that the Bank's determination to apply only its own internal rule concerning beneficiary designations was quite reasonable due to the uncertainties relating to the state of the law in the United States and to the choice of law, including the "location" of the pension funds (Washington, D.C.), the issuance by a Maryland state court of the divorce decree and Settlement Agreement, and the site of the deceased's death and Estate (Florida). The Tribunal further concluded

that to require the PBAC to refer to the laws of a State would potentially render its decision-making thoroughly impracticable, given the fact that staff members come from 184 nations, with widely differing approaches to the respective rights of divorced spouses.

The Tribunal noted that the underlying assumption of the SRP is that the best indicator of a deceased staff member's intention is the formally executed beneficiary designation. In this regard, the Tribunal found it well within the Bank's discretion to conclude that the divorce alone did not override the written beneficiary designation and that the terms of the Settlement Agreement did not clearly enough constitute a waiver by Ms. Hafida Rodriguez of her rights as beneficiary. The Tribunal further found it reasonable for the Bank to assume that the staff member should bear the burden of knowingly and formally making any changes on a matter as important as the designation of a beneficiary for a substantial death benefit. Moreover, noting the difficulties in proving that certain circumstances would justify an assumption that a deceased staff member would have intended that his beneficiary designation be revoked, the Tribunal considered the PBAC's reluctance to investigate the deceased's intentions be more than reasonable.

The Tribunal further noted that United States federal and state courts had differed among themselves with respect to the dispositive nature of written declarations and the appropriateness of investigations into a deceased's intentions. The Tribunal found that both section 4.1 (d) of the SRP and its underlying policies and justifications were reasonable and had been applied in this case without any abuse of discretion. Nevertheless, the Tribunal found it conceivable that in certain circumstances it would be an abuse of discretion to disregard post-designation events that might have an impact upon the equity of the rule. However, in such cases the burden of proving so would lie with the person attacking the written beneficiary designation, both because of that person's knowledge of and access to such unusual facts and because of the strong presumption of regularity accorded to such a designation.

The Tribunal concluded that the two sets of tenable contentions presented by the parties regarding the meaning of the waiver provisions in the divorce decree and the Settlement Agreement were sufficient to reinforce the PBAC's decision that there was inadequate reason to ignore the deceased's written beneficiary designation. The Tribunal observed that the SRP terms, as interpreted by the PBAC and the Tribunal, are meant to instruct the Bank as to the disposition of possibly disputed death benefits. The Tribunal noted that the SRP does not purport to resolve conclusively the respective claims of designated beneficiaries and third parties who assert superior rights under contracts, judicial decrees or other instruments to which the Bank is not a party. The Tribunal also stated that the PBAC has a continuing discretion to determine whether a dispute is in the process of being settled, and to draw such conclusions as it may deem appropriate in this respect pursuant to section 12.2 of the SRP.

The Tribunal for such reasons affirmed the decision of the PBAC.

2. *Decision No. 338 (4 November 2005): Prasad v. International Bank for Reconstruction and Development*<sup>30</sup>

PERFORMANCE EVALUATION PROCEDURE—REQUIRED PERFORMANCE REVIEW DISCUSSION AND FEEDBACK—SALARY REVIEW INCREASE—CONNECTION BETWEEN PERFORMANCE AND SALARY INCREASE EVALUATIONS—EVALUATION AS A DISCRETIONARY ACT BY MANAGEMENT—FINALITY OF DISCRETIONARY ACT IS CONDITIONED UPON IT NOT INVOLVING ABUSE OF DISCRETION—RECALL OF STAFF MEMBER FROM APPOINTMENT—DUE PROCESS RIGHTS—ABUSE OF DISCRETION—DAMAGE TO CAREER PROSPECTS

The Applicant in this case made several claims of mismanagement and abuse of discretion against the International Bank for Reconstruction and Development (the Bank) relating, *inter alia*, to his 2001–2002 Overall Performance Evaluation (OPE), his Salary Review Increase (SRI), and the Bank’s decision to recall the Applicant from his assignment as Country Manager for Lebanon.

