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ADMINISTRATIVE TRIBUNAL

Judgement No. 451

Case No. 467: YOUNG

Against: The Secretary-General  
of the International  
Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Jerome Ackerman, Vice-President, presiding;  
Mr. Ahmed Osman; Mr. Francisco A. Forteza;

Whereas at the request of Lynda Ann Young, a staff member of the International Maritime Organization, hereinafter called IMO, the President of the Tribunal, with the agreement of the Respondent, successively extended to 15 February and 15 May 1988 the time-limit for the filing of an application to the Tribunal;

Whereas, on 9 May 1988, the Applicant filed an application in which she requested the Tribunal:

- "-To rule that the administrative decision of 17 August 1987, reducing the Applicant's step level at P.1 from step VI to step IV, was not in conformity with the Staff Regulations and Staff Rules of IMO;
- To rescind the contested administrative decision and to order the Respondent to restore the situation of the Applicant in all respects to what it would have been if the contested administrative decision had not been taken."

Whereas the Respondent filed his answer on 5 January 1989;

Whereas the Applicant filed written observations on 23 February 1989;

Whereas the facts in the case are as follows:

The Applicant entered the service of IMO on 29 January 1973 under a fixed-term appointment at grade G.7, step I due to expire on 30 April 1973. On 1 May 1973 she received a probationary appointment which was converted into a regular appointment on 1 January 1974. She was promoted to G.8, step I on 1 January 1976 and reached step VIII in that grade on 1 April 1983. On 1 December 1983 the Applicant was promoted to P.1, step III. She reached step VI in that grade on 1 October 1986.

On 17 August 1987 the Director of the Administrative Division sent her the following memorandum:

"Subject: Corrections to step in grade and increment date

1 As Mr. Rohmee mentioned to you before his departure, I am writing now to confirm that an error was made in the Personnel Section when you were promoted from G.8 to P.1. The attached Personnel Action Form corrects this error with effect from the August 1987 payroll. You will note that the error has resulted in an overpayment. However, the Secretary-General has, taking into account all the circumstances, decided that this overpayment should not be recovered from you.

2 The reason for the correction has been explained to you orally, but this note sets out the position in writing. The basis for the error is in the interpretation by Personnel Section of staff rule 103.5 which states as follows:

'Staff members receiving promotions shall be paid in accordance with the following provisions:

(a)during the first year following promotion a staff member in continuous service shall receive in salary the amount of one full step in the level to which he has been promoted more than he would have received without promotion, except where promotion to the lowest step of the level yields a greater amount. The step rate and date of salary increment in the higher salary level shall be adjusted to achieve this end;

(b)when, on promotion, a staff member becomes ineligible for payment of non-resident's allowance and/or language allowance which he has formerly been receiving, the amount he has been receiving for

these allowances shall be added to his salary before promotion to establish his step rate and date of next salary increment under (a) above.'

- 3 As early as 1963 it was, however, recognized in the Consultative Committee on Administrative Questions (CCAQ - which co-ordinates personnel policy matters within the United Nations system) that a particular problem could arise in the interpretation of this rule with respect to promotions from the General Service to the Professional category, in that the basis for establishing the remuneration of the two categories is different, and the term 'salary' is not defined. In the case of the General Service category, the effect of cost of living movements is taken into account in the net salary payable; in the case of the Professional category, it is taken into account outside the net salary through the post adjustment system. It was noted that an element of double counting would arise in the case of promotions from the General Service to the Professional category, unless the comparison was made between net salary in the General Service category and net salary plus post adjustment in the Professional category. Accordingly, CCAQ agreed that the correct method of adjustment was to take the net take-home pay before promotion in the General Service category (i.e. net salary plus non-resident's allowance plus language allowance, if any), and so arrange matters that the net salary in the Professional grade plus the appropriate single rate of post adjustment for that step should exceed the previous take-home pay by an amount of one increment (or whatever the staff rule of the organization specified).
- 4 Pursuant to the agreement between IMO and the United Nations, it has been the long-standing practice of IMO, in interpreting its Staff Rules, that we should follow agreements reached in CCAQ, unless the Organization has either formally dissented in CCAQ at the time the decision was reached, or unless specific authority for a different interpretation has been sought from the Secretary-General.
- 5 When you were promoted, Personnel Section, contrary to the procedure agreed in CCAQ, made the calculations relating to your new step in grade and increment by comparing only the net salary in the Professional category with that in the General Service grade. As has been explained above, such a procedure can give rise to very serious distortions in the result except where there is no overlap between the two net salaries (as had, quite by chance, been the case in all previous promotions from General Service to Professional category in IMO), or where post adjustment happens to be nil. A result of the error could be that the promoted staff member would be placed on an excessively high step in grade

at duty stations where there is a plus post adjustment, while a staff member in the same situation would be placed on a much lower step in grade at duty stations with negative post adjustment. Moreover, as the level of post adjustment can fluctuate markedly over a short time, a situation could arise where staff members promoted from an identical grade in the General Service category but at different times would have to be placed on widely different steps in grade in the Professional category. Indeed, in your case, it was just this result which brought the matter to the attention of Finance Section (who spotted the error), when they received incorrect forms for the staff members who had been recently promoted from the General Service to the Professional category and had been placed on steps much higher than had applied when you and other staff members were promoted in similar circumstances.

- 6 In concluding, may I, on behalf of the Administrative Division, express my apologies for the error, and for any inconvenience which you may have suffered. I wish to assure you that in deciding on the action to be taken to rectify the error, every endeavour has been made to balance on the one hand the necessity for IMO to fulfil its obligations as a participant Organization in the Common System, and on the other hand the desire to keep to the minimum the loss which may be suffered by the individual staff members who have been affected by the error."

