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ADMINISTRATIVE TRIBUNAL

Judgement No. 444

Case No. 482: TORTEL

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Roger Pinto, First Vice-President, presiding;  
Mr. Jerome Ackerman, Second Vice-President; Mr. Samar Sen;

Whereas, on 4 November 1988, Maxime Tortel, a staff member of  
the United Nations, filed an application in which he requested the  
Tribunal:

- "1.To order the promotion of Applicant to the D-2 level  
effective 1 March 1987 and his appointment to the first  
appropriate D-2 vacancy.
- 2.To fix a compensation of one year base salary to be paid to  
Applicant as compensation for the injury sustained by him  
should the Secretary-General decide not to implement the  
order to promote him retroactively as in para. 1 above.
- 3.In any case to order the immediate promotion of Applicant  
to the D-2 level in any appropriate office of the  
Secretariat in New York."

Whereas the Respondent filed his answer on 1 December 1988;

Whereas the Applicant filed written observations on 23  
December 1988;

Whereas the facts in the case are as follows:

The Applicant, a French national, entered the service of the United Nations on 17 August 1966 as a Translator-Trainee in the French Section under a probationary appointment at the P-2 level. On 1 August 1968 he was granted a permanent appointment at the P-3 level as a Translator. On 16 April 1969 he was transferred to the Office of Personnel as a Personal Assistant to the Assistant Secretary-General. On 1 January 1970 he was reassigned to Staff Services as an Administrative Officer, a title subsequently changed to Personnel Officer, and on 1 April 1971 he was promoted to the P-4 level. On 7 February 1973 the Applicant became Administrative Officer in charge of Placement and on 1 April 1976 he was promoted to the P-5 level. On 15 July 1976 he was reassigned to the Training and Examinations Service as Deputy Chief and on 1 April 1982 he was promoted to the D-1 level as Chief of that Service. On 1 September 1984 he was reassigned as Deputy Director of the Division of Recruitment and Chief of the Professional Recruitment Service.

On 9 February 1987 Mr. Annan, newly appointed Assistant Secretary-General for Personnel Services, addressed to the Secretary-General, through Mr. Ahtisaari, newly appointed Under-Secretary-General for Administration and Management, a memorandum in which he recommended the reassignment of a number of Directors. The proposed changes had "emerged as a result of global review of all staff, serving at the D-2 and D-1 levels and/or discussions with appropriate senior officials, including members of your Cabinet. Besides the critical factors of competence, merit and seniority, we considered the need for a more appropriate geographical and gender balance at the senior levels in the Secretariat." Among other changes, Mr. Radovic (USA), Director of the Division of Recruitment, and Mr. Sadry (Iran), Director of the Division of Personnel Administration, were to be reassigned outside of the Office of Personnel Services and replaced, respectively, by Ms. Angela King (Jamaica) and Mr. Tanaka (Japan), who were serving at the D-1 level outside of the Office of Personnel Services and would be promoted to the D-2 level upon reassignment to these posts. On 12 February 1987 the Applicant, who the day before had had a discussion with Mr. Annan

in the course of which he had been informed of the impending changes, wrote a "Note for the file", copied to Mr. Annan, in which he described the conversation and stated inter alia that in August 1984 the previous Under-Secretary-General for Administration and Management, Mr. Ruedas, when offering the post of Deputy Director of the Division of Recruitment to the Applicant, had promised him that upon Mr. Radovic's departure he should have priority for appointment to the post of Director of that Division. On the same day Mr. Radovic wrote a note "to whom it may concern" in which he referred to a similar "commitment". On 13 February 1987, in a memorandum addressed to all Heads of Departments and Offices, Mr. Ahtisaari announced the reassignments which had been recommended to the Secretary-General on 9 February 1987. On 26 February 1987 Mr. Annan sent to the Applicant a memorandum in which he offered his own version of the discussion of 11 February 1987.