The Applicant had worked for the Bank since 1979 and had consistently received good performance evaluations. On 1 November 1999, the Applicant was appointed to the newly created position of Resident Representative in Beirut for a three-year term. The position was later renamed Country Manager. In this role, the Applicant reported to the Director, Middle East, and the Vice President, Middle East and North Africa (MNA). The original officials to whom the Applicant reported were soon replaced by two new persons. The new Vice-President introduced a number of organizational and work changes, including a redistribution of countries and a stronger emphasis on the management of country portfolios.

During the first year at his post, the Applicant received mainly positive evaluations, both with regard to his 2000–2001 OPE and his 360 Degree Feedback Report. Both of these evaluations were signed by the Applicant’s former Director. Meanwhile, certain correspondence indicated that the new Vice-President had some reservations regarding the Applicant’s performance. In June 2001, the Vice-President met with the Applicant and expressed concern about the lack of improvement in Lebanon’s troubled portfolio and the Applicant’s management of the Country Office. The Vice-President’s comments were reflected in the 2000–2001 OPE.

Over the following year, the Applicant’s work proved yet more difficult, with the Applicant’s new Director criticizing his performance and suggesting that he consider returning to Washington prior to the expiration of his appointment. The Applicant returned to Washington in May 2002, seven months ahead of the appointment’s original end-date.

The Applicant’s 2001–2002 OPE reflected the deteriorating perceptions of the Applicant’s performance by the Director and Vice-President and his ratings had changed dramatically from that of the previous period. While the Director signed the OPE almost six months after being presented with it, neither the Applicant nor the Vice-President signed it.

In December 2002, the Applicant initiated an Appeals Committee proceeding regarding his 2001–2002 OPE. While the Bank withdrew the contested OPE during the process, the Appeals Committee nevertheless found that this did not dispose of the Applicant’s complaints and concluded that the Bank had not followed its procedures in completing

<sup>30</sup> Bola A. Ajibola, President; and Robert A. Gorman and Francisco Orrego Vicuña, Judges.

the OPE. It held that the Applicant had been harmed by procedural flaws and denied fair treatment, particularly with respect to the Director's failures to: (i) conduct a required performance review discussion with the Applicant; (ii) provide clear feedback on areas for improvement; (iii) sign the OPE promptly; and (iv) follow a systematic process in collecting feedback. The Appeals Committee found that the mismanagement of the 2001–2002 OPE process had impacted the Applicant's due process rights and denied him any opportunity to explain and defend his performance. The Appeals Committee, however, did not find that the performance evaluation embodied in the 2001–02 OPE, or the manner in which it had been conducted, had been motivated by a desire to harass or retaliate against the Applicant. The Bank accepted the Appeals Committee's recommendation that the Applicant be awarded compensation and costs.

In its consideration of the case, the Tribunal first examined the question whether procedural violations had occurred during the 2001–2002 OPE process. It noted that staff rule 5.03, paragraph 2.02, provides that the manager or designated supervisor and the staff member "shall meet and discuss the staff member's performance . . ." and that the essential steps in the process must all be memorialized in writing and relate to the review period under consideration. The Tribunal further noted that discussion of performance does not replace the need for ongoing feedback throughout the year in question and should be provided so that the staff member is "able to anticipate the nature of this year-end discussion and resultant ratings on the OPE." While the Tribunal confirmed that an evaluation is a discretionary act entailing an exercise of judgment by management and that such an evaluation is final, it also reiterated its finding in *Saberi*, Decision No. 5 [1981], para 24, that the finality of discretionary acts is conditioned upon their not involving an abuse of discretion or other forms of arbitrariness or discrimination.

The Tribunal observed that strict requirements govern the provision of feedback to staff members and noted that no specific performance discussions had been held with the Applicant, neither during the period reviewed nor since the 2001–2002 OPE's withdrawal. It further held that discussions of a general nature, or those held prior to the actual OPE process, were not sufficient, and that the Bank must take a proactive role since the obligation to guide the affected staff member falls upon it and not the other way round. The Tribunal also reiterated that the assessment of performance has to take into account all relevant and significant facts that existed for that period of review and found that the gathering of information in the Applicant's case did not seem to have been sufficiently comprehensive.

