

ADMINISTRATIVE TRIBUNAL

Judgement No. 412

Case No. 435: GROSS

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Samar Sen, President; Mr. Ahmed Osman;

Mr. Jerome Ackerman;

Whereas, on 26 June 1987, Ciceil Lipsay Gross, a staff member of the United Nations, filed an application, the pleas of which read as follows:

"SECTION II. PLEAS

1. The Applicant makes no request at this time for any preliminary or provisional measures including the production of additional documents or hearing of witnesses but reserves her right to do so at a later time.
2. The decisions which the Applicant is contesting and whose rescission she is requesting is the refusal to give any consideration to her application for assignment to the new P-5 post of Chief of Section established in the Division for Policy Co-ordination of the Office of Financial Services and the failure to give proper consideration to her promotion in accordance with the 1984 promotion exercise guidelines (...).
3. The obligations which the Applicant is invoking are contained in Article 101 of the Charter of the United Nations, staff regulations 4.2, 4.3 and 4.4 and the guidelines laid down in the memorandum issued by the Assistant Secretary-General, Office of Personnel Services of 3 November 1983, to all Heads of Departments and Offices, on the subject of the 1984 Promotion Exercise (...).
4. Applicant requests specific performance under article 9, paragraph 1 of the Statute of the Tribunal of these obligations, by her promotion to the P-5 level being given

retroactive effect for all purposes to 1 April 1984, including payment to her retroactively and in the future, of the salary and benefits commensurate therewith, the Organization's records to reflect her seniority in grade as of that date.

5. Should the Secretary-General choose to exercise his option under article 9, paragraph 1, of the Statute, the amount of compensation claimed by the Applicant is \$35,817, calculated as follows:

(a) Loss of salary totalling \$8,218, broken down as follows:

- difference in salary between P-4 XII and P-5 IV in 1984, \$379;
- difference in salary between P-5 IV and P-5 V in 1985, \$785;
- difference in salary between P-5 V and P-5 VI in 1986, \$772;
- difference in salary between P-5 VI and P-5 VII in 1987, \$787;
- sum of differences in salary resulting from annual within-grade salary increases during the period 1988 through 1994, \$5,495.

(b) Loss of pension entitlements totalling \$27,500, broken down as follows:

- difference in Pensionable Remuneration calculated as the average difference between two steps at the P-5 or higher level: \$2,500;
- resulting reduction in projected final average remuneration at age 60, used to calculate the amount of the Applicant's annual pension benefit: \$2,500;
- projected total loss in the amount of the Applicant's future pension: \$27,500 (based on life expectancy of 82 years).

Alternatively, to award Applicant the actuarial equivalent of the pension loss as calculated by the UN Joint Staff Pension Fund.

6. Compensation for the delay in the adjudication of the appeal caused by its dilatory handling by the Secretary-General in failing to respond to Applicant's appeal to the Joint Appeals Board contrary to the provisions of staff rule 111.2(g): \$5,000.

7. Moral damages in an exemplary amount, including punitive damages: \$25,000.

8. Counsel fees and other expenses incurred in connexion with the preparation of this appeal: \$5,500."

Whereas the Respondent filed his answer on 6 November 1987;  
Whereas the Applicant filed written observations on  
23 December 1987;

Whereas, on 14 April 1988, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent;

Whereas, on 20 April 1988, the Respondent provided answers to the questions put by the Tribunal and on 2 May 1988, the Applicant commented thereon;

Whereas the facts of the case are as follows:

Ciceil Lipsay Gross entered the service of the United Nations on 16 April 1969. She was initially offered a two year fixed-term appointment at the P-4, step 1 level as Chief of the Housing, Staff Activities and Welfare Section in the Office of Personnel Services (OPS). On 16 April 1971, she was granted a probationary appointment. Effective 6 December 1971, the Applicant took special leave without pay for one year. On her return to duty, she was transferred to the Office of Financial Services (OFS) as Chief of the Insurance Unit. On 1 April 1974, the Applicant accepted a permanent appointment and on 1 July 1974, she was transferred to the Division of Human Rights in Geneva as a Human Rights Officer at the P-4, step V level. Effective 17 December 1978 the Applicant was transferred to the Division for Policy Co-ordination, OFS at Headquarters, as Secretary of the Advisory Board on Compensation Claims (ABCC), a function which she exercised until 31 March 1980. In that capacity, she also acted as Chairman of the Claims Board.

