

Samar SEN  
Vice-President

New York, 1 October 1982

Nicolas TESLENKO  
Acting Executive Secretary

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## Judgement No. 295

(Original: French)

Case No. 286:  
Sue-Ting-Len

Against: The Secretary-General  
of the United Nations

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*Application seeking recognition of the Applicant's right to be considered for promotion in accordance with the rules in force prior to the adoption of General Assembly resolution 33/143.*

*Request that information circular ST/IC/81/19, issued subsequent to Judgement No. 266, should be applied to the Applicant.—Scope of the information circular.—The Secretary-General's concern to provide for a transition between two systems of promotion and to ensure respect for acquired rights.—The first requirement specified in the information circular: assignment to a post corresponding to a Professional post.—That requirement is not met in the case of the Applicant.—The second requirement specified in the information circular: the department concerned must have prepared recommendations prior to 29 August 1979.—That requirement is not met in the case of the Applicant.—The applicant cannot validly claim enjoyment of the benefit of the information circular—Applicant's contention that, regardless of the language of the information circular, she is entitled to enjoyment of acquired rights under the previous system.—Scope of Judgement No. 266.—Staff Regulation 12.1.—Consideration of the Applicant's case in the light of the acquired rights concept.—Critique of the position taken by the Joint Appeals Board.—Crucial importance of the fact that, prior to the entry into force of the new system, action in direct preparation for the evaluation of suitability was taken.—The Tribunal concludes that the Applicant is not entitled to claim the benefit of acquired rights.—Application rejected.*

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THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Endre Ustor, President; Mrs. Paul Bastid, Vice-President; Mr. Herbert Reis; Mr. Arnold Kean, alternate member;

Whereas, on 15 July 1982, the Applicant filed an application requesting the Tribunal

“(a) to accept the dissenting opinion of the staff-elected member of the Joint Appeals Board that, on the basis of work actually performed, the Applicant had been assigned the functions of a Professional post and that the Applicant's Department had, in effect, recommended her for promotion to P-2 (or prepared her promotion recommendation) prior to 29 August 1979, and that therefore the Applicant is entitled to have her case transmitted to the appropriate appointment and promotion body for consideration under information circular ST/IC/81/19,

“or, alternatively,

“(b) to endorse the recommendation of the Joint Appeals Board that a way should be found to ensure that the Applicant enjoys the benefit of her acquired rights

“... .

“and to award her compensation for the injury sustained by her.”

Whereas the Respondent filed his answer on 13 August 1982:

Whereas the Applicant filed written observations on 7 September 1982:

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 October 1968 as a clerk-typist at the G-2 level for the duration of the twenty-third session of the General Assembly and was assigned to the Press Pool, Press and Publications Division, Department of Public Information. On the expiration of her appointment, she was offered another three-month fixed-term appointment due to expire on 23 March 1969. On 24 March 1969, she was offered a probationary appointment and was assigned to the Radio and Visual Services Division. On 1 April 1969 she was automatically promoted to the G-3 level. On 1 October 1970, her appointment was converted to a permanent appointment. On 20 August 1972, the Applicant was reassigned from the Radio and Visual Services Division to the Office of the Assistant Secretary-General. On 18 July 1973, she was informed that the Secretary-General had approved the inclusion of her name in the register of staff members eligible for promotion to the senior G-4 level of the General Services category and her promotion was authorized as of 1 April 1973. The periodic report concerning her professional duties and assignments for the period 1 April 1972 to 31 March 1974 states that:

“Miss Sue-Ting-Len is secretary to the Assistant Secretary-General and as such carries the major part of the secretarial and related work-load of the Office of the Assistant Secretary-General. She also has on several occasions replaced the Personal Assistant to the Assistant Secretary-General.”

Her next periodic report, covering the period 1 April 1974 to 30 September 1975, contains a similar comment and states, *inter alia*, that:

“During the period covered, Miss Sue-Ting-Len was secretary to the Special Assistant to the Assistant Secretary-General, Office of Public Information, and as such carried the major part of the secretarial and related work-load of the Office of the Assistant Secretary-General. Miss Sue-Ting-Len’s work continued to be of very high quality and was performed with initiative, diligence and intelligence. This was particularly important during the period when the post of Personal Assistant to the Assistant Secretary-General remained vacant. As of 1 October 1975, [she] was assigned to that post.”

On 10 September 1976, the Applicant initiated without success a recourse procedure against a decision not to include her name in the G-5 promotion register.

On 13 June 1977, the Applicant’s functional title was changed to Research Assistant. On 13 July 1977, she addressed to Mr. Genichi Akatani, then Assistant Secretary-General for Public Information, a memorandum concerning her “special post allowance and promotion”, in which she stated *inter alia*:

“In April 1977, three years after you first promised me a promotion to the G-5 level, you repeated that promise and added that you had instructed the OPI

Executive Officer to secure for me, retroactively to 1 October 1975, a special post allowance to the G-5 level.