Furthermore, the Tribunal found more serious the fact that the Applicant had not been afforded an opportunity to discuss in a timely manner the criticisms made against him and observed that even those in higher management are entitled to an opportunity to correct mistakes. The Tribunal reiterated its finding in *Marshall*, Decision No. 226 [2000], para. 24, that although a change in a staff member's assessment, relative to prior evaluations, cannot in itself be regarded as an abuse of discretion, an abrupt change, unaccompanied by adequate descriptive statements may suggest a "degree of inconsistency in the exercise of managerial responsibilities." The Tribunal concluded that the Bank had violated staff rule 5.03 and the Applicant's due process rights with respect to the 2001–2002 OPE.

The Tribunal thereafter considered the Applicant's claim that the Bank had abused its discretion with respect to his SRI assessment, which was significantly lower compared

to previous years, and that no explanation had been provided as to the rationale for this decision. In this regard, despite the efforts of the Bank to de-link the SRI and OPE procedures, the Tribunal observed that a connection between the two necessarily existed and recalled its finding in *Desthuis-Francis*, Decision No. 315 [2004], para. 32, that “if there is any appreciable difference between these two processes, it is in all probability a difference in emphasis rather than a fundamental cleavage.” It noted that there existed no evidence that the SRI assessment had taken the Applicant’s OPE into account, which had never been completed, and that it thereby lost all connection to his individual performance. It also noted that there was no connection between the disputed SRI assessment and the Applicant’s previous salary increases and that the Bank had failed to provide any satisfactory justification for this decision. The Tribunal concluded that the Bank had abused its discretion in respect of the Applicant’s SRI assessment and established more generally that OPE and SRI assessments cannot contradict each other without a most convincing explanation.

In reviewing the Applicant’s early recall from Lebanon, the Tribunal noted its finding in *Sengamalay*, Decision No. 254 [2001], para. 30, that a reassignment is not an abuse of discretion “simply because . . . the unit Vice-President’s impression of a staff member’s management skills is markedly less enthusiastic than that of the staff member’s immediate supervisor”. However, in the Applicant’s case, the Tribunal found that while his new supervisors had shared critical views of him, their assessment contrasted rather dramatically with earlier ones. The Tribunal also found that only negative aspects of the Applicant’s performance had been given attention in the adoption of the recall decision and that this raised questions about the decision’s impartiality and objective nature. While the Vice-President may not have been formally involved in the performance evaluation or the recall decision, this was not true in substance since both he and the Director were part of these processes. Both were also aware of the Bank President’s view on the need to reorganize the MNA Region. The Tribunal determined that the recall decision had responded to this reality more than to any specific performance problem, and was entirely disconnected from the OPE that allegedly supported it. The Tribunal consequently held that the Bank had abused its discretion with respect to the Applicant’s recall, as the decision lacked the necessary transparency and openness.

The Tribunal concluded that a reassignment decision can be reasonably reached only at the end of an appropriate chain of assessments, and that the isolation of such a decision, or that of an SRI, can constitute an abuse of discretion even when the decision adopted could otherwise be entirely justified. It observed that there may be cases in which a reassignment has to be effected promptly in the best interests of the institution, but even then the matter has to be handled with respect for due process rights, and in the open and transparent manner that has to govern professional relations, including most certainly a discussion of the performance issues concerned.

In considering remedies, while the Tribunal noted that the 2001–2002 OPE could not be quashed as it had been withdrawn, it granted the Applicant’s request that the SRI performance ratings and increase percentage be deleted from his personnel file. The Tribunal disagreed with the Applicant that his present position was causing damage to his career and forcing him into retirement, as the position had not caused deterioration in his grade level and as there was no evidence that his career was ending. The Tribunal acknowledged, however, that the Applicant’s career prospects in the Bank had been affected by the

aggregate of decisions and measures reviewed. The Tribunal therefore ordered the Bank to assist the Applicant's job search, granted the Applicant compensation in addition to that awarded by the Appeals Committee, and awarded the Applicant costs.