On 1 April 1980, the Applicant was seconded for a period of two years to the Food and Agriculture Organization (FAO), a specialized agency of the United Nations, as Senior Officer, Social Security Group, at the P-5, step V level. Her secondment, initially

extended for a further fixed-term period of two years until 31 December 1982 was however extended further through 31 August 1983 and then, 15 September 1983.

On 16 September 1983, the Applicant resumed her service with the United Nations at the P-4, step XII level, in OFS.

In a memorandum dated 16 December 1983 addressed to the Controller, the Applicant requested that a Personnel Action Form issued on 2 December 1983 by OFS to record the Applicant's transfer to Headquarters and her reassignment from the Division for Policy Co-ordination, OFS to the Budget Division, within OFS, as a Budget Officer at the P-4, step XII level, effective 16 September 1983, "either be cancelled or be amended to reflect its temporary character and the P-5 level of [her] present assignment". The Applicant recalled discussions concerning her placement, held with him, with the Executive Officer and with the Budget Director in which they had agreed that "in the light of [her] experience as head of Social Security at FAO and [her] previous functions in the UN, including those in OFS, the post of Budget Officer did not appear to be suitable". She further asserted that while it was pointed out that pending the availability of an appropriate post, some temporary arrangements would have to be made for administrative purposes, these arrangements would not in any way prejudice the active search for proper placement for her. It was on that understanding that she had accepted, "on a temporary basis, to carry out certain tasks which had in the past and were at present being performed by other officers all of whom [were] at the P-5 or higher levels, and that such assignment should serve as one of the elements justifying [her] promotion to the P-5 level, without ... classifying [her] as a Budget Officer".

On 16 December 1983, the Applicant wrote to the Director of Personnel, OPS, to request that her performance evaluation report for the period December 1978 through March 1980, when she served as Secretary of the ABCC, at the Division for Policy Co-ordination, OFS, be promptly incorporated into her official status file in order

that her records be complete at the outset of the procedures preliminary to the 1984 promotion review.

On 27 December 1983, the Applicant conveyed to the Chairman of the Appointment and Promotion Board, pursuant to paragraph 7 of ST/IC/83/72, information that would be pertinent to her promotion to the P-5 level during the 1984 promotion review, including a performance evaluation report from the Chief, AFPE (Establishments and Entitlements Service) FAO. The Applicant described all her professional activities since 1978 and indicated the absence from her personnel file of the report evaluating her performance while she had served at the Secretariat of the ABCC.

On 5 February 1984, the Director of the Budget Division, OFS, conveyed to the Controller his views concerning the Applicant's promotion to the P-5 level in a memorandum that reads as follows:

"While Mrs. Gross' presence in the Budget Division has been of too short duration yet for me to recommend her for promotion on the basis of performance, I should like to draw your attention to the fact that in 1984 a P-5 post in the Budget Division staffing table may be encumbered by a staff member at the P-4 level. You may wish to use this opportunity to accommodate Mrs. Gross at the P-5 level since it seems to be only fair to grant her promotion."

On 9 January 1984, the Executive Officer, OFS, wrote to the Applicant, on behalf of the Controller, concerning her request of 16 December 1983 to cancel or amend the administrative action taken to assign her to a post in the Budget Division at the P-4 level. He asserted that the Office of Financial Services had never made a commitment to reabsorb her at a level higher than P-4 upon her return from the FAO. Indeed, a P-4 post had been blocked for her and "the most obvious course of action" would have been to assign her to the Secretariat of the ABCC, the post which she held prior to her secondment. However, since she had expressed reservations concerning a reassignment to her prior duties, after a "thorough search" the Office of Financial Services had been able to identify a position in the Budget Division for which a strictly financial

background was not indispensable. He asserted that the Applicant's placement was difficult in view of her lack of interest to assume her previous functions and her lack of a background in finance. OFS had concluded that it would concentrate its efforts, in consultation with OPS, on finding a suitable position elsewhere, where her background and experience could be utilized more appropriately. As regards the Personnel Action Form dated 16 December 1983, he had no problem in amending it to reflect the understanding that the Applicant's assignment was of a temporary nature.

In a reply dated 13 January 1984, the Applicant challenged the seriousness of the efforts made by OFS to place her in a suitable position. In addition, she attached the recommendation for her promotion submitted by the Director of the Budget Division, which showed there was a P-5 post available in that division to effect her promotion.

During the first two weeks of January 1984, OFS convened an Internal Promotion Review Group, in accordance with the guidelines set forth by the Assistant Secretary-General for Personnel Services, to consider recommendations of staff for the 1984 Promotion Review.

