

Judgement No. 296*(Original: French)***Case No. 278:
Sun****Against: The Secretary-General
of the United Nations**

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.

The two interventions are not receivable, since the judgement is not such as to affect a right peculiar to the interveners.

A document signed by the Applicant is not relevant in view of a general provision introduced subsequently.—Rights of the Applicant under information circular ST/IC/81/19.—Request sent to the Department by the Office of Personnel Services for a list of the posts set aside for those staff members whom it would have recommended for promotion under the previous system.—Question whether the post intended for the Applicant, and her name, should have been included in the list.—Had the Department complied with the request addressed to it, the Applicant could have benefited from the information circular.—Question whether the failure to include them was illegal or based on legally valid considerations.—Conduct of the Secretary of the Joint Staff Pension Board.—Special legal status of the Pension Fund.—Article 7 (b) of the Regulations of the Fund.—Absence of special provisions peculiar to the staff members referred to in that article.—Implications of the failure to include the Applicant's post and name as regards the validity of the denial of entitlement under the information circular.—System for identifying the beneficiaries of the information circular.—Conclusion of the Tribunal that the Applicant is entitled to rely on the information circular.—The other pleas are rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Madame Paul Bastid, Vice-President; Mr. Herbert Reis; Mr. Arnold Kean, alternate member;

Whereas on 24 March 1982 the Applicant submitted directly, without the agreement of the Respondent, an application requesting the Tribunal:

“A. With respect to Respondent's refusal to agree to waive proceedings before the Joint Appeals Board and to submit her Appeal directly to the Administrative Tribunal (Annex 24) and Respondent's failure to provide the Joint Appeals Board with a written answer to her Appeal filed 9 October 1981 (see Annex 26), to *adjudge and declare* that:

“(i) Respondent's refusal to agree to direct submission of Applicant's Appeal to the Administrative Tribunal was not undertaken in good faith, and together with Respondent's continuing failure to comply with the Joint Appeals Board's request for an answer to her Appeal constitutes an *abuse of process*; and

“(ii) Respondent's failure to comply with the Joint Appeals Board's request for an answer to her Appeal constitutes a failure to implement Staff Rule 111.3 (h), thereby denying Applicant her right to action by the Joint Appeals Board with the maximum of dispatch consistent with a fair review of her Appeal.

“B. With respect to administrative measures announced in Information Circular ST/IC/81/19 of 10 March 1981 (Annex 25) which was cited by the Respondent in denying Mrs. Sun consideration for promotion from the General Service to the Professional category on the basis of her long-term, full-time and satisfactory performance of professional duties in a professional-level post, to hold that:

- “(i) the administrative measures fail to uphold Applicant’s acquired right to be considered for promotion in accordance with the rules governing promotion when she accepted the assignment to a professional-level post; and
- “(ii) the administrative measures fail to implement the judgement of this Tribunal No. 266 (Capiro) with respect to Applicant although Applicant had acquired the same rights to be considered for promotion as had Mrs. Capiro prior to the inauguration of the new system of promotion on 29 August 1979 and Applicant should be treated to the same relief.

“C. To *order* the Respondent to convene an Appointment and Promotion Board to consider Applicant for promotion to the Professional level in accordance with the rules governing promotion from the General Service to the Professional category that were established in 1957 and prevailed from 1 January 1978 when Applicant assumed the duties of a Professional post until 29 August 1979, when the new system of promotions was inaugurated.”

Whereas on 12 August 1982 the Respondent agreed that the application should be submitted directly to the Administrative Tribunal and filed his answer;

Whereas, on 31 August and 2 September 1982, Roslyn Rossman and Rita Sabbarese, staff members of the United Nations Secretariat, filed applications for intervention;

Whereas on 3 September 1982 the Applicant submitted observations on the Respondent’s answer;

Whereas on 13 September 1982 the Respondent submitted written comments on the applications for intervention filed on 31 August and 2 September 1982;

Whereas on 17 September 1982 the parties filed additional documents;

Whereas on 22 September 1982 the Tribunal invited the interveners to attend a public session on 27 September 1982, without prejudging the receivability of their applications for intervention;

Whereas on 24 September 1982 the Applicant filed additional documents;

Whereas on 27 September 1982 the Respondent filed an additional document;

Whereas on the same date the Tribunal heard the parties and the interveners in public session;

Whereas on 28 September 1982 the Applicant filed additional documents;

Whereas on 29 September 1982 the Tribunal put a written question to the Respondent;

Whereas on 30 September 1982 the Respondent submitted written answers to questions which had been put to him by the Tribunal at the public session and on the same date the Applicant submitted written comments on the Respondent’s answers;