3. *Decision No. 340 (4 November 2005): G. v. International Bank for Reconstruction and Development*<sup>31</sup>

IMPROPER STAFF RELATIONSHIPS—CONFLICT OF INTEREST—DISCRETION TO DECIDE TO CONDUCT AN INVESTIGATION—ADMINISTRATIVE LEAVE IS NOT A DISCIPLINARY MEASURE—NOTICE OF INVESTIGATION—SCOPE AND STANDARDS OF REVIEW WITH RESPECT TO INVESTIGATIVE PROCEEDINGS AND ADMINISTRATIVE LEAVE

The Applicant, a Finance Analyst with the International Bank for Reconstruction and Development (the Bank), challenged the Bank's decision to place her on administrative leave during an investigation of possible misconduct undertaken by the Bank's Department of Institutional Integrity (INT).

In November 2002, the Applicant undertook a mission to Afghanistan for three weeks, during which time the Government decided to hire a commercial bank to provide services to its Central Bank. The Applicant was invited to accompany Government officials to Dubai in early January 2003 in order to meet with various commercial banks to determine their suitability for this purpose. The Applicant's trip was approved by her supervisor, with the caveat that she would not give the impression that the Bank was giving its blessing to any particular bank. She ultimately did not make the trip.

The Applicant returned to Afghanistan on 22 January 2003 and stayed until 1 April 2003. During this time, the Government received proposals from three commercial banks willing to provide the requested banking services. The Government decided to hire a consultant to evaluate the proposals and asked the Applicant if she knew of anyone who could perform the work in question. The Applicant suggested a Mr. I, a former Bank staff member who had been the Applicant's mentor when she first joined the Bank.

Mr. I was hired in March 2003 for a fee of approximately US\$ 2,500. Mr. I and the Applicant were invited to accompany Government officials for meetings in Dubai in April, which they both attended. The Applicant did not seek explicit permission from any supervisor for this April mission, and later explained that this was for two reasons: (i) her supervisor had previously approved her joining the Afghan delegation for the January 2003 meetings relating to the same issue; and (ii) the April trip to Dubai was of minimal cost since she was at any rate scheduled to leave Afghanistan for Washington via Dubai on 1 April, and thus could conveniently extend her stopover in Dubai for two days.

After returning to Washington, the Applicant submitted to the Bank a withdrawal application for the payment of Mr. I's consulting fees and expenses in the amount of US\$ 1,927.38. A Finance Officer reviewed the application and approved the payment. On 4 June 2003, two Bank staff members reviewing payment instructions noticed the payment to Mr. I and, having heard that he had a personal relationship with the Applicant, reviewed the relevant documentation. They discovered that a receipt for Mr. I's stay in Dubai was

<sup>31</sup> Elizabeth Evatt, Vice President, presiding; Jan Paulsson, Vice President; and Sarah Christie and Florentino P. Feliciano, Judges.

addressed to the Applicant's home in Virginia, that the Applicant had been in Dubai on the same dates as the Applicant, that the Applicant had recommended the Afghan Government to hire a consultant (this person ultimately being Mr. I), and that the Applicant had processed Mr. I's application for payment.

The two staff members informed their superiors of their findings, and the Applicant was subsequently questioned by her Division Chief on these matters. The Division Chief thereafter contacted the INT, which commenced a preliminary inquiry focusing on whether there was any foundation or merit to the initial suspicions and allegations of misconduct that would warrant a full investigation. In the meantime, the INT was also notified of concerns that the Applicant had recommended a particular bank to the Afghan Government with whom it should conduct its business.

The INT reviewed the information and documents provided by the Applicant's department and formally interviewed her Division Chief, the Director and the Regional Chief Financial Officer for the South Asia Region. Once an evidentiary foundation had been established, the INT also accessed and reviewed the Applicant's archived e-mails. The INT did not notify the Applicant about the preliminary inquiry, nor did it interview the Applicant about the allegations during the preliminary inquiry.

In October 2003, the INT informed the Applicant's Division Chief and Director of its conclusion that the circumstances of the case warranted a full investigation on a number of questions. The INT did not, however, provide any written report to them or to the Applicant. On 15 October 2003, the INT informed the Applicant by memorandum that it was conducting an investigation into four specific allegations against her and interviewed the Applicant the following day. Given its preliminary inquiry and taking into account the fact that the Applicant had fiduciary responsibilities as a Finance Analyst, the Division Chief and the Director decided to recommend that the Applicant be placed on administrative leave for the duration of the investigation.