In a memorandum dated 10 January 1984, the Executive Officer, OFS, transmitted to the Controller a list of all the staff members of the OFS who were eligible for promotion and an indication as to whether they had been recommended or not by their division and/or by the Review Group. According to the memorandum, the Group did not support the Applicant's recommendation for promotion to the P-5 level "in view of her extremely short stay in the Budget Division" and because "in her memorandum of 16 December to the Executive Officer, she indicated that a position in the Budget Division would not be suitable for her". The Group supported the recommendation for promotion to the P-5 level of Mr. Augusto José who served at the Division for Policy Co-ordination as Chief of the Insurance Unit. In order to effect the promotion, a P-5 post "would be redeployed from Treasury to the Division for Policy Co-ordination".

At the time, the post of Chief of the Insurance Unit was

graded at the P-4 level. As a result of a structural reorganization within the Division for Policy Co-ordination, three units within the Division -- the Insurance Unit, the Secretariat of the Advisory Board on Compensation Claims and the Claims Board -- had been amalgamated into a single section, under the umbrella of the "Chief, Insurance Claims and Compensation Section". On 1 February 1984, the Office of Personnel Services approved the reclassification of the post of Chief, Insurance Claims and Compensation Section encumbered by Mr. Augusto José, to the P-5 level. (A request for reclassification had been submitted on 20 December 1983.)

On 2 March 1984, the Applicant wrote to the Controller to inform him that it had just come to her attention that the amalgamation of the secretariats of the Insurance Unit, the ABCC and the Claims Board into one organizational group to be headed by an Officer at the P-5 level was about to be effected and that the designation of the head of the Unit was imminent. She recalled a conversation they held when she returned from the FAO, to discuss possible posts to which she might be assigned. According to the Applicant, the Controller had mentioned the possible reorganization within OFS and had noted that, in view of the Applicant's qualifications and experience, she would be ideally suited for the new job. Since six months had elapsed since her return from her secondment to the FAO, and she was still waiting for an appropriate placement, she wanted to reiterate her keen interest in filling that post, if and when it should be established. On 7 March 1984, the Applicant again wrote to the Controller and to the Under-Secretary-General for Administration and Management reiterating her request to have her candidacy seriously considered for the post on the basis of her qualifications, expertise and proven performance in the three areas concerned.

In a memorandum dated 14 March 1984, the Executive Officer, OFS, informed the Applicant that the Joint Internal Review Group had, on the basis of her seniority, qualifications (including performance) and the availability of a suitable P-5 post, decided

not to recommend to the Controller that her name be included among the recommendations of the department for promotion to the P-5 level. The Group had considered her case "not only in relation to posts in the Budget Division, but also in all other divisions of the Office of Financial Services". As regards her possible assignment to the Division for Policy Co-ordination, in connection with the amalgamation of the Insurance Unit, the secretariat of the ABCC and the secretariat of the Claims Board, he noted that no new position would be created because of "budgetary constraints". The post of Chief of the Insurance Unit had been reclassified from the P-4 to the P-5 level and Mr. José who encumbered the post "would continue to carry out his former functions, in addition to the new ones". The arrangement had been "approved by the Controller on the basis of the strong recommendation of the Director of the Division for Policy Co-ordination".

On 28 March 1984, the Applicant requested the Secretary-General to review the administrative decision of 14 March 1984 refusing to give any consideration to her application for assignment to the new post of Chief of Section established in the Division for Policy Co-ordination of the Office of Financial Services. She also requested, under staff rule 111.2(f), a suspension of any action to implement the administrative and organizational changes and personnel actions related to the filling of the post in question, pending the Secretary-General's decision on her application. On 1 May 1984, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on the suspension of action on the decision that was the subject of the appeal on 18 May 1984. Its recommendations read as follows:

- "16. For all the above considerations the panel recommends that as a prudent preventive measure the Respondent suspend any action on the reclassification of the post of Chief of Insurance Unit including any ensuing intermediate steps leading to the final decision and implementation of the assignment to the reclassified post, and suspend in particular any announcement of interim assignment to that post, until the JAB submits its report on the merits of this



appeal and the Secretary-General makes a final decision on the validity and regularity of the reclassification of the post of Chief of Insurance Unit. It further recommends that in carrying out the Panel's recommendations, the Respondent provides a copy of this report to the relevant promotion review bodies.

17. The foregoing notwithstanding the Panel urges both parties to enter into dialogue with a spirit of cooperation and good will, in order to find a solution to the assignment and promotion of the appellant acceptable to both parties."