Whereas on the same date—30 September 1982—the Respondent also submitted a written answer to the question put by the Tribunal on 29 September 1982;

Whereas on 1 October 1982 the Secretary of the United Nations Joint Staff Pension Board filed written observations;

Whereas on the same date the Applicant submitted written comments on the Respondent's answer to the question put by the Tribunal on 29 September 1982 and on the written observations of the Secretary of the Pension Board;

Whereas the facts in the case are as follows:

Mrs. Dora Sun entered the service of the United Nations on 4 January 1971, under a three-month contract, as an accounting clerk at the G-3 level (step IV) with the secretariat of the Pension Fund. Her appointment was subsequently converted into a probationary appointment. With effect from 1 January 1973, she received a permanent appointment at the G-4 level.

On 1 April 1976, she was promoted to the G-5 level with the functional title of Principal Accounting Clerk.

In July 1978, the Secretary of the United Nations Joint Staff Pension Board (hereinafter referred to as "the Board") recommended to the twenty-fourth session of the Board, in his note entitled "Administrative expenses—Budget estimates for 1979" (JSPB/R.558 (XXIV)), that the Applicant's post should be reclassified. The Secretary stated that the units affected by the classification included:

"(b) the General Accounts Unit of the Accounts Section, where the incumbent will operate as an Associate Accountant responsible for the overall bank reconciliation work of that unit;"

The Secretary's recommendation was approved by the Board, which referred to it as follows in its annual report to the General Assembly at its thirty-third session:

"65. Parallel with the above, although not involving any significant increase in costs, are several upward post reclassifications which the Board considers are now necessary in order to bring the grades into line with current levels of duties and responsibilities. First among these are the posts of the three chiefs of the Accounts, Data Processing and Registry Sections . . . The remainder derive in part from some restructuring brought about in anticipation of the revised system of cost-of-living adjustments in 1979, as well as from the greater complexity and increased volume which continue to characterize the over-all operation of the Fund. It is proposed, thus, to reclassify . . . three G-5 posts to the P-2 level in (a) the participants unit of the Registry Section, (b) *the general accounts unit of the Accounts Section*, and (c) the contributions unit of the Accounts Section. In all cases proposed, however, the Board would also seek an evaluation of the proper grade-levels from the Classification Unit of the United Nations before any personnel action is taken . . .". (Supplement No. 9 A/33/9.) (Emphasis added.)

The General Assembly adopted the report of the Board, thus approving the request for reclassification.

At the same session, the General Assembly adopted on 20 December 1978 resolution 33/143, which, in section I, paragraph 1 (g), requested the Secretary-General to adopt the following measures regarding recruitment of Professional staff:

"(g) Movement of staff from the General Service category 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;".

In the meantime, the then Assistant Secretary-General for Personnel Services had written to all heads of departments and offices on 1 November 1978, seeking recommendations for promotions not later than 31 December 1978, so that the Appointment and Promotion Board and its subsidiary bodies could begin their review of staff for the 1979 promotion registers as soon as possible after the New Year. Heads of departments and offices were specifically requested to limit promotion recommendations to "the estimated number of vacancies available during the forthcoming register year".

Although the Applicant had been recommended by the Chief of the Accounts Section of the Pension Fund for promotion to the P-2 level, that recommendation was not forwarded to the Assistant Secretary-General for Personnel Services in response to his letter of 1 November 1978 because no Professional post was then available.

On 1 June 1979, the Applicant assumed the responsibilities of Assistant to the Chief of the Payment Unit of the Pension Fund. At that time, however, as stated by the Secretary of the Board, the department was "given to understand that it was no longer possible to submit her case to the Appointment and Promotion Committee, as had been the procedure in the past, because of the introduction of the competitive examination process".

On 19 June 1979, the Assistant Secretary-General for Personnel Services asked all heads of department and offices to provide him with detailed information concerning P-1 and P-2 posts earmarked for the examination to be held in accordance with General Assembly resolution 33/143.

On 29 August 1979, pursuant to General Assembly resolution 33/143, section I, paragraph 1 (g), the Secretary-General issued a bulletin (ST/SGB/173) establishing annual competitive examinations commencing with the 1979 promotion year—1 April 1979 to 31 March 1980—for promotion to the Professional category of staff members from the General Service category. 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 examinations. On 6 December 1979, the Assistant Secretary-General for Personnel Services issued a further administrative instruction (ST/AI/268/Add.1) exempting from the first competitive examination staff members who, prior to 20 December 1978, had been assigned to, had been fulfilling and continued to fulfil the duties of any of the Professional posts reserved for that first examination.