The INT final report of 9 July 2004 vindicated the Applicant with respect to the most serious allegations, and concluded that an allegation of excess of authority, although apparently founded, was immaterial in effect and at any rate mitigated by the Applicant's good work. While no sanctions were ultimately imposed on the Applicant, she submitted her Application with the Tribunal in order to seek redress on the ground that the decision to place her on administrative leave was arbitrary and capricious.

In considering the case, the Tribunal observed that while the allegations against the Applicant had turned out to be unfounded, they were on their face troubling and had required a thorough investigation. It further observed that the issue before it did not relate to the Applicant's relations with Mr. I, but "whether the Bank [had] failed to respect the Applicant's rights in placing her on administrative leave."

The Tribunal noted that placement on administrative leave is not a disciplinary measure and is therefore reviewable only for abuse of discretion. The Tribunal found the Applicant's contention that she should not have been placed on administrative leave because her work was not of a fiduciary nature unconvincing, and saw no reason to question the Bank's decision that it was unfeasible to re-assign the Applicant to alternative tasks not involving financial responsibility. The Tribunal likewise rejected the Applicant's contention that her placement on administrative leave had irreparably damaged her career. The Tribunal found that the investigation had left her integrity intact, that the Bank had left her free to

resume her career, that there was no evidence of the Applicant being unwelcome to pursue her career, and that the Applicant's claim was one of conjecture.

In considering the Applicant's allegation of improper motive in the investigation, the Tribunal recalled that such a finding cannot be made without clear evidence and that the Applicant carried the burden of proof. In rejecting the Applicant's allegation, the Tribunal observed that what is required of the INT is not that every inquiry be a perfect model of efficiency, but that it operates in good faith without infringing individual rights.

Regarding the Applicant's contention that her rights had been infringed by the manner the INT had conducted its preliminary investigation, the Tribunal noted that it was difficult to articulate a positive standard for determining when an evidentiary basis exists for initiating such an inquiry, and found that it appeared to be a matter of discretion given the lack of guidance from Bank rules and standards. The Tribunal further observed that a meaningful negative standard had been set out by the Tribunal in *Koudogbo*, Decision No. 246 [2001], to the effect that a preliminary inquiry cannot be launched on the basis of rumours or allegations from questionable sources, and should not be triggered merely because of isolated, anonymous, indirect, word-of-mouth tips. The Tribunal stated that such statements must be considered critically. It found that the facts which justified the Applicant's investigation were objective and of the Applicant's own doing, and that there had been no harassment or abuse of investigatory initiatives.

The Tribunal rejected the Applicant's contention that she had not been given timely notice of the preliminary investigation. The Tribunal stated that since a preliminary inquiry is not an adjudicatory process, it is not open to challenge on as broad a range of grounds as those which may invalidate judicial proceedings, and particularly with respect to lack of notice. While the Tribunal recalled its jurisprudence that the subject of a preliminary inquiry should be informed of that fact at the earliest reasonable moment, it also held that it did not require such notification in each and every circumstance (*D*, Decision No. 304 [2003]). The Tribunal noted that the Applicant's first questioning in the matter by her Division Chief preceded the formal notice given to her by several months and that she had obviously been in a position to prepare for the interview. The Tribunal stated that it could not find that the decision to place the Applicant on administrative leave had been materially affected by a tardy notification.

For such reasons, the Tribunal dismissed the Application.

4. *Decision No. 343 (4 November 2005): I. v. International Bank for Reconstruction and Development*<sup>32</sup>

JURISDICTION OF THE TRIBUNAL EXTENDING TO FORMER AND RETIRED STAFF—SURVIVABILITY OF TERMS OF CONTRACT OF EMPLOYMENT—EXISTENCE OF AN ADMINISTRATIVE DECISION TO BE REVIEWED—ADMINISTRATIVE DECISION CAN BE AFFIRMATIVE OR NEGATIVE—*OBITER DICTUM* STATEMENTS BY TRIBUNAL

In this case, the Applicant, a retired staff member of the International Bank for Reconstruction and Development (the Bank), claimed that the investigation by the Bank

<sup>32</sup> Elizabeth Evatt, Vice President, presiding; Jan Paulsson, Vice President; and Sarah Christie and Florentino P. Feliciano, Judges.

of a current staff member<sup>33</sup> had been conducted wrongfully and to his prejudice. The Tribunal in this judgment considered only the question of jurisdiction.