The Secretary-General decided not to accept the Panel's recommendation for suspension of administrative action, on the ground that the reclassification of a post encumbered by another staff member constituted an administrative action which could not in itself be regarded as violating the Applicant's terms of appointment. Furthermore, the reclassification of the post in question had been approved on 1 February 1984 when the post was already encumbered by Mr. José. There was thus no action concerning classification of the post, or assignment to it, which could be suspended.

On 29 June 1984, the Assistant Secretary-General for Personnel Services transmitted to the Applicant the Panel's report and the Secretary-General's decision thereon.

On 9 July 1984, the Assistant Secretary-General for Personnel Services announced to the staff in ST/IC/84/39 the 1984 Senior Officer P-5 Promotion Register approved by the Secretary-General, upon the recommendation of the Appointment and Promotion Board. Mr. Augusto José's name was included in the Promotion Register; the Applicant's name was not.

On 1 August 1984, the Applicant instituted a recourse procedure before the Appointment and Promotion Board to request that her name be included in the 1984 Senior Officer P-5 Promotion Register. On 8 August 1984, the Applicant transmitted to the Board a copy of the report evaluating her performance during the period 1978 to March 1980 when she had served as Secretary of the ABCC and which she had just received. It had been signed by the Controller

on 2 August 1984. The Applicant was not successful in her recourse.

Effective 17 September 1984, the Applicant was transferred to the Office of General Services. She was promoted to the P-5 level on 1 April 1985.

On 23 July 1986, the Respondent filed his reply on the merits to the Applicant's statement of appeal before the JAB. The Board adopted its report on 5 March 1987. Its considerations, findings and recommendations read as follows:

"Considerations, findings and recommendations of the Panel

25. The Panel saw its task as examining whether the appellant was properly reviewed as a candidate for the post of Chief, Insurance Claims and Compensation Section in accordance with the guidelines laid down in the memorandum issued by the Assistant Secretary-General, Office of Personnel Services of 3 November 1983, to all Heads of Departments and Offices. Paragraph 2 of that memorandum states inter alia that:

'Departments and offices are required to ensure the existence of suitable procedures to conduct their internal promotion review in a fair and objective manner for the purpose of establishing the departmental list... All participants should be provided with all documentation relevant to the promotion review i.e. up to date staffing tables, fact sheets and performance evaluation reports and the recommendations from the organizational units within the Department or Office.'

26. The Panel noted that during oral proceedings held in connection with the appellant's request for suspension of administrative action, it had resulted that the internal review group had felt that since the appellant had just returned from secondment and had not yet been assigned to a specific area, a recommendation for promotion should be first preceded by a specific assignment.

27. The Panel was concerned that the internal review group was not aware, at the time of its review, that the appellant was an interested candidate for the Section Chief post and had not been informed of her conversation with Mr. Foran. This situation was not rectified by the fact that the Executive Officer had stated that he himself had informed the group that the appellant should be considered as a collateral for the new post of Section Chief.

28. The Panel noted that the record showed that the internal

review was conducted between 4 and 11 January 1984 (...) and that the reclassification of the post of Section Chief, although proposed in December 1984[sic], was only approved in February 1985[sic], one month after the review Group had finalized its recommendations.

29. Contrary to the impression portrayed in the memorandum dated 10 June 1986 that the appellant was considered for promotion not only against a post in the Budget Division but also, as a collateral, against all other P-5 posts in OFS, including the P-5 post in the Division for Policy Co-ordination, the Panel noted that the memorandum of 20 January 1984 indicates that whenever a staff member was considered as a collateral, it was specifically indicated in the record according to the Group's agreed procedure (c). However, the appellant's name only appears in the group's examination of the Budget Division recommendations, where her recommendation to the P-5 level was considered and rejected for the reasons therein stated i.e. that her recommendation was not supported in view of her short stay in that Division and her own expressed lack of interest in a position there. This would tend to support the appellant's contention that she was only considered for a post in the Budget Division.
30. Furthermore, even if the group did review the appellant (when asked during the oral proceedings, they could not recall) as a collateral, it did so in the absence of pertinent information relating to the appellant's extensive experience in the field of insurance. Her performance evaluation report covering the period 17 December 1978 to 31 March 1980, when the appellant served as Secretary, Advisory Board on Compensation Claims, was only completed in August 1984, over six months after the internal review. Also the fact sheet at the time of the review did not contain any reference to the FAO evaluation. The evaluation by Mr. Erikson made available to the review group contained no detailed description of her duties during her assignment to FAO.
31. The Panel finds, on the basis of the above, that the internal review conducted in January 1984 did not, in the appellant's case, meet the requirements of the 1984 promotion exercise guidelines and that recommendations for promotion were made on the basis of incomplete information. The Panel also finds that had all the relevant facts been at the review group's disposal, this would probably have resulted in the appellant's name being listed in the 1984 (P-5) Promotion Register. The Panel therefore recommends that she should be awarded \$1,000 compensation due to the deficiencies in the review process. The Panel also recommends that the relevant promotion bodies should be provided with a copy of this report. Since however there is no automatic right to