On 8 November 1979, the Assistant Secretary-General for Personnel Services addressed to all heads of departments and offices a memorandum entitled "1980 Promotion Registers". The addressees were reminded, *inter alia*, of the following:

"6. In compliance with General Assembly resolution 33/143, the Secretary-General has decided to establish annual competitive examinations by occupational groups as the basis for selecting staff members in the General Service and other categories for promotion to posts in the Professional category subject to geographical distribution. Accordingly, the promotion of General Service staff to the Professional category is now governed by ST/SGB/173 and ST/AI/268."

On 17 December 1979, the Secretary of the Board wrote, in a memorandum to the Assistant Secretary-General for Personnel Services:

"In reply to your memorandum of 8 November 1979, I wish to recommend

that the following members of this Secretariat be placed on the register for promotion from G-5 to P-2:

“Mrs. D. SUN

“It is hoped that after further information has been received concerning the procedure to be followed with regard to the promotion of staff members from the General Service category, we will be in a position to supply the necessary Job Descriptions, Performance Evaluation Reports and other supporting evidence required.”

On 17 April 1980, the Secretary of the Board requested the Office of Personnel Services to grant the Applicant a special post allowance to the P-2 level on the following grounds:

“Mrs. Dora Sun, who assumed the function of Assistant to the Chief of the Payment Unit of the Fund in June 1979, has been assigned against a Professional post at the P-2 level since 1 July 1979.

“In recognition of her outstanding record of performance at the Professional level, I recommended in December 1979 that she be placed on the 1980 register for promotion from the G-5 to the P-2 level.

“In the light of the situation concerning the procedure for promotion to the P-2 level and the resultant delay created by the proposed competitive examination for such promotions, I should be grateful if approval could be granted for a special post allowance to the P-2 level for the above staff member with effect from 1 January 1980.”

In a letter of 3 June 1980, the Applicant was informed by a Personnel Officer that the Assistant Secretary-General for Personnel Services had approved the request for a special post allowance with retroactive effect to 1 July 1979, the date from which she had been performing functions at a higher level. This, however, was on the understanding that:

“... the grant of a special post allowance does not exempt her from the necessity of passing the competitive examination in order to be eligible for promotion to the Professional category, and that the assignment of functions is temporary in nature and not a recognition of her suitability for appointment or promotion to the Professional level”.

On 29 July 1980, the Applicant signed the following statement, which appeared at the foot of the Personnel Officer's letter of 3 June 1980:

“I note and accept the conditions under which the special post allowance is awarded to me”.

On 22 December 1980, the Applicant wrote to the Chairman of the Central Examination Board requesting promotion to the Professional category without the need for her to take part in the competitive examination established by bulletin ST/SGB/173.

In the meantime, the Administrative Tribunal had rendered Judgement No. 266 in the case of Mrs. Capio against the Secretary-General of the United Nations. Subsequent to that judgement, on 10 March 1981, the Administration issued information circular ST/IC/81/19 exempting from the 1979 competitive examination General Service staff members who had been in a situation similar to that of Mrs. Capio. Even before the issuance of the information circular, the Applicant had written to the Director of the Division of

Personnel Administration, on 19 February 1981, requesting his confirmation that the new transitional measures which the Administration intended to adopt in view of the Capio judgement would apply to her case and that she would be considered for promotion to the P-2 category in accordance with the previous promotion system.

On 10 March 1981, the Secretary of the Board addressed to the Director of the Division of Personnel Administration a memorandum stating, *inter alia*:

“ . . .

“1. Steps were taken as early as 1978 to reclassify her post from the G-5 level to the P-2 level to reflect the increased responsibilities devolving upon this staff member. Because of the various problems existing in the Pension Fund, Mrs. Sun was assigned, as early as 1978, functions at a higher level, on a regular basis, to supervise and train staff members in the administration and monthly reconciliation of the Fund's bank accounts, which she has been satisfactorily performing since that date.

“2. As a result of some extensive restructuring of the Secretariat of the Fund, brought about in anticipation of the new cost-of-living adjustment system for 1979 and the increased level of complexity which characterizes the general operations of the Fund, a proposal was submitted to the Pension Board for the reclassification of Mrs. Sun's post in order to bring her grade in line with her functions as an Associate Accountant responsible for the overall bank reconciliation work in the General Accounts Unit of the Accounts Section of the Fund. The proposal was subsequently approved by the Board in 1978, and was included in the budget estimates of the Fund for 1979.