“On 21 April 1977, I received from you a performance evaluation report which described me as having given ‘an outstanding performance’ as your Personal Assistant since 1 October 1975.

“On 13 June 1977, I was reassigned by you to the OPI Office of the Thematic Task Force Co-ordinator as Research and Liaison Assistant. You assured me that this assignment was again at the G-5 level. However, I have not yet received a job description.

“In the meantime, you have been reliably quoted to me as saying that you do not feel bound by promises which you have given to a mere woman.

“In view of the above, I am constrained to request you to confirm to me that you have recommended me for promotion to the G-5 level, as you have repeatedly promised over a period of more than three years. I also request you to advise me of the date on which I shall receive my special post allowance (retroactive to 1 October 1975) which you instructed the OPI Executive Officer to secure for me several months ago. Finally, I wish to request that I be provided forthwith with a job description pertaining to my current functions at the G-5 level.

“If you feel unable to comply with this request within 30 days, or if you choose not to reply, I will regard your action as an administrative decision within the terms of Staff Rule 111.3 (a) and request the Secretary-General to reverse it.”

On 25 July 1977, the Acting Executive Officer of the Office of Public Information replied to the Applicant as follows:

“Further to our two conversations on the above subject and in answer to your specific questions please take note of the following:

“(a) you were not recommended for promotion during the current review.

“(b) the question of a special post allowance for you is under review by the Office of Personnel Services.

“(c) a job description for your current assignment will be prepared in the very near future; in this connexion please furnish me in writing with a summary of the verbal instructions you have received in this respect.”

On 16 August 1977, the Administrative Officer of the Office of Public Information sent the Applicant her job description as Research Assistant in the Office of the Thematic Task Force Co-ordinator, to which she had been assigned on 13 June 1977. The job description provides that the duties and responsibilities are as follows:

“DUTIES:

“As directed and assigned by the Thematic Task Force Co-ordinator:

“—Undertakes research into the documentation relating to subjects in the fields of maintenance of peace, decolonization, racial discrimination and any other theme for which the Co-ordinator has responsibility; from this research should emerge the background against which specific information activities can be proposed.

“—Maintains files on action taken and correspondence exchanged relating to

approved information activities in these same fields so that basic material is available for the preparation of relevant reports.

“—Prepares brief summaries of Task Force meetings.

“—Performs any other research or other task as assigned.”

On 26 October 1977, the Applicant was granted a G-5, step 1, special post allowance with retroactive effect from 1 April 1976 through 5 September 1976, but not beyond that date. Following a recommendation by the Joint Appeals Board, dated 3 June 1980, this special post allowance was to be extended through 12 June 1977.

On 11 November 1977, the Applicant initiated, without success, a further recourse procedure against a further decision not to include her name in the G-5 promotion register.

On 9 May 1978, the Executive Officer of the Department amended personnel action form No. 070-346 to reflect the change in the functional title of the Applicant who had, from 1 October 1975 to 5 September 1976, held the post of Personal Assistant to the Assistant Secretary-General.

On 6 October 1978, the Applicant was informed that the Secretary-General had approved the inclusion of her name in the register of staff members eligible for promotion to the Principal (G-5) level of the General Services category. The promotion became effective on 1 February 1979. On 20 October 1978, the Applicant initiated a third recourse procedure, this time against the decision not to include her name in the 1978 P-1 promotion register, published in circular ST/IC/78/46 of 20 October 1978. In her memorandum addressed to the Chairman of the Working Group of the Appointment and Promotion Committee, she stated *inter alia*:

“2. Specifically, I wish to draw the attention of the Committee to the fact that my actual functions significantly exceed those listed in my job description (at the G-5 level), a copy of which is enclosed . . .

“3. The Under-Secretary-General for Public Information has repeatedly stated to me that he regards my functions as being at the professional level and that he fully supports my promotion to the professional category. I respectfully invite the Committee to verify this point with the Under-Secretary-General personally with whom I have cleared this recourse letter.

“4. I have obtained my B.A. degree in Political Science (major in international politics) and I am presently doing graduate work for my Masters degree in the same field.

“ . . . ”

On 5 March 1979 the Chairman of Working Group I of the Appointment and Promotion Panel informed the Applicant that there did “not appear to have been any omission of data which would have warranted a reversal of [the Working Group’s] previous decision to include [her] name in the G-5 register and not in the P-1 register. Therefore the Working Group reiterate(d) its decision that [her] name be maintained in the 1977 G-5 register.”