promotion and bearing in mind all the circumstances of the case including the fact that the appellant has since transferred from the Office of Financial Services and been promoted to the P-5 level, the Panel also recommends that all other claims should be rejected."

On 6 May 1987, the Assistant Secretary-General for Human Resources Management<sup>1</sup> informed the Applicant that:

"... The Secretary-General, while not agreeing with the Board's finding that there were procedural deficiencies which would justify the award of compensation, has decided:

- (a) To accept, in an attempt to settle the case, the Board's recommendation for payment to you of \$1,000;
- (b) To accept the Board's recommendation that the appointment and promotion bodies be provided with a copy of its report, provided you agree to this; and
- (c) To take no further action in this case."

On 26 June 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied the consideration that was owed to her under the Staff Regulations and Rules and Personnel Directives in connexion with the internal promotion review conducted by the OFS.

(a) The Internal Review Group that considered staff for promotion in connexion with the 1984 promotion review was not aware, at the time of its review, that the Applicant was an interested candidate for the post of Chief, Insurance, Claims and Compensation Section.

(b) Even if the review group did review the Applicant as a collateral to other staff recommended for promotion, it did so in the absence of pertinent information concerning the Applicant's

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<sup>1</sup> Successor of OPS

experience in the field of insurance.

(c) In spite of repeated oral and written requests by the Applicant to the Respondent that he prepare a performance evaluation report covering her period of service at the ABCC, this document was only completed six months after the internal promotion review had been conducted at OFS.

Whereas the Respondent's principal contentions are:

1. The steps preceding the 1984 promotion review were valid exercises of the discretionary power of the Administration.

2. Staff members have no right to promotion, let alone promotion at a particular time to a specific post. Absent prejudice, improper motive or procedural irregularity, a decision whether or not to promote a staff member is within the discretionary power of the Secretary-General and not subject to review by the Tribunal.

3. Staff members have no right to be assigned to any specific post or responsibility and even less to object to the assignment of another staff member to a particular post.

4. The Applicant's claim for compensation for wrong suffered as a consequence of the delayed response of the Respondent to the JAB should be rejected because she suffered no loss as a result of the delay.

The Tribunal, having deliberated from 26 April 1988 to 18 May 1988, now pronounces the following judgement.

I. The Applicant challenges two decisions: one is the alleged refusal by the Respondent to consider her application for assignment to the new P-5 post of chief of the new section established in the Division for Policy Co-ordination, OFS, and the other is the claimed failure to give her proper consideration for promotion under the 1984 guidelines, established by the Respondent. These two issues are closely intertwined; the JAB in its second report focused

attention on the promotion problem, after having dealt briefly with the assignment question in its first report.

II. With respect to whether proper consideration was given to the Applicant's efforts to be assigned to the post of chief of the new section in the Division for Policy Co-ordination, the Tribunal notes at the outset the Applicant's representation that, soon after the Applicant returned from her FAO position in Rome in the Fall of 1983 to an assignment at OFS in New York, she spoke about her future with Mr. Foran, then the Comptroller and Assistant Secretary-General, OFS. She asserts that he called to her attention a planned reorganization within the Division for Policy Co-ordination. The proposed reorganization involved amalgamating into one section the Insurance Unit in the Division with the Secretariat of the Advisory Board on Compensation Claims and the Secretariat of the Claims Board. It was anticipated that the section would be headed by a chief at the P-5 level. Previously, the Applicant had served for almost two years as Chief of the Insurance Unit and for another period of close to two years as Secretary of the Advisory Board on Compensation Claims. She had also served as Chairman of the Claims Board and during her 3-1/2-year assignment with FAO in Rome had been assigned at the P-5 level in charge of all such units in FAO. She states that Mr. Foran recognized that she would be eminently qualified to fill the post of chief of the newly to be created section, and that she was interested in being assigned to that position. Mr. Foran states that there are no notes on the discussion which took place in his office, and, apparently due to the passage of almost five years since the discussion, he is unable to confirm or deny any of the specific characterizations the Applicant has attached to the matters discussed. However, he states that it was not his style to have used the expression "eminently" in describing a staff member's qualifications. In these circumstances the Tribunal believes it appropriate to credit the Applicant's version of the discussion except for the superlative imputed to him

by her with respect to her qualifications. Without regard to the word "eminently", it appears clear that, based on the Applicant's experience and performance evaluations, she would have been at least, in Mr. Foran's views, well qualified for the post.