On 6 March 1987 the Applicant requested the Secretary-General to review the decision to appoint two new Directors from outside the Office of Personnel Services to head the Division of Recruitment and the Division of Personnel Administration. On 23 April 1987 Mr. Annan advised the Applicant that the Secretary-General had decided to maintain the decision not to appoint him to either of the two posts.

On 22 May 1987 the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 15 August 1988. The Board's conclusions and recommendations read as follows:

"Conclusions and Recommendations

16. The Panel concluded that there was no contractual or promissory commitment obliging the respondent to appoint the appellant to the position of Director, Division of Recruitment or to any other post of Director.
17. The Panel also concluded that the appellant was not entitled to compensation by reason of the fact that the posts of Director, Division of Recruitment and Director, Division of Personnel Administration had not been advertised and that he had not been considered for those posts as the Panel found that justice had been done to the appellant's right to be considered for those posts.
18. In view of the above, the Panel makes no recommendation in favour of the appeal."

On 17 August 1988 Mr. Ahtisaari informed the Applicant that the Secretary-General had decided to maintain the contested decision and to take no further action on the case. On 4 November 1988 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. There was a commitment on the part of Mr. Ruedas that the Applicant would replace Mr. Radovic upon his departure. The fact that such a commitment was made to the Applicant has not been challenged by the Respondent.

2. The Applicant was not considered for the post. As implicitly admitted by Mr. Annan, the recommendation of Mr. Annan to the Secretary-General was based on a determination to give preference to staff on the basis of nationality and gender. This approach was in direct conflict with the provisions of staff regulations 4.2 and 4.3 and with the official policy of the Secretary-General.

3. The vacancy for the post was not advertised, in violation of existing and binding rules.

4. The theory that administrators at the director's level are political appointees not subject to the criteria governing the selection of staff at lower levels is erroneous.

5. The failure to fulfil the commitment given to the Applicant and his exclusion from consideration for the post of Director were motivated by prejudice. The existence of prejudice and discrimination against the Applicant is confirmed by his reassignment on 1 December 1987 to the post of Deputy Director for Special Projects which was clearly created for the sole purpose of accelerating his removal from his functions.

Whereas the Respondent's principal contentions are:

1. An administrative instruction provides that promotions to the Director level are reserved to the Secretary-General. Staff are, therefore, on notice that any "assurances" given by officials below the level of the Secretary-General cannot amount to a binding

obligation on the Secretary-General to promote such staff.

2. The Applicant's assessment of his own superior abilities is irrelevant to a determination of whether his rights have been violated by the failure of the Secretary-General to promote him.

3. The Staff Regulations permit consideration to be given to geographic distribution and the General Assembly has required that consideration be given to geographic distribution and that consideration also be given to the advancement of women.

4. Positions at the Director level may be filled internally without advertising.

5. Mere allegation of prejudice is not a sufficient basis to attack a discretionary decision of the Secretary-General.

The Tribunal, having deliberated from 12 to 23 May 1989, now pronounces the following judgement:

I. On several occasions in the past, the Tribunal has dealt with the question of validity or otherwise of different kinds of commitments made to staff members by the Administration about advancement, assignment and the like. In the circumstances, the jurisprudence of the Tribunal in these matters has been established, and, as recently as 1988, in Warner, Judgement No. 418, paras. XVII-XIX, the Tribunal discussed the subject again. Considerations contained therein are largely applicable in the present case (in particular see paragraphs IX and X below). The Joint Appeals Board in its report adverse to the Applicant quoted from Gomez (Judgement No. 342 (1985)), and relied on the Tribunal's observation, in paragraph V, that:

"as a general matter, the United Nations does not enter into legally binding contractual arrangements for the career development of its staff. Indeed, the Organization should not give the appearance, as it did not in this case, of entering into even a quasi-contractual undertaking with a particular staff member for, say, training or other particular treatment. To do so might give grounds for implying a tendency to invidious discrimination as to those staff members who are not made the

subject of special arrangements."