On 1 November 1978, the then Assistant Secretary-General for Personnel Services sent a memorandum to all heads of departments and offices concerning the 1979 promotion registers, with instructions on how to proceed with recommendations for promotions in 1979. The memorandum read in part as follows:

"3. I wish to call attention to staff rule 104.14 (f) (iii) (A) which provides *inter alia* that 'These registers shall be established in relation to an estimate of the total number of known and foreseeable vacancies to be filled by promotion at each grade level in the period until the next general review of staff.' Recommendations for promotion should be limited to the estimated number of vacancies available during the forthcoming register year.

"..."

"5. It is a departmental responsibility to refrain from recommendations based only on a creditable performance in the present level. In view of the relatively limited opportunities for promotion to each successively higher level, a staff member must have demonstrated a performance record sufficiently superior to that of his colleagues as to merit selection from among them for promotion to a higher level.

"6. Departments and Offices are again asked to exercise care in recommending staff members for promotion from the General Service to the Professional category. Staff members should not be recommended for promotion to the Professional level unless it is clearly demonstrated that they are carrying out Professional functions or are capable of doing so, and that they have the potential to advance to at least the P-3 level.

"..."

On 14 December 1978, the Thematic Task Force Co-ordinator in the Office of Public Information, who was also the Applicant's supervisor, wrote a memorandum to the Under-Secretary-General for Public Information concerning the 1979 promotion registers in which he stated:

"With reference to the memorandum of 1 November 1978 from Mr. Gherab to all heads of departments and offices concerning the above subject, I should like to submit a recommendation for the promotion of Ms. Barbara Sue-Ting-Len to the professional category.

"Ms. Sue-Ting-Len has provided an expert support to my office over the past 18 months, since her assignment to the Office of the Thematic Task Force Co-ordinator. Her duties are clearly at the professional level; in this context, I refer particularly to her liaison with the various units of OPI and with substantive departments as well as to her drafting of thematic activity reports, correspondence and statements.

"With reference to Mr. Gherab's memorandum, I also have no hesitation in stating that Ms. Sue-Ting-Len fully possesses the potential to advance to at least the P-3 level.

"I am aware that you yourself are acquainted with the professional nature of Ms. Sue-Ting-Len's work and that you are supporting her recourse against having been omitted from the 1978 P-1 register. For that reason, I do not doubt that you will wish to accept my proposal that she be formally recommended for promotion in 1979."

The Co-ordinator stated, in the Applicant's periodic report for the period 1 May 1977 to 18 December 1978 that:

"Staff member's work is of a professional nature and she has performed her duties with professional quality and ability. During the absence of the Thematic Task

Force Co-ordinator on vacation, staff member effectively handled inquiries and the routine work of the section.”

On 20 December 1978, the General Assembly adopted resolution 33/143, in which it requested the Secretary-General, in section I, paragraph 1 (g), to adopt the following measure in respect of the recruitment of Professional staff:

“(g) Movement of staff from the General Service to the Professional category should be limited to the P-1 and P-2 levels and be permitted up to 30 per cent of the total posts available for appointment at those levels and such recruitment should be conducted exclusively through competitive methods of selection from General Service staff with at least five years experience and post-secondary educational qualifications.”

On 24 February 1979, the Department of Public Information, in a request for additional posts in the 1980-1981 budget, proposed the provision of a junior professional post in the Office of the Thematic Task Force Co-ordinator. Accordingly, on 28 April 1979, the Director of the Budget in the Office of Financial Services addressed a memorandum to Mr. Akatani, then Under-Secretary-General for Public Information, section I of which read in part as follows:

“(a) *Office of the Under-Secretary-General*

“4. A new P-2 post was requested to strengthen the Office of the Thematic Task Force Co-ordinator. It was determined that the duties and responsibilities relating to the new post are now being performed in the main by a staff member at the G-5 level. *I have therefore agreed to the inclusion of a reclassification of that post to the P-2 level instead of the new post requested.*”

On 2 July 1979, the Executive Officer of the Department of Public Information sent a memorandum to all the divisional directors of the Department which read in part as follows:

“1. It will be recalled that an announcement had previously been made that the Office of Personnel Services was making arrangements to set up a new procedure for the promotion to the Professional category of staff members in other categories as requested by the General Assembly in its resolution 33/143 of 20 December 1978.

“... ”

“3. An essential step in the preparations is the identification of posts to be reserved for promotion of staff as outlined in the attached draft SGB and AI. Accordingly, we have been requested to earmark those posts at the P-1/P-2 level which are to be filled through promotion of non-Professional staff.

“4. As will be noted in paragraph 4 of the draft administrative instruction attached, a list of all posts that were available to be filled by promotion on 1 April 1979 and that are expected to become available before 1 April 1980 is to be made by the Department. The total number of posts to be selected for the competitive examination will be approximately 30 per cent of the number of posts to be filled at the P-1 and P-2 levels during that year. The remaining P-1/P-2 posts will normally be filled through the recruitment of external candidates.