III. While she was waiting to hear further regarding the proposed new position, the Applicant was working as a Budget Officer in the Budget Division of OFS. She had been assigned there upon her return from Rome and was performing various ad hoc functions. However, after the conversation with the Applicant mentioned above and before a decision was reached as to who would head the reorganized section, Mr. Foran took no action to bring to the attention of his subordinate managerial personnel handling the proposed reorganization, the Applicant's interest in the proposed new position, her qualifications for it, or Mr. Foran's views as to her suitability for it. Mr. Foran states only that he mentioned to his colleagues that he had talked with the Applicant, and reiterated previous requests that they continue to search for a suitable post for her in OFS.

IV. Mr. José, in January 1984, had been recommended for promotion to the P-5 level by OFS on the basis of his length of service and performance as head of the Insurance Unit. The Appointment and Promotion Board agreed, and Mr. José attained that position later in the year without his moving to any new post since the post he was then holding as chief of the newly created unit had been reclassified as a P-5 post.

V. The Applicant protested against this sequence of events; in her eyes, it appeared that, notwithstanding her discussion in 1983 with Mr. Foran, she was being unjustly ignored as a candidate for the new position of Section Chief when the reorganization decision was reached, and that the reorganization had artificially been structured in such a fashion as to guarantee that Mr. José would

fill the new post without regard to claims of anyone else. By recourse to the JAB, the Applicant attempted to have the process suspended pending the outcome of her appeal. The JAB, concluding that, on the facts before it, there was a basis for her concern, recommended suspension in its first report. The Secretary-General rejected this on the ground that the new post had by then been created and Mr. José was filling it. Thus, the outcome feared by the Applicant had become a reality.

VI. The Tribunal has made it clear in past decisions that the authority of the Administration with regard to the reorganization of departments is very broad indeed and will not ordinarily be questioned by the Tribunal. (Judgement No 350, Raj (1985)). Thus, the Tribunal holds that OFS was free to reorganize the Division for Policy Co-ordination functions as it saw fit. The Tribunal has also held repeatedly that the Administration has wide discretion with regard to the assignment of individuals to particular posts in connexion with reorganizations or otherwise. (Judgement No. 312, Roberts (1983)). While the Tribunal continues to adhere to its jurisprudence on that matter, it has also to recall its view that if, as a result of unfair or improper procedures, or the injection of extraneous motives in connexion with these processes, a staff member is adversely affected, he can legitimately claim remedy. Cf. Roberts, idem; e.g., Judgement No. 310, Estabial (1983); Judgement No. 411, Al-Ali (1988).

VII. In this case, the Tribunal finds that the procedures followed lead to an inescapable inference of unfairness in the treatment of the Applicant. The main reason for this finding is the lack of any explanation why, after Mr. Foran's discussion with the Applicant concerning the proposed reorganization, no reasonable consideration was given to assignment of her to the post before the decision to award it to Mr. José was reached. Given the fact that discussion of this subject seems to have been initiated with the Applicant by



Mr. Foran himself, the Tribunal concludes that there was a reasonable belief on the part of the Applicant that she would at least be considered for the post.

While staff regulation 4.4 may not have mandated the Applicant's selection to fill the post being created by the reorganization, under the circumstances of this case, the staff member was entitled to be given consideration for the post, and, if rejected, to a suitable explanation.

Silence followed by a post hoc "explanation", which consists mainly of denial that a new post was created and the tenuous theory that all that occurred was expansion of an incumbent's preexisting position with no vacancy to be filled does not constitute, in the Tribunal's view, an adequate "explanation". In effect, the Administration appears to have failed to comply with staff regulation 4.4.