“3. Unfortunately, due to the delay in certain aspects of this restructuring, a P-2 post did not become available for Mrs. Sun's promotion until 1 July 1979 and, as a result, Mrs. Sun's functional title was changed to Associate Accountant only on that date and she was given a special post allowance to the P-2 level. At that time, however, we were given to understand that it was no longer possible to submit her case to the Appointment and Promotion Committee, as had been the procedure in the past, because of the introduction of the competitive examination process. Since she had been performing professional duties from as early as 1978, if a post had been available earlier, and had the new procedure for promotion been anticipated in December 1978, I would have included her in the Fund's recommendations for the promotion register with effect from 1 April 1979.

“In the light of the above, it would be much appreciated if Mrs. Sun's case could be submitted to the Appointment and Promotion Committee for special review for promotion to the P-2 level under the previous promotion procedure. I am at your disposal for any additional documentation or information that may be required in connection with this special review.”

On 13 March 1981, the Director of the Division of Personnel Administration informed the Applicant that her request of 19 February 1981 was being carefully studied by the Office of Personnel Services and that a reply would be addressed to her as soon as possible.

On 3 April 1981, Mr. Jonah, Assistant Secretary-General for Personnel Services, wrote in a confidential memorandum to the Secretary of the Board:

“1. I should like to inform you that, in view of Judgement No. 266 of the

United Nations Administrative Tribunal (*Capio v. the Secretary-General*), OPS is forwarding to the relevant Appointment and Promotion bodies for review, the cases of Mrs. Capio and other staff members in the General Service category who appear to be similarly situated, i.e. staff members who were assigned the functions of a Professional post and who had been recommended by their Department or Office for promotion prior to the establishment of the new system of competitive examinations. The Administrative Tribunal found that in the Capio case, the staff member was entitled to be considered for promotion (but not necessarily promoted) under the criteria applicable before the competitive examination procedures were introduced. A copy of the Information Circular, ST/IC/81/19, giving further details concerning the Capio case and the procedure for the review of General Service staff members recommended for promotion to the Professional category is attached for your information.

“2. [Attached is a list of staff members in your Department or Office who meet the criteria set out in the Information Circular and whose case has been forwarded to the APC. Your confirmation of the accuracy and completeness of the list (Annex I) will be appreciated.] In this connection, I would like to draw your attention to the case(s) of staff member(s) who has/have filed an appeal on the basis of the Capio Judgement (see Annex II).* Your written comments on the staff member's submission (attached) would be appreciated.”

On 8 May 1981, the Director of the Division of Personnel Administration requested the Secretary of the Board to reply as soon as possible to the above-mentioned memorandum of 3 April 1981 concerning the review of 1979 departmental recommendations for promotion of General Service staff members to the Professional category. The Secretary replied as follows on 29 May 1981:

“This is with reference to Mr. Jonah's memorandum of 3 April 1981 and yours of 8 May 1981 concerning the above as it relates to Mrs. Dora SUN.

“As far as the application of Mrs. Sun is concerned, I am pleased to confirm that we concur with all the facts as stated in that application and fully support her request. In this connection I would refer to my memorandum of 10 March 1981 addressed to you.

“I trust that this gives you all the information you require—if not I am at your disposal for anything further.”

On 9 June 1981, the Director of the Division of Personnel Administration, in his reply to the Secretary of the Board, stated, *inter alia*:

“Your memorandum of 10 March confirms that Mrs. Sun meets one of the criteria set out in paragraph 3 of Information Circular ST/IC/81/19, i.e. performance of professional functions. As Mrs. Sun, however, lacks the second requirement, as

* “CONFIDENTIAL

“ANNEX II

“STAFF MEMBERS WHO HAVE FILED AN APPEAL ON THE BASIS OF THE CAPIO JUDGEMENT

“DEPARTMENT

“UNJSPF

“STAFF MEMBER

“Dora SUN”

indicated in paragraph 3 of your memorandum, i.e. inclusion in the 1979 departmental recommendations for promotion, I regret to inform you that her case cannot be transmitted to the Appointment and Promotion Committee under paragraph 6 of the above-mentioned information circular.”

Also on 9 June 1981, the Director of the Division 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 Information Circular ST/IC/81/19 of 10 March 1981 and that, consequently, her case would not be transmitted to the appropriate appointment and promotion body for consideration under that information circular.

On 29 June 1981, the Applicant requested the Secretary-General to review the administrative decision of 9 June 1981.

On 16 July 1981, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to maintain that decision. Having notified the Joint Appeals Board on 17 August 1981 of her intention to appeal against the Secretary-General's decision, the Applicant filed the appeal on 9 October 1981.

On 25 September 1981, the Applicant requested the Secretary-General's agreement to the submission of an application directly to the Administrative Tribunal. Agreement was refused on 2 October 1981 by the Director of the Division of Personnel Administration.