“5. The following posts at the P-1/P-2 levels are currently vacant or encumbered at a lower level in the Department:

<i>"Division</i>	<i>Post</i>	<i>Current Incumbent</i>
<i>" . . .</i>	<i>. . .</i>	<i>. . .</i>
"OUSG	Assistant Information Officer Thematic Task Force	Reclassification 1980 budget Sue-Ting-Len"

Notwithstanding the above information, on 17 August 1979, the Executive Officer addressed a memorandum to the Director of the Division of Personnel Administration in the Office of Personnel Services concerning the "competitive examination for promotion of staff members to the Professional category, 1979" which read in part as follows:

"1. In Mr. Jonah's memorandum of 19 June 1979, this Department was requested to identify those posts at the P-1/P-2 level which will be reserved for promotion of staff under the competitive examination procedure.

"2. In accordance with the draft administrative instruction attached to your memorandum, a list will have to be established for all P-1/P-2 posts subject to geographical distribution that were available to be filled by promotion on 1 April 1979 and that are expected to become available before 1 April 1980.

"3. A response to the request was delayed until the results of the hearings before the ACABQ on the Department's budget estimates for 1980-1981 were available. In our estimates, we had requested a new P-1/P-2 post but we have now been informed that this post has been denied. It had been our intention to list this post as one of those for the competitive examination.

" . . . "

The post of Assistant Information Officer, held by the Applicant, was left out because the Advisory Committee on Administrative and Budgetary Questions (ACABQ) had refused to reclassify it. In fact, the first report on the Proposed Programme Budget for the Biennium 1980-1981 of ACABQ (A/34/7) states as follows in section A, paragraph 27.4:

"27.4. In paragraph 27.8 of the proposed programme budget, the Secretary-General requests the reclassification of an existing General Service post in executive direction and management to the P-1 level in order to strengthen the Thematic Task Force. He states that the responsibilities of the existing General Service post are to be redistributed among the other General Service staff. In the opinion of the Committee, the fact that such a redistribution is considered possible demonstrates that the General Service post in question was not essential. Since the existing post is, in effect, to be abolished, the General Assembly is left with a proposal for the creation of a new P-1 post, rather than with a request for reclassification. The Committee does not believe that adequate justification has been given for the creation of a new P-1 post to strengthen the Thematic Task Force. Accordingly, the Advisory Committee recommends against the request in paragraph 27.8, with a consequent reduction in the estimates by \$24,300."

In the mean time, on 8 May 1979 the Applicant had addressed a memorandum to the Under-Secretary-General for Public Information in which she requested a special post allowance corresponding to the P-2 level on the grounds that following the departure of her supervisor Mr. Gribkov she had assumed considerably more responsibilities. On 10 July 1979, in the absence of an answer, the Applicant reiterated her request to the new

Under-Secretary-General for Public Information, Mr. Yasushi Askashi, who replied to the Applicant on 17 July 1979 as follows:

“In connexion with your memorandum dated 10 July 1979 addressed to me, I have now had an opportunity to look into the matter and regret to inform you that a special post allowance is not possible at this time. As you may be aware, the post which you currently encumber is proposed for reclassification in 1980.

“I wish to assure you that it is my intention to review your request when the result of the reclassification proposal is known.”

On 29 August 1979, pursuant to General Assembly resolution 33/143, section I, paragraph (g), the Secretary-General issued bulletin ST/SGB/173 establishing annual competitive examinations, starting with the 1979 promotion year (1 April 1979-31 March 1980), for promotion to the Professional category of staff members from other categories. On the same date the Assistant Secretary-General for Personnel Services issued administrative instruction ST/AI/268, establishing the detailed procedures of the new system governing “the review at each duty station of staff members in the General Service or related category who qualify for promotion to the Professional category”. On 6 December 1979, the Assistant Secretary-General for Personnel Services issued administrative instruction ST/AI/260/Add.1, in which he exempted from the first competitive examination General Service staff members who, prior to 20 December 1978, had been assigned to and were continuing to fulfil the duties of any of the Professional posts reserved for that first competitive examination. On 20 November 1980, the Administrative Tribunal rendered Judgement No. 266 in favour of Mrs. Capio. Subsequent to that judgement, on 10 March 1981, the Administration issued information circular ST/IC/81/19 to exempt from the 1979 competitive examination a further group of General Service staff in situations similar to that of Mrs. Capio. Paragraph 3 of the information circular provides that “Although the Judgement is directed specifically to the Applicant, it has been decided to apply it equally to other staff members in the General Service category who had been assigned functions of a Professional post and for whom the department or office concerned had prepared recommendations prior to the issuance of the Secretary-General’s bulletin ST/SGB/173 and administrative instruction ST/AI/268 of 29 August 1979”. On 17 December 1980, the General Assembly had adopted resolution 35/210, annex III, paragraph 10 (a), of which reaffirms the principle of competitive examination and provides that “No exceptions shall be authorized”.