VIII. Not only was no appropriate action taken to ensure fair consideration of the Applicant, Mr. Foran did not see fit to communicate directly with her after she wrote to him on March 2, 1984. She had learned of the amalgamation of the three positions and reminded him of the conversation they had had six months previously. By a memorandum of March 14, 1984, the Executive Officer offered his own explanation of the matter to the Applicant in the following words:

- "3. ... From the content of your memorandum I suspect that you may have the mistaken impression that such a re-organization would involve the addition of a new position at the P-5 level. Unfortunately, in view of the budgetary constraints we have to live within, this will not be the case. The purpose of the re-organization would merely be that of rationalizing the work of the Division and of establishing a more direct line of responsibility for certain functions previously carried out quasi independently.
4. The result of the exercise, therefore, would be an expansion of the role of the Chief of the Insurance Unit as supervisor not only of the Insurance Unit, but also of the secretariats of the ABCC and the Claims Board. These increased

responsibilities justified the reclassification of the position from P-4 to P-5. The post, as you know, is currently encumbered by Mr. José who will continue to carry out his former functions, in addition to the new ones. This arrangement was approved by the Controller on the basis of the strong recommendation of the Director of the Division for Policy Co-ordination (DPC). In short, therefore, there is no vacancy in DPC and no additional post will be added to the Division against which you could be accommodated."

IX. The Executive Officer's explanation is not only difficult to understand, but also reflects a somewhat strained version of what actually happened. The Executive Officer wrongly imputed to the Applicant a "mistaken impression" that the reorganization was going to involve a new position at the P-5 level. He also failed to indicate why the Applicant could not have been properly considered on the basis of her qualifications for assignment to the newly created post before it was reclassified. If she had indeed thus been considered, he failed to explain why she was rejected: the clear import of his communication was that she had not been considered at all.

X. The second paragraph of the Executive Officer's response quoted above likewise falls short of a clear statement of what was happening. That paragraph simply restates the obvious fact that the new post would entail duties significantly greater than the former post, and that the increased responsibilities justified the reclassification to the P-5 level. The further comment that the post "is currently encumbered by Mr. José who will continue to carry out his former functions in addition to the new ones" is significant in that the end result had already been decided upon. It does not provide any justification why this result was inevitable or whether the Applicant's candidacy was taken into consideration or why, if it was, it was rejected. The statement that the arrangement was approved by the Controller on the basis of the strong recommendation of the Director adds little as there is no indication of the reasons underlying such a recommendation.

XI. A communication that begs the fundamental question raised by the Applicant, that recharacterizes in conclusory terms, without reasoned explanation, the event which occurred and which distorts the point being made by the Applicant is not, in the judgement of the Tribunal, sufficient to meet the Administration's obligation with respect to fair treatment and proper and equitable procedure for staff members. Nonetheless, the Tribunal has been concerned with some intemperate remarks and vituperative comments, such as those which appear frequently in the Applicant's submissions. Since the Applicant is a permanent staff member with a testimonial for devotion to the UN Charter, the need for restraint and harmonious relations among all those who work together cannot be overemphasized. Moreover, the Tribunal notes that such remarks neither aid the Tribunal in its deliberations nor the Applicant's cause.

XII. The brief submitted to the Tribunal by the Respondent's counsel advances an explanation for what took place. It states:

"... The uncertainty of the Applicant's return and the flexibility with which the Administration accommodated her wishes for extensions of her stay in Rome entailed ... great difficulties in fitting the Applicant into the Administration's reorganization plan when she finally returned. For those and for budgetary reasons the Administration decided to effect the reorganization without changing the then existing incumbencies ..."

Post hoc explanations of counsel that are not supported by evidence in the file are not a satisfactory substitute for the latter. Here there is no indication that any "great difficulties" were brought to the attention of the Applicant at the time of, or before the decision was announced, or at the time of her discussion with Mr. Foran. Moreover, there is no explanation of what the "great difficulties" were, or how "budgetary reasons" influenced the final decision for Mr. José's selection. In the face of counsel's

explanation, it is strange indeed that Mr. Foran would have spoken as and when he did with the Applicant about the planned reorganization.

XIII. The Tribunal wishes to repeat that it is not holding that the Administration was obliged to assign the Applicant to the newly created post or that it was derelict in that regard. The Tribunal considers however that, in keeping with its jurisprudence, and in the specific circumstances of this case, the Applicant was to be given fair and adequate consideration for assignment to the newly created post. Further, if the Administration wished to reject her candidacy for it, she should have been given a suitable explanation for the decision. In fact, she received nothing but the March 14, 1984 communication from the Executive Officer which the Tribunal has found to be both inadequate, if not misleading.