On 24 March 1982, the Applicant filed the above-mentioned application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. (i) The Respondent's refusal to agree that the Applicant's appeal should be submitted directly to the Administrative Tribunal was not made in good faith because there are no substantive questions of fact to be settled or even clarified by the Joint Appeals Board. The only questions to be answered are questions of law that can only be addressed to the Administrative Tribunal and that only the Tribunal can answer. In addition, the Respondent's continuing failure to comply with the Joint Appeals Board's request for an answer to her appeal constituted an abuse of process.
- (ii) The Respondent's failure to comply with the Joint Appeals Board's request for an answer to the appeal constituted a failure to implement staff rule 111.3 (h), thereby denying the Applicant her right to action by the Joint Appeals Board with the maximum of dispatch consistent with a fair review of her appeal.
2. With respect to administrative measures announced in Information Circular ST/IC/81/19 of 10 March 1981 which was cited by the Respondent in denying the Applicant consideration for promotion from the General Service category to the Professional category on the basis of her long-term, full-time and satisfactory performance of professional duties in a Professional post:
 - (i) The administrative measures fail to uphold the Applicant's acquired right to be considered for promotion in accordance with the rules governing promotion when she accepted the assignment to a Professional post;

- (ii) The administrative measures fail to implement Judgement No. 266 of the Tribunal in the Capiro case with respect to the Applicant although the Applicant acquired the same right as Mrs. Capiro to be considered for promotion prior to the inauguration of the new system of promotion on 29 August 1979 and the Applicant should be treated to the same relief.

Whereas the Respondent's principal contentions are:

1. Methods by which staff are recommended to the Secretary-General for promotion to the Professional category are procedural or "statutory" measures which are subject to change at any time. Under the prior promotion procedure, General Service staff members performing assigned Professional functions did not thereby acquire a legally cognizable right to be considered for promotion to the Professional category because performance of assigned duties is an obligation of all staff independent of the career consequences of such performance.

2. The General Assembly's directive to the Secretary-General to establish competitive procedures for promotion of General Service staff to the Professional category is a valid and proper exercise of the Assembly's authority pursuant to Article 101 of the United Nations Charter. Exceptions to this new and fair procedure are properly construed narrowly, not only to respect the authority of the General Assembly but also to ensure equality of treatment of General Service staff.

3. In the absence of a recommendation by the secretariat of the Board for the 1979 promotion review, the substitution of the new competitive examination procedure for that review did not violate any legally cognizable right or expectation of the Applicant inasmuch as this substitution occurred before the prior procedure had advanced sufficiently with respect to the Applicant to give her an objectively-based expectation of inclusion in the 1979 promotion register.

The Tribunal, having deliberated from 22 September to 7 October 1982, now pronounces the following judgement:

I. The Tribunal notes that the Applicant's request that the Respondent should agree to direct submission of the case to the Administrative Tribunal and her argument that his refusal constitutes an abuse of process no longer require adjudication. The Respondent eventually agreed, in his answer, that the case need not be submitted first to the Joint Appeals Board.

II. On the basis of article 19.1 of the Rules, under which

"Any person to whom the Tribunal is open under article 2, paragraph 2 . . . may apply to intervene in a case at any stage thereof on the ground that *he has a right which may be affected by the judgement to be given by the Tribunal*" (emphasis added),

two staff members at the G-5 level who had completed several years' service at that level applied to intervene in the present case in order to present their claims with respect to their acquired rights.

The Tribunal notes that the principal application is based on a very special factual situation, peculiar to the Applicant. Since the decision to be rendered will have to be taken in terms of that situation, it is not such as to affect a right peculiar to the interveners. The Tribunal accordingly rules that these two interventions are not receivable.

III. The Tribunal has considered the implications of the document which the Ap-

plicant signed after being informed by a Personnel Officer that approval by the Assistant Secretary-General for Personnel Services of a special post allowance to the P-2 level with effect from 1 July 1979 was on the understanding that "the grant of a special post allowance does not exempt her from the necessity of passing the competitive examination in order to be eligible for promotion to the Professional category, and that the assignment of functions is temporary in nature and not a recognition of her suitability for appointment or promotion to the Professional level".

The Office of Personnel Services required the Applicant's signature on the document setting out these conditions. During the oral proceedings, the parties gave conflicting accounts of the circumstances in which that signature was given. The Tribunal does not consider it necessary to inquire into whether any defect may attach to that expression or will. It notes that the issue in the present case is whether the circular of 10 March 1981, which was drawn up nearly nine months after the Applicant had signed that document and which grants all staff members falling within categories specified in the circular the right to be dealt with under the previous promotion system, applies to this case. In the view of the Tribunal, this general provision cannot be restricted as to its legal effects because of requirements that were imposed on a staff member at an earlier date in connection with the introduction of the competitive examination.