On 17 February 1981, the Applicant told the Assistant Secretary-General for Personnel Services that she should be considered for promotion to the Professional category “under the system that prevailed prior to 21 August 1979 on the basis of Administrative Tribunal Judgement No. 266 (Capio)”. In support of her request she stated *inter alia*:

“(i) ever since assuming duties as Research Assistant in June 1977—these duties outlined in my job description had been at the Professional level. This is evidenced by my performance evaluation report dated 11 December 1978, in which it states that my work is ‘of a professional nature’, and that I performed my duties with professional quality and ability . . .

“(ii) On 14 December 1978, I was officially recommended for promotion to the Professional category;

“. . .”



On 11 May 1981, in response to the Applicant's recourse action of 17 February 1981, the Director of Personnel Administration informed the Applicant that a careful review of her case had led to the conclusion that it did not meet the criteria specified in paragraph 3 of circular SC/IC/81/19 of 10 March 1981.

On 21 May 1981, the Applicant wrote to the Secretary-General under staff rule 111.3 requesting a review of the decision of 11 May 1981. She stated that, should the reply be negative, she would request direct submission of her case to the Administrative Tribunal. On 16 June 1981, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to maintain the contested administrative decision on the following grounds:

"A further review of your case has confirmed that you do not meet one of the two criteria set out in the above-mentioned circular. You were not recommended for promotion by your Department, nor included in a memorandum sent by your Department when the Office of Personnel Services requested a list of the posts set aside for those staff members whom it would have recommended for promotion had there been a promotion review, so that these posts could be used for the competitive examination."

The Secretary-General also stated that her appeal was not suitable for direct submission to the Administrative Tribunal because he believed that prior examination of the appeal by the Joint Appeals Board would serve a useful purpose in the clarification of the factual issues involved.

On 8 July 1981, the Applicant filed an appeal before the Joint Appeals Board.

On 26 January 1982, the Board concluded and recommended as follows:

"31. The Board finds that Information Circular ST/IC/81/19 was by its terms not applicable to the appellant.

"32. As that Information Circular does not take account of the acquired rights of the appellant, the Board must now define the full scope of those rights.

"33. From 1 November 1978, the date of the circular memorandum of the Assistant Secretary-General for Personnel Services relating to the 1979 Promotion Registers, the appellant, having more than the minimum seniority in grade required by that memorandum, was entitled to consideration in 1979 for promotion to the Professional category, in the light of the criteria used in the promotion system which existed prior to 29 August 1979, account being taken of the evidence relevant to those criteria which dated from before the time when the 1979 review under the old system would normally have begun. These rights, not having been given effect in 1979, became acquired rights upon the introduction of the new system of promotion to the Professional category by competitive examination. The appellant had no acquired right to the retention for her benefit of the competence of the Appointment and Promotion Board and its subsidiary bodies, but a way should nevertheless be found to ensure that she enjoys the benefit of her acquired rights.

"34. The appellant's promotion to G-5, for which the operative document was signed on 9 July 1979 (though with an effective date of 1 February 1979), did not involve any waiver by her of her rights as they had existed before 1 February 1979, nor could the promotion retroactively annul those rights, which should have been given effect before 9 July 1979."

However, the alternate staff-elected member of the Joint Appeals Board expressed a dissenting opinion on the following grounds:

“ . . .

“[Having regard to circular ST/IC/81/19] . . .

“The questions for determination thus are in the first place

“(1) whether the appellant had been assigned the functions of a Professional post and

“(2) whether the Department or Office concerned had prepared recommendations for her promotion prior to the issuance of the Secretary-General's bulletin ST/SGB/173 and Administrative Instruction ST/AI/268, both dated 29 August 1979.

“The fact that the appellant's assignments were of a professional nature was attested by her supervisor in her periodic report covering the period 1 May 1977 to 18 December 1978, a report countersigned by the Under-Secretary-General of her Department. (A similar statement was included in her periodic report for the period 19 December 1978 to 31 August 1980.) Thus, on the basis of work actually performed, it cannot be said that she had not been assigned the functions of a Professional post.

“As to recommendation for promotion, her supervisor—in connexion with the memorandum dated 1 November 1978 from the Office of Personnel Services concerning suggestions for the 1979 Promotion Registers—recommended to his Under-Secretary-General that the appellant be promoted to the Professional category (memorandum dated 14 December 1978). While she was not included in the list of persons recommended for promotion by her Department, it has been made clear that the reason her supervisor's recommendation was not sustained was ‘lack of post’. . . .