XIV. With respect to the alleged failure to give the Applicant proper promotional consideration under the 1984 guidelines established by the Administration, the Tribunal has reviewed carefully the findings of the JAB regarding this issue and has considered the arguments of the Respondent and the Applicant with respect to them. Paragraphs 27 to 30 of the JAB report which are quoted above set forth the JAB's reasons for concluding that the internal review conducted in January 1984 did not, in the Applicant's case, meet the requirements of the 1984 guidelines for promotion purposes and that recommendations for promotion were made on the basis of incomplete information.

XV. Although the Tribunal is generally in accord with the views expressed by the JAB for the reasons stated by it, the Tribunal does not share the JAB's view that, because the reclassification of the post of section chief was not approved until a month after the review group had finalized its recommendations, this necessarily showed that no consideration could have been given to the

Applicant's candidacy for it. It may well be that the review group was aware during its deliberations between January 4 and January 11, 1984 of the impending reclassification. The more persuasive reason supporting the JAB's conclusion is that the preponderance of the evidence shows that the Applicant was not considered by the review group for anything other than a position within the Budget Division.

This is buttressed by the explanation in the Executive Officer's March 14, 1984 communication quoted above, the gist of which seems to be that the Applicant was not considered at all by OFS for the new post because of Mr. José's presence in it. Indeed, it is difficult to see how on the one hand the Executive Officer could have taken the position he did in the March 14, 1984 communication to the Applicant, and on the other hand why he would have had any reason a few months earlier for suggesting to the review group, as he asserts he did, that the Applicant should be considered as a collateral for the post encumbered by Mr. José. However, the review group did not recall reviewing her as a collateral.

XVI. The Respondent in disputing the JAB report makes the point that although the review group may not have had before it all of the pertinent information relating to the Applicant's experience and past performance, this omission was of very little consequence because the Applicant herself was allegedly at fault to some extent.

In addition, the Applicant, in a memorandum dated December 27, 1983 addressed to the Chairman of the Appointment and Promotion Board, had described her activities with respect to the period from December 1978 onwards. The Tribunal does not find the Applicant to have been remiss and is not satisfied that the Applicant's December 27, 1983 memorandum was an adequate replacement for the material which should have been before the internal review group and the Appointment and Promotion Board. At any rate, the internal review group did not have all the relevant performance evaluation reports before it. And if the group's recommendation is tainted procedurally by the lack of sufficient information about a

candidate, the entire process may be affected because there is no assurance how this may have influenced the internal review group's recommendation or whether this might have had a ripple effect on the Appointment and Promotion Board.

XVII. For all of the foregoing reasons, the Tribunal concludes that the Applicant was treated unfairly and was denied protection of due process in connexion with both her efforts to be assigned to the newly created post, and with respect to the consideration to which she was entitled, but did not receive in the review procedure for the 1984 promotions. Unlike the JAB, the Tribunal is unable to conclude that the Applicant would probably have been promoted during the 1984 promotion review exercise but for the procedural deficiencies, or that she would necessarily have been assigned to the newly created post. Quite clearly, as is true of any staff member, she had no right to be promoted and she had no right to be assigned to a particular post. The right she had and which the Tribunal finds was abrogated was the right to receive fair consideration and proper treatment.

XVIII. Accordingly, the Tribunal cannot entertain the Applicant's request for specific performance in the form of retroactive promotion to the P-5 level as of April 1, 1984, and the various retroactive salary and benefit entitlements claimed by her including alleged loss of pension entitlements. Likewise the Tribunal denies the Applicant's request for exemplary moral damages including punitive damages. The Tribunal finds no justification for anything of this nature in the circumstances of this case. The Tribunal further denies the Applicant's request for counsel fees and other expenses.

XIX. However, in recognition of the injury sustained by the Applicant as a result of abridgement of her procedural rights, the Tribunal considers that the Applicant is entitled to compensation in

the amount of \$US 5,000.-. The Tribunal notes with disapproval the unjustified delay of more than two years by the Respondent in submitting a reply to the Joint Appeals Board. In this case, unlike Herrera, Judgement No. 351 (1985), the Applicant was injured by the delay because she was entitled to, but was denied prompt vindication of the procedural rights and the right to fair treatment of which she had been deprived. See Judgement No. 327, Ridler (1984). However, the Tribunal does not wish to award any separate or specific damage for the delay that took place in different stages of this case.

XX. In view of the above, the Tribunal orders the Respondent to pay to the Applicant the amount of \$US 5,000.-.

XXI. All other pleas are rejected.  
(Signatures)

Samar SEN  
President

Ahmed OSMAN  
Member

Jerome ACKERMAN  
Member

Geneva, 18 May 1988

R. Maria VICIEN-MILBURN  
Executive Secretary