IV. The Applicant requests the Tribunal to order the Respondent to convene an Appointment and Promotion Board to consider her for promotion to the Professional category in accordance with the rules established in 1957. She is of the view that the Respondent, in denying her on the basis of circular ST/IC/81/19 of 10 March 1981 consideration for promotion from the General Service category to the Professional category, failed to uphold her acquired rights in accordance with the rules in force when she accepted the assignment to a Professional post. She also argues that she should be treated to the same relief as was ordered by the Tribunal in Judgement No. 266 (Capio).

The Applicant further requests the Tribunal to base its ruling in her case on other considerations in addition to the terms of circular ST/IC/81/19.

The Tribunal observes that in Judgement No. 295 (Sue-Ting-Len) it stated that "the decision taken in one case is binding only for that case" and that it is "irrelevant to examine the terms of the circular by reference to Judgement No. 266". It also concluded that circular ST/IC/81/19 "adequately expresses and gives proper effect to" the "considerations" which, in the view of the Tribunal, determine what allowance should be made for acquired rights in the event of the introduction by the General Assembly of a new system for the promotions in question.

V. In view of the foregoing, the only issue on which the Tribunal has to rule concerns the rights of the Applicant, regard being had to the terms of circular ST/IC/81/19.

VI. The Tribunal notes that, even before the issuance of the information circular, the Applicant requested the Director of the Division of Personnel Administration to confirm that the new transitional measures which the Administration intended to adopt would apply to her case. On the very date on which the circular appeared, the Secretary of the Board wrote to the Director stating that he "fully" supported the Applicant's request and the legitimacy of her claim and giving the reasons for his own conduct in the matter. After receiving the circular, he again stated on 29 May 1981 that he "fully" supported her request, without, however, relying on the actual terms of the circular.

VII. The reason why the Applicant's request to be dealt with under the previous

promotion system was rejected was spelt out in the reply sent on 16 July 1981 on behalf of the Secretary-General, maintaining the earlier decision. As evidence of the fact that the Applicant did not meet one of the two criteria set out in the circular, the Assistant Secretary-General for Personnel Services stated: "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 examinations*" (emphasis added).

The Tribunal recognizes that the circular expressly states that the transitional system provided for in the circular will apply to staff "identified in this way". It notes that it is not disputed that the memorandum from the Office of Personnel Services of 19 June 1979 was sent to the secretariat of the Fund but the latter failed to supply the list of posts which should have been drawn up prior to the entry into effect of the new promotion system.

That being the case, there are three questions to be considered by the Tribunal:

A. Whether the post intended for the Applicant, and her name, should have been included in the list called for by the Office of Personnel Services on 19 June 1979;

B. If so, whether the failure to include them was illegal or was based on legally valid considerations;

C. What implications may follow from that failure as regards the validity of the denial of entitlement under circular ST/IC/81/19 on the ground of the failure to include them in the list.

VIII. A. According to the memorandum of 19 June 1979, all heads of departments and offices were informed that it was necessary, in order to determine the number of posts to be filled by competitive examination in 1979, "to earmark for the examination those posts which you had intended to use for the promotion of GS staff members whom you have recommended for the P1 and P2 registers".

The memorandum clearly indicated that this was a different matter from the recommendations made in response to the memorandum of 1 November 1978, before it was envisaged that the new promotion procedures would be applied in 1979.

The memorandum stated that the Assistant Secretary-General for Personnel Services was seeking detailed information concerning these posts and added: "If they have not been already classified, I suggest that the attached job description forms be used for that purpose".

IX. The Tribunal notes that the Secretary of the Board submitted to the Board, on 17 July 1978, the budget estimates for 1979, in paragraph 9 of which he requested, *inter alia*, the reclassification of a G-5 post to the P-2 level for "the General Accounts Unit of the Accounts Section, where the incumbent will operate as an Associate Accountant responsible for the overall bank reconciliation of that unit". That request, obviously referring to the post intended for the Applicant, was approved by the Board, which in its report to the General Assembly specifically requested reclassification of the post in "the general accounts unit of the Accounts Section". The report went on to say: "In all the cases proposed, however, the Board would also seek an evaluation of the proper grade-levels from the Classification Unit of the United Nations before any personnel action is taken".

The General Assembly adopted the report at its thirty-third session, thus approving the reclassification of the post intended for the Applicant.

The Secretary of the Board stated in his memorandum of 10 March 1981 that, due to delays in the restructuring of the Fund secretariat, a P-2 post "did not become available for Mrs. Sun's promotion" until 1 July 1979 and it was only on that date that "Mrs. Sun's functional title was changed to Associate Accountant . . . and she was given a special post allowance to the P-2 level".