The Applicant, who retired from the Bank in 1994, was hired as a short-term consultant for a Bank-financed project in Afghanistan in March 2003. In October 2003, the Bank's Department of Institutional Integrity (INT) commenced an investigation of Ms. G, a staff member in the Loan Department, based on allegations that she had engaged in misconduct involving the Applicant. The INT investigated in particular whether Ms. G's personal relationship with the Applicant had influenced her to recommend to the Afghan Government that it hire the Applicant as a consultant. As part of its investigation, the INT inquired into the issue of potential conflict of interest in the manner in which the Applicant had been offered the consultancy and had received payment thereunder.

During the investigation, the INT interviewed the Applicant and several other witnesses. Some of the witnesses informed the INT that the Applicant and Ms. G had an intimate relationship, while others indicated that they were only close friends. The INT concluded its investigation in July 2004 and reported that there was insufficient evidence to support a finding of misconduct by Ms. G with respect to the most serious charges. The INT further found that the allegations of an intimate relationship between Ms. G and the Applicant could not be substantiated.

Meanwhile, on 3 May 2004, the Applicant had written to the President of the Bank raising concerns about the allegations regarding his relationship with Ms. G, which the Applicant considered defamatory and demanded their immediate retraction. The Applicant further requested that the Bank take remedial steps and conduct an inquiry into the process. On 29 June 2004, the Applicant's counsel wrote letters to the INT Director and the President of the Bank reiterating the Applicant's concerns and complaining about a Bank memorandum allegedly defaming the Applicant. This memorandum, of which the Applicant had been previously unaware, allegedly indicated that there was a ban on the Applicant being rehired. The Applicant's counsel requested an unredacted copy of the memorandum.

The Acting Director of the INT replied on 5 August 2004, reassuring the Applicant that the investigation had not impacted his ability to receive consulting contracts financed by the Bank but did not take any further remedial measures. The Applicant launched an action before the Appeals Committee challenging, *inter alia*, the Acting Director's refusal to retract the defamatory allegations; correct records of the Applicant's Bank employment which had been wrongly published in the INT report; and take appropriate actions to mitigate damage to his reputation. The Appeal was ultimately rejected for lack of subject-matter jurisdiction. The Appeals Committee concluded that the Appeal had not been directed against an administrative decision alleged to have altered or breached the Applicant's terms of appointment or conditions of employment, or any formal disciplinary action based on misconduct.

In considering its own jurisdiction over the case, the Tribunal rejected the Bank's reliance on *Walden*, Decision No. 167 [1997], in contending that an Ethics Officer's report does not constitute a "decision" that can be the subject of administrative review. The Bank further declared its statement in *Walden* to have been *obiter dictum*, as the application in

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<sup>33</sup> G, Decision No. 340 [2005]. For a summary of this case, see chapter V, section C.1, above.

that case had been rejected for untimeliness. The Tribunal concluded that the Applicant had convincingly rebutted the Bank's argument that there was no administrative decision for the Tribunal to review. The case was not a mere challenge to an INT report, but rather one involving an allegedly unfair and prejudicial investigation process.

The Tribunal found that the issues in the case clearly involved the Applicant's privacy and reputational rights as well as alleged violations of the terms and conditions of his employment. The Tribunal agreed with the Applicant that such rights survived his separation and retirement from the Bank, and that administrative decisions may be either affirmative or negative (i.e., a failure to exercise a power affecting a staff member's rights). The Tribunal further agreed that the Bank's argument that it had not directed any accusation against the Applicant was to be rejected, as the allegation of an intimate relationship and receipt of a consultancy on that basis had been made as much against the Applicant as against Ms. G. The Tribunal agreed that the Bank's argument would, if accepted, deprive the Applicant of the only forum in which he could vindicate his rights.