“On the other hand, action was taken by the appellant's Department, prior to 29 August 1979, to recommend that a junior professional post be established in her unit, with the clear implication that this was intended for the appellant. This intent is reflected in a reply from the Director of the Budget to the Under-Secretary-General, DPI, dated 28 April 1979, stating that while the Department had requested a new P-2 post, it had been determined that the duties and responsibilities relating to the new post were being performed in the main by a staff member at the G-5 level; and that he therefore agreed to the inclusion of a reclassification of that post to the P-2 level, instead of the new post requested. A memorandum dated 2 July 1979, addressed by the Executive Officer, DPI, to Directors, DPI, confirms that the post in question was the one occupied by the appellant.

“The Advisory Committee on Administrative and Budgetary Questions subsequently did not recommend conversion of the G-5 post to a P-2 post and the General Assembly followed the Committee's recommendation. Thus the P-2 post was not established. Nevertheless, it cannot be said that the Department had not, in effect, recommended the appellant for promotion to P-2 prior to 29 August 1979.

“In view of the above, I submit that the appellant is entitled to have her case transmitted to the appropriate appointment and promotion body for consideration under Information Circular ST/IC/81/19.”

On 7 June 1982, the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General, having re-examined her case in the light of the Board's report, had decided:

“(a) to accept the conclusion of the majority of the Board that information circular ST/IC/81/19 was not applicable to you, and

“(b) to take no further action on your case.”

On 15 July 1982, the Applicant filed an application before the Administrative Tribunal. Whereas the Applicant's principal contentions are:

1. The Applicant had, prior to the establishment of the competitive examination system for promotion from the General Service to the Professional category on 29 August 1979, acquired through her services the right to be considered for promotion under the system which existed up to that date.

2. The Applicant had, on the basis of work actually performed, been assigned the functions of a Professional post, and the Applicant's Department had, in effect, but not officially, recommended her for promotion to the P-1 category (or prepared her promotion recommendation) prior to 29 August 1979, and therefore the Applicant is entitled to have her case transmitted to the appropriate appointment and promotion body for consideration under information circular ST/IC/81/19.

Whereas the Respondent's principal contentions are:

1. The Applicant did not qualify for the special promotion procedure created by information circular ST/IC/81/19 of 10 March 1981 because the Applicant neither performed the functions of a Professional post nor received a departmental recommendation for promotion to the Professional category prior to 29 August 1979.

2. General Service staff seeking promotion to the Professional category are entitled to be exempted from the 1979 competitive examination only if their departments or offices had recommended them for promotion under the prior promotion procedure before the introduction of the competitive examination procedure on 29 August 1979.

3. Even if the Tribunal finds in favour of the Applicant, no delays have occurred in handling this appeal which would warrant the award of damages for delay by the Tribunal.

The Tribunal, having deliberated from 20 September to 6 October 1982, now pronounces the following judgement:

I. The Applicant's principal contention is that the Tribunal should adjudge that, in implementation of circular ST/IC/81/19 of 10 March 1981, her case should be transmitted to the appropriate appointment and promotion body with a view to considering her for promotion to the P-2 level.

Should the Tribunal rule that circular ST/IC/81/19 is not applicable to the Applicant, she requests the Tribunal to adjudge, in accordance with the recommendation of the Joint Appeals Board, that a way should be found to ensure that she enjoys the benefit of her acquired rights.

II. Circular ST/IC/81/19 concerns the “review of General Service staff members recommended for promotion to the Professional category for the 1979 register”. It was issued subsequent to Judgement No. 266 (Capió). In this case, the Tribunal had before it an application to the effect that the Applicant's promotion should be reviewed according to the method applicable prior to the implementation of General Assembly resolution 33/143 by administrative instruction ST/AI/268 of 29 August 1979. The Tribunal decided on the basis of a very particular *de facto* situation specific to the Applicant that the Respondent should take the necessary steps to admit the contention. The Respondent

complied with the judgement and decided, in addition, in circular ST/IC/81/19 to apply the solution equally to other staff members in the General Service category "who had been assigned the functions of a Professional post and for whom the department or office concerned had prepared recommendations prior to the issuance of the Secretary-General's bulletin ST/SGB/173 and administrative instruction ST/AI/268 of 29 August 1979".

III. The Tribunal notes that the effect of the implementation of the new circular has been to permit the promotion of staff members in the General Service category under the system established in 1957, thus making an exception to the competitive examination system instituted by resolution 33/143. It observes that resolution 35/210, annex III, paragraph 10 (a) of 17 December 1980 reaffirms the competitive examination principle and provides that "no exceptions shall be authorized".