In view of the foregoing, the Tribunal finds that the P-2 post to which the Applicant was assigned on 1 July 1979, qualified her, under the conditions laid down in the memorandum of 19 June 1979, for inclusion in the required list and that furthermore, regard being had to the terms of the memorandum, such inclusion was not precluded by any action on the part of the Classification Unit as envisaged by the Board. Consequently, if the office concerned had complied with the request addressed to it, the Applicant could have benefited from the circular of 10 March 1981.

X. B. The Tribunal has inquired into the circumstances in which the memorandum of 19 June 1979 went unanswered by the Secretary of the Board. There is in the file a note by a Personnel Officer, dated 29 August 1979, recording some information which had been received. The note refers to the position taken by the Fund, and in particular by the Deputy Secretary, to the effect that the Fund's posts should be "excluded from the 30 per cent" of posts for which promotion was to be by written examination. It was also mentioned in the note that four staff members had been recommended for promotion.

The Tribunal observes that these were the four persons recommended in December 1978, all of whom, the note indicates, were occupying P-2 posts before 1 April 1979.

The Tribunal has received from the Secretary of the Board himself, on 1 October 1982, very precise information about his conduct in this case. He indicates that his action in recommending the Applicant for promotion in December 1979 was in accordance with the previous practice of making a recommendation at the request of the Assistant Secretary-General for Personnel Services only after a P-2 post had become available, on 1 July 1979. However, he went on to say that "the secretariat of the Fund continued to follow that practice even after 29 August 1979 because it had made it clear to the Office of Personnel Services that it did not recognize that any changes to be introduced or introduced in the promotion system from the G to P category would be applicable to the Pension Fund secretariat . . . The Secretary of the Fund has continued to maintain that position and has consistently refused to make available posts in the Pension Fund secretariat to be filled by competitive examination from the G to P category."

Lastly, the Tribunal notes that, in a memorandum of 20 April 1982 to the Director of the Division of Personnel Administration, the Secretary of the Board had already indicated that he did not intend to assist in applying the examination system, as established, but expressed his readiness to reconsider as soon as examinations appropriate for work in the area of social security and pension matters would have been established.

XI. The Tribunal observes that the reasons advanced for the conduct of the Secretary of the Board are derived both from the special legal situation of the Pension Fund and from the status peculiar to the Secretary of the Board under the Regulations of the Fund adopted by the General Assembly.

The Tribunal has already considered the special legal status of the Fund in Judgement

No. 245 (Shamsee). It noted that "the chief executive officer of the Fund is not the Secretary-General of the United Nations but the Secretary of the Staff Pension Board itself". According to that judgement, the Fund is "a subsidiary organ of the General Assembly, admittedly of a *special type*" (emphasis added).

Article 7 of the Regulations of the Fund, concerning the secretariat of the Board, reads as follows:

"Article 7

"Secretariat of the United Nations Joint Staff Pension Board

"(a) A Secretary to the Board, and a Deputy Secretary or other officer empowered to act in the absence of the Secretary, shall be appointed by the Secretary-General on the recommendation of the Board.

"(b) The Secretary-General shall appoint such further staff as may be required from time to time by the Board in order to give effect to these Regulations.

"(c) The Secretary shall be the chief executive officer of the Fund and shall perform his functions under the authority of the Board; he, or the officer empowered to act in his absence, shall certify for payment all benefits properly payable under these Regulations."

In the present case, the Tribunal considers that the most relevant provision is paragraph (b).

The effect of this text is that, apart from the Secretary of the Board and the Deputy Secretary, who are in a special position, all staff "appointed" by the Secretary-General have the status of United Nations staff members, and that the rules applicable to them are therefore drawn up by the competent United Nations organs. However, in the exercise of his competence, the Secretary-General must, under the Regulations of the Fund, take into account two principles:

(1) The staff must be such as is *required* by the Board;

(2) The Board must give *effect to the Regulations* of the Fund. It follows from these provisions that in the exercise of his authority the Secretary-General, being bound by the Regulations of the Fund, may have occasion to draw up special provisions peculiar to its staff. Such was not the case where the problem under discussion is concerned, and it is clear that in this case, rightly or wrongly, the rules that were established made no provision for the special considerations applicable to the Fund. It is not for the Tribunal to intrude the question of the responsibility of the Administration in a dispute which actually arises from the administrative policy pursued. The Tribunal simply notes that both the relationship between the Fund on the one hand and the United Nations and the 13 member organizations on the other, and the tasks peculiar to the Fund, may be such as to justify special provisions. However, there is nothing in the file to indicate any action to that end by the Board.