The Tribunal rejected a narrow conception of its jurisdiction which would leave a former staff member incapable of bringing a case based on an alleged violation of his rights. The Tribunal identified in this respect a parity of reasoning between it and the International Court of Justice (ICJ) in its Advisory Opinion of 1956 relating to the Judgments of the Administrative Tribunal of the International Labour Organization.<sup>34</sup> The ICJ in that case counselled that a contract of employment should not be interpreted literally so as to disentitle an employee from relying upon it when challenging its non-renewal. The Tribunal stated that the issue of whether relevant rules extend to the benefit of retired staff members in the circumstances of the Applicant's case was a matter of substance, not jurisdiction.

The Tribunal praised the presentation of the Applicant's arguments and stated that the Bank's jurisdictional objection should not have been made. For such reasons, the Tribunal denied the Bank's request that the Application be declared inadmissible, and awarded the Applicant costs in connection with the jurisdictional phase of the proceedings.

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<sup>34</sup> *Judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational, Scientific and Cultural Organization, Advisory Opinion of October 23rd, 1956, I.C.J. Reports 1956, p. 77.*

## D. DECISIONS OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND<sup>35</sup>

*Judgment No. 2005-1 (18 March 2005): F., Applicant v. International Monetary Fund, Respondent*

REVIEW OF DECISION TO ABOLISH A POST—ABOLITION OF POST FALLS UNDER MANAGERIAL DISCRETION TO BE REVIEWED ON GROUND OF ABUSE OF DISCRETION—PROPER MOTIVATIONS TO ABOLISH A POST—EVALUATION OF QUALIFICATIONS OF AN APPLICANT FOR A POST IS A MANAGERIAL AND NOT A JUDICIAL RESPONSIBILITY—REQUIREMENT OF FAIR AND REASONABLE PROCEDURES FOR THE ABOLITION OF A POST—INADEQUATE NOTICE OF THE ABOLITION OF A POST—ALLEGATIONS OF DISCRIMINATION ON RELIGIOUS BASIS—FAILURE TO TAKE EFFECTIVE MEASURES IN RESPONSE TO RELIGIOUS INTOLERANCE AND WORKPLACE HARASSMENT—SERIOUS EFFORTS TO BE UNDERTAKEN BY INTERNATIONAL ORGANIZATIONS TO REASSIGN THEIR EMPLOYEES WHOSE POSITIONS HAVE BEEN ABOLISHED—GRANTING OF LEGAL COSTS DERIVING FROM REPRESENTATION IN PROCEEDINGS ANTECEDENT TO THE TRIBUNAL'S REVIEW PROCESS

The Applicant joined the International Monetary Fund (the Fund) on 4 February 1980 as a Transcriber. In 1990, he was appointed to the post of Translation Preparation Assistant at Grade A-6, and in October 1998, he was promoted to Grade A-7, holding the post of Translation Coordination Assistant. It was in this position that the Applicant was serving when it was abolished, effective 1 November 2001.

The Language Section where the Applicant had been working for more than 20 years underwent structural changes within the organization of the Fund, resulting in the abolition of the Applicant's position. It was not contested that for years his Language Section was plagued with problems of interpersonal conflicts, not exempt of certain religious issues. The restructuring of the Language Section was aimed to enhance the efficiency of the newly created Department of Technology and General Services as a whole and, at the same time, resolve the problems mentioned above.

On 21 February 2002, the Applicant sought administrative review of the decision to abolish his post and of several surrounding issues of discrimination, retaliation and harassment. The administrative review was transferred to the Director of Human Resources (HR), who, on 8 August 2002, found that the decision to abolish the post and the Applicant's separation from service had been made in compliance with the rules of the Fund. She further refuted the discrimination and harassment allegations. On 3 October 2002, the Applicant filed a Grievance with the Grievance Committee, which issued its Recommendation and Report on 31 July 2003, recommending denial of the Grievance. On 20 November 2003, the Applicant filed his Application with the Tribunal.

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<sup>35</sup> 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>.