The Tribunal notes that, at the time the competitive examination system for promotion entered into force, transitional measures were provided concerning either the organization of the competitive examination, or exemption from the examination, or the retention for the benefit of certain staff members, of the previous system for considering qualifications. Circular ST/IC/81/19 of 10 March 1981 provides for the retention of the previous procedure for the benefit of a further group of General Service staff members. The purpose of these various arrangements made by the Secretary-General is to enable a transition to be made between two systems of promotion. They are designed to prevent the new system from having retroactive effect when the chances of promotion of the staff member concerned under the previous system are already reasonably ensured at the time the competitive examination system enters into force. Hence it cannot be contested that the Secretary-General has sought to ensure respect for acquired rights, a principle laid down in regulation 12.1 of the Staff Regulations.

IV. The Tribunal must first consider whether, in order to benefit from circular ST/IC/81/19, the Applicant meets the first requirement specified in that text and "had been assigned the functions of a Professional post".

The file shows that the Applicant was promoted to the G-4 level as of 1 April 1973 and to the G-5 level as of 1 February 1979. Having appealed against the fact that her name had been omitted from the 1978 P-1 promotion register, she stated in her memorandum of 20 October 1978, addressed to the Chairman of the Working Group of the Appointment and Promotion Committee, that the Under-Secretary-General for Public Information had told her repeatedly that he regarded her functions as being performed at the Professional level and that he fully supported her promotion to the Professional category.

On 14 December 1978, subsequent to the memorandum concerning the 1979 promotion registers, the Applicant's supervisor wrote to the Under-Secretary-General for Public Information that he wished to submit a recommendation for the Applicant's promotion to the Professional category. In particular he referred to her functions as Professional functions. The same formula appears in the periodic report of 11 December 1978 which adds that the Applicant is performing her duties "with professional quality and ability".

However, the reclassification to P-1/2 level of the post held by the Applicant requested in the Proposed Programme Budget for the Biennium 1980/1981 by the Secretary-General was not accepted by the Advisory Committee for Administrative and Budgetary Questions. In these circumstances, the Tribunal holds that, whatever similarity may be acknowledged between the functions performed by the Applicant and Professional functions, the circular

requires assignment to a post corresponding to a Professional post. In the absence of a post established prior to the entry into force of the new promotion system, this requirement cannot be met. In this connection the Tribunal must note the difference in language as compared with the memorandum of 1 November 1978 which provides, with regard to the promotion of General Service staff to the Professional category, that it must be clearly established that staff members "are carrying out Professional functions or are capable of doing so".

V. Accordingly, and because she does not meet the first requirement specified in circular ST/IC/81/19 for enjoying the benefit of the transitional measures, the Applicant is not entitled to such benefit.

VI. According to this circular, there is a second requirement: the department or office concerned must have prepared recommendations prior to 29 August 1979.

Paragraph 5 explains the reason for the use of the term "prepared". Actually two cases are specified: first, that of recommendations made before it was known that a new procedure was to be introduced, and secondly, in other cases, that the names of the staff members had been given to the Office of Personnel when all departments and offices were asked for a list of the posts that they had set aside for those staff members whom they would have recommended for promotion under the old system, so that these posts could be used for the competitive examinations. The Office of Personnel Services was to send the list of those staff members to the department or office concerned, with a request that it confirm the accuracy or completeness of the list and provide a copy of the original recommendation if it had not already been transmitted.

The Applicant states that her supervisor submitted a recommendation for her promotion on 14 December 1978 to the Under-Secretary-General for Public Information, but the measures which she describes did not result in recommendations made before the new system was known. They are not applicable to the second case specified in the circular: there was, in fact, no existing Professional post.

Consequently, the Tribunal finds that, since the second requirement was not fulfilled, the Applicant cannot therefore validly claim enjoyment of the benefit of circular ST/IC/81/19.

VII. The Applicant, basing herself on the arguments presented by the Joint Appeals Board, contends that, regardless of the language of circular ST/IC/81/19, she is entitled to enjoyment of acquired rights under the previous promotion system. She bases her argument even on the affirmation of the Joint Appeals Board that the criteria specified in the circular are not in accord with the "law as set forth by the Tribunal".

The Tribunal notes that the decision taken in one case is binding only for that case. While the reasons cited in support of a judgement may be used as a basis for reasoning in respect of other cases, the circumstances of the case cannot be disregarded for the purpose of evaluating its scope, especially when the course of the proceedings has shown exceptional particularities which are apparent from a careful reading. In the present case it is irrelevant to examine the terms of the circular by reference to Judgement No. 266; on the other hand, the Tribunal must consider whether regulation 12.1 of the Staff Regulations entitled the Applicant, independently of the requirements set forth in the circular, to retention of the previous promotion system.