XII. C. In any event, the Tribunal finds a paradoxical situation. Circular ST/IC/81/19, for the purpose of identifying which General Service staff members could be permitted, like Mrs. Capio (Judgement No. 266), to have their cases reviewed in accordance with the criteria applied under the previous system dating from 1957, referred in paragraph 5 to staff members whose names had been "given to the Office of Personnel Services 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

had there been a promotion review, *so that these posts could be used for the competitive examinations . . .*" (emphasis added).

This means that information required to be supplied as a preparatory step towards the holding of the examination was to be used, at least in part, for drawing up the list of General Service staff for whom the department or office concerned had "prepared recommendations" and who for that reason were eligible, in accordance with circular ST/IC/81/19, for review under the old system of annual promotion registers.

However, this method of *identifying* posts and staff members could not be applied to the Applicant because of the deliberate conduct of the Secretary of the Board. His obvious purpose in not supplying the information requested of him was to object, so far as his office was concerned, to a preparatory step towards the holding of the examination. But his attitude had the effect of subsequently placing the Applicant in a position where the provisions of the circular were used as the basis for the decision to exclude her from its benefits.

XIII. The Tribunal believes that a close scrutiny of the terms of the circular will lead to a more precise appreciation of its effect. Its purpose, according to paragraph 7, is to define a system for identifying the beneficiaries. For that purpose, it is laid down in paragraph 3 that, of the General Service staff members who had been assigned the functions of a Professional post, the ones eligible would be those "for whom the department or office concerned had prepared recommendations" prior to 29 August 1979. Paragraph 5 indicates the methods of identification. That paragraph distinguishes between two situations. The first involves cases where the recommendations of departments and offices for the promotion of some staff members had already been submitted to the Office of Personnel Services before it became known that a new procedure was to be introduced with effect from 1 April 1979. The second involved staff members whose names had been given to the Office of Personnel Services 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 had there been a promotion review, so that these posts could be used for the competitive examinations. In the case of the Applicant, her name did not appear on any list prepared in accordance with the latter method because of the position of principle taken by the Secretary of the Board. However, the Tribunal has found in paragraph IX above that, in this particular case, a factual situation existed prior to 29 August 1979 to the benefit of the Applicant and that that situation strictly fulfilled the requirements of the above-mentioned memorandum of 19 June 1979, those requirements being reflected in paragraph 5 of circular ST/IC/81/19 for the identification of persons eligible under the terms of the circular.

The Tribunal therefore finds that the Applicant must in all respects be considered to be a General Service staff member "identified" for the purposes of the application of circular ST/IC/81/19. It would consider it inadmissible that the conduct of the Secretary of the Board, who in any event had firmly indicated his desire for the Applicant to benefit from the old promotion system, should have the effect of depriving her of that benefit. The Tribunal accordingly concludes that she is entitled to rely on circular ST/IC/81/19.

XIV. For these reasons, the Tribunal rules that:

- (a) The interventions are not receivable;
- (b) The Applicant is entitled to benefit from the application of circular ST/IC/81/19;
- (c) All other pleas are rejected;

(d) In view of the terms of subparagraph (b) above, there is no occasion to fix any compensation pursuant to article 9.1 of the Statute of the Tribunal.

(Signatures)

Endre USTOR
President

Arnold KEAN
Alternate member

Suzanne BASTID
Vice-President

Nicholas TESLENKO
Acting Executive Secretary

Herbert REIS
Member

New York, 7 October 1982

Judgement No. 297

(Original: English)

Case No. 285:
Panis

Against: The Secretary-General
of the United Nations

Non-renewal of the fixed-term appointment of a staff member of the Office for the Caribbean of ECLA (Economic Commission for Latin America).

Request to provide a certification of the Applicant's satisfactory service.—By providing an appropriate testimonial, the Administration has given satisfaction to that plea.

The issue whether the Administration gave the Applicant ground for an expectancy that his appointment would be renewed.—Responsibility of the Administration for the failure of the Chief of the ECLA Office for the Caribbean to inform the Applicant of the substantial changes recommended concerning future employment.—Serious irregularities in the preparation of the Applicant's Performance Evaluation Report discovered by an investigative panel.—Refusal by the Applicant to accept a post offered him at Addis Ababa by the United Nations Industrial Development Organization.—Different legal position which the Applicant would have been in if he had decided to accept that offer.—Payment of three-months' net base salary to the Applicant by the Secretary-General.—Decision of the Tribunal not to make an additional award.—New pleas presented by the Applicant in the course of the proceedings are not receivable.—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Herbert Reis;
Mr. Luis de Posadas Montero;

Whereas on 11 February 1982, the Applicant filed an application which did not comply with the formal requirements of Article 7 of the Rules of the Tribunal;