In Gomez, however, the Tribunal went on to say:

"Of course, the Administration must behave responsibly in its administrative arrangements and refrain from expressing hopes or intentions it has no expectation of fulfilling; ..."

II. In the present case, the evidence is compelling that an arrangement or commitment, however undesirable it might prove to be in terms of personnel policy, as indicated in Gomez, was entered into with the Applicant. The Respondent does not seriously dispute the Applicant's factual claims with regard to his having been induced in 1984 by the then Under-Secretary-General for Administration and Management along with the then Assistant Secretary-General for Personnel Services to accept the position of Chief of the Professional Recruitment Service with the newly created functional title of Deputy Director of the Division of Recruitment. The statements of the Applicant corroborated by Mr. Radovic, the then Director of the Division of Recruitment, who was present at the relevant conversation between the Applicant and the senior officers - the Under-Secretary-General and the Assistant Secretary-General -, clearly indicate that a commitment was made to the Applicant.

III. Mr. Radovic, in his certificate of 12 February 1987, refers to the commitment that the Applicant would succeed Mr. Radovic as Director when Mr. Radovic left the post. The Applicant described the same commitment in slightly different terms - as a promise of priority in replacing Mr. Radovic when he left the post. The Joint Appeals Board attached significance to this slight difference, and the Respondent has argued that the difference is decisive. The Tribunal finds that, in the circumstances of this case, the difference in description is not material inasmuch as "priority" must mean that the Applicant would have preference over other candidates unless, of course, it was clearly established that he did not meet as well as his competitors the criteria established and applied by the Respondent in making the selection. Undoubtedly, criteria such as

merit, seniority, experience, integrity, geographical distribution, etc., are expected to be taken into account in making the selection.

While, under the Charter and the appropriate resolutions of the General Assembly, the Respondent is under an obligation to consider various yardsticks, the Tribunal holds that he should also have been fully conscious of the commitment held out to the Applicant.

IV. Even assuming arguendo that as part of the "global" review the Applicant was, as the Joint Appeals Board found, given some consideration before the decision was made to fill the post of Division Director, there is no evidence of the manner in which this was accomplished, or of exactly what was done. For this reason, the Tribunal is unable to determine what occurred in the "global" review, and is therefore unable to decide that it gave fair consideration to all those involved. Similarly, no proof was presented of any review of the Applicant's personnel file or of any discussion with him. In sum, therefore, there is no indication whatever that the Applicant was given "priority" consideration. In the normal course of events, the Applicant could reasonably have understood the promise of "priority" received by him as being a firm undertaking that he would succeed Mr. Radovic subject, of course, to satisfactory performance as Deputy Director, and, in fact, he had an excellent performance rating with respect to the 1984-87 period.

V. The Respondent contends that it was unreasonable for the Applicant to have relied on verbal commitments and that in any event the Under-Secretary-General had no authority to speak for the Secretary-General on this matter. In this connection, the Respondent relies upon ST/AI/234. That administrative instruction, itself, was issued by the Under-Secretary-General for Administration and Management. It describes various delegations of authority by the Secretary-General to persons below the level of Under-Secretaries-General but makes no delegation at all to the Under-Secretary-General.

VI. The Tribunal views the omission of a delegation in ST/AI/234 to

the Under-Secretary-General not as a denial of any delegation to him, but as an indication that, except as understood between him and the Secretary-General, the Under-Secretary-General had extremely broad authority with regard to personnel matters. If, as between the Secretary-General and the Under-Secretary-General, the understanding was that the latter had no authority whatever to make commitments regarding promotion to the D-2 level, it was the responsibility of the Under-Secretary-General to act in accordance with that understanding. It must be presumed that there was no such understanding when the Under-Secretary-General acted as he did in this case. This is consistent with the fact that ST/AI/234 was promulgated by the Under-Secretary-General and also with the advice received by the Tribunal from the Secretary-General in another case in response to an inquiry by the Tribunal. See Noll-Wagenfeld, Judgement No. 410 (1988), para. XXIII.