VIII. In the Applicant's case, an examination should be made to ascertain whether

in fact the situation could justify application of the promotion system established in 1957 on the basis of the acquired rights concept. To arrive at this conclusion, the Joint Appeals Board discussed and minimized the scope of the following affirmation appearing in Judgement No. 266:

“Since the necessary administrative measures relating to the Applicant’s suitability to be considered for promotion in 1979 had been taken prior to the adoption of resolution 33/143 and prior to the issue of administrative instruction ST/AI/268 of 29 August 1979, the Applicant had thereby acquired the right to have her suitability for a P-2 post evaluated according to the method established in 1957, and not by the competitive examination method.”

The Board also emphasized the avenues open to the Appointment and Promotion Committee independently of the action taken by the Applicant’s supervisor under the 1957 system. Thus, in the view of the Joint Appeals Board, the requirements established by circular ST/IC/81/19 are not in accord with the acquired rights under the 1957 system: the entitlement of a staff member with the requisite seniority in grade to be considered for promotion does not, in the Board’s opinion, depend in any way on a recommendation or the preparation of a recommendation by the staff member’s department nor on the staff member’s assignment to Professional functions, as the circular requires. Entitlement would derive from the fact of having served in the grade for the requisite minimum period. The Joint Appeals Board refers in this connection to the terms of the memorandum of 1 November 1978. The Tribunal notes that the document, issued by the Assistant Secretary-General for Personnel Services, concerns promotions as a whole. The Tribunal finds that, since it is addressed to all heads of departments and offices, their role and the importance given to their recommendation are made very clear.

The Board stressed the fact that the capability to perform Professional functions may be considered in the presentation for promotion and noted that, in the criteria laid down in 1959, the Director of Personnel formally took into account the case in which the functions performed would be below the Professional level but in which the person concerned would appear “capable” of assuming professional functions if assigned thereto.

IX. The Tribunal notes that the Joint Appeals Board acknowledges an acquired right to the retention of the 1957 procedure for all General Service staff with the required seniority for any promotion, the link between an activity at the Professional level being reducible to possible capability.

The Tribunal recognizes that the Applicant was concerned to show that on 14 December 1978 her supervisor considered her worthy of being proposed for promotion to the Professional level and requested the Under-Secretary-General for Public Information to accept the proposal for promotion in 1979. But this proposal was not accepted because no post was available.

The reclassification of the post held by the Applicant, which was requested by her department for the budget biennium 1980/1981, was turned down by the Advisory Committee on Administrative and Budgetary Questions. Thus, no proposal for promotion was made by the department and no Professional post was opened for her benefit.

Although the Applicant can invoke, as acquired rights to the retention in her favour of the previous promotion system, only the length of her services and the nature of her activities, the Joint Appeals Board nevertheless considers that the rights, which had not been implemented in 1979 became acquired rights at the time the new system of promotion to the Professional category by competitive examination was established.

X. The Tribunal observes that it is inadmissible in the context considered to allow that acquired rights refer to the length of services and to the nature of the functions of General Service staff.

The Tribunal notes that the transitory measures referred to in the foregoing paragraph II were determined within the well-defined above-mentioned limits.

Furthermore, the Tribunal recalls that in Judgement No. 266 it spoke of "prerogatives attached to services performed *at the time when the procedure is initiated*" and also stated that "Since the necessary *administrative measures* relating to the Applicant's suitability to be considered for promotion in 1979 had been taken prior to the adoption of resolution 33/143 and prior to the issue of administrative instruction ST/AI/268 of 29 August 1979, the Applicant had *thereby* acquired the right to have her suitability for a P-2 post evaluated according to the method established in 1957, and not by the competitive examination method." (Emphasis added.) Clearly what is important is the fact that, prior to the entry into force of the new system, action in direct preparation for the evaluation of suitability was taken. In other words, the acquired right to evaluation of suitability cannot impede the institution of the examination except where the requirements for the promotion operation are already met in such a way that the operation can probably be completed.

In conclusion, infringement of acquired rights can be cited only where the former procedure was in the process of being implemented in such a way that to preclude evaluation of suitability for promotion would, as a consequence, give retroactive effect, in respect of measures already adopted, to the administrative instruction of 29 August 1979.

The Tribunal is of opinion that circular ST/IC/81/19 adequately expresses and gives proper effect to these considerations.

Having regard to the Applicant's personal situation, the Tribunal decides that she is not entitled to claim the benefit of acquired rights.

XI. The application is therefore rejected.

(Signatures)

Endre USTOR  
(President)

Suzanne BASTID  
Vice-President

Herbert REIS  
Member

New York, 6 October 1982

Arnold KEAN  
Alternate member

Nicholas TESLENKO  
Acting Executive Secretary

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