The Applicant raised various claims, including that the decision to abolish his post and terminate his employment was motivated by discrimination on religious grounds and, thus, was improperly motivated. He further argued that the abolition of post in reality constituted a redistribution of functions with the view to resolve personal problems grounded in religious intolerance that had never been investigated by the Fund despite his repeated claims. The Applicant also alleged that the procedure of separation had not followed the rules relating to advance notice and that the efforts provided by the Fund to find him an alternative position had been insufficient. The Respondent strictly denied each of the Applicant's contentions and argued that the Applicant himself contributed to the irrefutable interpersonal problems within the Section and its failure to find an alternative post.

In considering the case, the Tribunal noted that it was the first case brought to it in which an Applicant directly contested the lawfulness of an abolition of post, and also the first case where it had to address allegations that a staff member's career had been adversely affected by religious prejudice.

The Tribunal observed that the abolition decision had been taken in the exercise of managerial discretion and was thus subject to limited review for abuse of discretion, that could not "be overturned unless [it was] shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedure". Accordingly, the Tribunal decided to consider whether: (i) the decision was based on an error of law or fact; (ii) it was improperly motivated so as to vitiate an otherwise lawful decision; (iii) it was discriminatory because of the Applicant's religion; (iv) the Applicant was subjected to a hostile work environment; and (v) the abolition decision was carried out in violation of fair and reasonable procedures.

Regarding the question whether the abolition decision involved abuse of discretion, the Tribunal considered whether the position had been abolished or redesigned to meet institutional needs and whether the incumbent was no longer qualified to meet its requirement. The Tribunal concluded that the reasons advanced by the Fund in justification for the structural changes in the Section were credible and sufficient, and that the new positions involved responsibilities materially different from those performed by the Applicant.

The Tribunal also concluded that the finding by the Fund that the Applicant was not qualified for the redesigned position was persuasive and that "the determination of the adequacy of professional qualification [was] a managerial, and not a judicial, responsibility". Therefore, in the view of the Tribunal, the decision to abolish the post was not motivated by religious discrimination. Nevertheless, the Tribunal recalled the close relationship between discrimination and harassment and that in this regard, there was evidence that conduct in the Applicant's Section had not met the standards set forth in the Code of Conduct of the Fund, and that the Fund's supervisors had not taken effective measures to correct that problem. Accordingly, it found that there was ground to conclude that the Applicant had suffered from harassment in the workplace because of his religion.

Turning to the question of procedures applied for the abolition of the post, the Tribunal held that an official notice of eight days of the abolition decision was not reasonable and that it should be distinguished from the subsequent notice of separation of service. Indeed, the staff member should be in a position when such a decision of abolition is con-

veyed to him or her, to set out any reasons that he or she may have to contest the propriety or equity of this decision.

Finally, the Tribunal referred to a general principle of law requiring that international organizations make genuine, serious and pro-active efforts to find alternate employment for staff declared redundant. However, in the view of the weak initiative shown by the Applicant in finding another position in the Fund, the Tribunal concluded that the fault should be borne by both parties.

Regarding costs, the Tribunal held that a request for costs deriving from representation in proceedings antecedent to the Tribunal's review had been found to be within the scope of the Tribunal's remedial authority:

"The phrase 'legal representation' . . . embraces Applicant's representation in the administrative review that she had to exhaust . . . prior to the filing of an Application with the Tribunal, as well as the proceedings before the Tribunal."<sup>36</sup>

Based on the above, the Tribunal unanimously decided that the abolition of the Applicant's post in the context of the reorganization of the Department was an act of managerial discretion, whose conception and implementation did not provide cause for reconsideration by the Tribunal on grounds of abuse of right or otherwise. However, the Tribunal awarded financial compensation of US\$ 100,000 to the Applicant for the Fund's failures to take effective measures in response to religious intolerance and workplace harassment of which he had been an object, and for failure to give him reasonable notice of the abolition of his post. Further, it was decided that the Fund should pay the Applicant the reasonable costs of his legal representation.

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<sup>36</sup> *IMFAT Order No. 1 -1997-1, Interpretation of Judgment No. 1997-1 (22 December 1997).*