VII. What is perhaps more important is that the Under-Secretary-General for Administration and Management holds so senior a position in the Organization as to give the sort of commitment he made in this case a measure of finality. It was entirely reasonable for the Applicant to have thought that the Under-Secretary-General spoke with authority when he induced the Applicant to take the position that was being offered. In these circumstances, the Tribunal cannot conclude that the Applicant has to bear the consequences of any lack of actual authority on the part of the Under-Secretary-General. The Tribunal also notes in this context that the Applicant relied on the strength of the undertaking he received by accepting the position offered in 1984, and subsequently refrained from pursuing other opportunities for advancement which might be available to him for the next three years.

VIII. If the Tribunal were to hold that staff members act at their peril when they rely on the kind of commitment made here at the level of Under-Secretary-General for Administration and Management with respect to a matter within his area of responsibility, such a conclusion could lead to much irresponsible conduct and confusion.

The Tribunal recalls its remarks in Gomez that "... the Administration must behave responsibly in its administrative arrangements and refrain from expressing hopes or intentions it has no expectation of fulfilling ...". That there was a change of senior officials in the Administration between 1984 and 1987 has hardly any application or consequence; the commitment to the Applicant continued to subsist. A staff member is normally entitled to expect the Organization to honour commitments on which the staff member has relied in good faith.

IX. As the Tribunal stated in Warner, Judgement No. 418, para. XXI, "the decision to appoint or promote a staff member to whom commitments have been made is the sole prerogative of the Administration. If this decision is not taken, however, the attendant circumstances may well entail the responsibility of the Administration." The Tribunal finds that the circumstances here do entail the responsibility of the Administration even if the Applicant could not eventually and after priority consideration be promoted. Promotion and disposition of members of the staff are within the Respondent's discretion taking into account all the appropriate factors.

X. The Tribunal finds that since no serious attempts were made to observe the obligation of priority consideration towards the Applicant, he is entitled to compensation. However, as in Warner, the Tribunal cannot ask the Respondent to displace the present incumbent in the Division Director position or require that the Applicant be promoted to the D-2 level. The Applicant should, however, without being adversely affected by his having appealed in this case, be considered fully and fairly along with other candidates for vacancies in D-2 positions for which he is found to be qualified and in which he is interested.

XI. In view of the foregoing, there is no need for the Tribunal to judge on the Applicant's contentions or the Joint Appeals Board's determinations regarding the advertising of vacancy notices, or

whether prejudicial or extraneous considerations were involved in the Applicant's non-selection. The Tribunal expresses no views with regard to these matters in this case. The Tribunal notes with dismay, in this and at least one other case before it, allegations that staff who present legitimate grievances for redress tend to be removed from present posts or reassigned to newly created inconsequential, if not redundant, positions. Since in the present case this allegation was not taken up before the Joint Appeals Board, the Tribunal will not deal further with it. The Tribunal would nonetheless be concerned about seemingly coincidental reassignments of staff members who avail themselves of the appeals process to "penalty box" types of jobs.

XII. The compensation to be awarded by the Tribunal is in consideration of the Tribunal's conclusion that the Applicant was not given the treatment that he had been promised, but not on the basis that he would have been automatically promoted to the D-2 level. The Tribunal awards to the Applicant compensation equivalent to three months of his net base salary for the injury he suffered as a result of the Administration's failure to fulfil its obligations.

XIII. For the foregoing reasons, the Tribunal decides that:

1. The Respondent shall pay to the Applicant compensation equivalent to three months of his net base salary for the injury sustained, and that
2. All other pleas of the Applicant are rejected.

(Signatures)

Roger PINTO  
First Vice-President, presiding

Jerome ACKERMAN  
Second Vice-President

Samar SEN  
Member

Geneva, 23 May 1989

Jean HARDY  
Acting Executive Secretary