A Personnel Action Form reducing the Applicant's step at P.1 from step VI to step IV as from 1 August 1987 and changing the increment date accordingly was attached to the memorandum.

In a memorandum of 21 August 1987 addressed to the Secretary-General, the Applicant requested a review of the administrative decision to reduce her step in grade P.1 from VI to IV. Her memorandum read in part:

"...

I appreciate the logic of the explanation set out in paragraph 3 of the attached memorandum [from the Director of the Administrative Division] and note from paragraph 4 that it has been the practice of IMO, in interpreting its Staff Rules, to follow agreements reached in CCAQ. However, I would draw attention to the fact that the method agreed by CCAQ for establishing the step level in the case of promotions from the General Service to the Professional category is not defined in IMO's Staff Rules and therefore

was unknown to me. In 1983, at the time of my promotion from G.8 step VIII to P.1 step III, I was not given any explanation of the method by which my new salary and increment date had been calculated and I accepted my Personnel Action form in good faith.

As I may expect to have many more years of service within the UN family the current decision will have a continuing effect throughout these years. I therefore consider that the decision to correct my step in grade, after four years, is unjust and that it is an important matter of principle that the original commitment should be honoured by IMO.

I am grateful to you for taking the decision not to ask me to make financial redress for the alleged overpayment but nevertheless I should be glad if you would give further consideration to this question and authorize a review of the decision to reduce my salary from 1 August 1987."

On 17 September 1987 the Director of the Administrative Division informed the Applicant that the Secretary-General saw no reason to alter his original decision. On 2 October 1987 the Applicant asked the Secretary-General to agree to direct submission of an application to the Tribunal. Her request was granted on 16 October 1987.

On 1 December 1987 the Applicant was promoted to P.2, step I.

On 9 May 1988 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Staff rule 103.5 makes no distinction between the different types of promotion and therefore applies identically to all promotions.

2. "Salary" for Professional staff is defined in the Staff Regulations as "net salary" and there is therefore no justification for making it mean anything else in the applicable staff rule.

3. The practice of IMO in the past has been to use the method of calculation now repudiated by the Administration; the administrative action that has been taken amounts to more than just the correction of a mathematical error and in fact represents a change of policy for which there is no warrant in the Staff Regulations and Staff Rules.

4. The practice agreed by CCAQ cannot be relied on by the Administration of IMO since it has not been incorporated in the

Staff Regulations and Staff Rules, is not an interpretation of them (since it is incompatible with them) and, in any case, has not been announced to the staff who had no means of knowing about it. The change of practice to avoid the double counting of the cost-of-living element of remuneration could quite properly have been introduced, but only after the appropriate amendments to the Staff Regulations and Staff Rules. No such amendments were made to accommodate the desired change in policy and therefore the existing Staff Regulations and Staff Rules must be applied.

Whereas the Respondent's principal contentions are:

1. The Secretary-General had the discretion to interpret the relevant rule so as to ensure the correct technical method of calculation.
2. The Staff Regulations and Rules must be interpreted in a manner which ensures fair and consistent treatment of staff. If there is any doubt, the overall purpose and intent of the rule must be relied on. The definition of "salary" for purposes of the Staff Regulations cannot be held also to lead to a binding definition in the Staff Rules where such a definition would clearly lead to an undermining of the intent of any rule.
3. In rule 103.5, the clear intent is to provide to a staff member the value of one step at the higher grade when he or she is promoted. The method determined by CCAQ for establishing that value for General Service to Professional promotions has been worked out to ensure the greatest possible similarity to promotions within a category, and requires the wider definition of "salary".
4. A rule must be interpreted in a manner to allow for as much consistency and fairness over time as possible.

The Tribunal, having deliberated from 31 May to 5 June 1989, now pronounces the following judgement:

I. The Applicant, who held a General Service category post at G.8 level, step VIII, was promoted on 1 December 1983 to the Professional category at P.1, step III. On 17 August 1987 (by which time the Applicant was at grade P.1, step VI) the Respondent issued an administrative decision to reduce the Applicant's step from step VI to step IV. The reason given for this reduction was the discovery, according to the Respondent, of an error made by the Personnel Section when the Applicant was promoted from G.8 to P.1 on 1 December 1983.

The Applicant requests the Tribunal to rule that the above-mentioned decision of 17 August 1987 was not in conformity with the Staff Regulations and Rules of IMO and should be rescinded.

II. The Tribunal notes that the two parties agree on a number of points:

(a) That the basic applicable law in this case is Staff Rule 103.5 stating salary policy in promotions;

(b) That this rule covers promotions in the Organization within both the Professional category and the General Service category, and also from the General Service to the Professional category.

The Tribunal also notes that in the case of promotion from the General Service to the Professional category the two parties agree that the relevant salary to be taken into account for the staff member in the General Service category is the net salary, but that when it comes to determining the comparable salary in the Professional category, they hold different views.

III. Thus, according to the Applicant, the net salary of the staff member in the General Service category should be compared to the net salary in the Professional category. The Applicant, in this respect, relies on a literal reading of "salary" for professional staff as defined in IMO Staff Regulations, Annex 1, paragraph 3 (b).



In this Annex to the Regulations, the definition of "salary" for professional staff is "net salary" except "where otherwise provided in these Regulations". Since the Staff Regulations nowhere provide for a different meaning of "salary" in the case of promotion from the General Service to the Professional category and since there is nothing in staff rule 103.5 or elsewhere in the Staff Rules which supplements that meaning with any additional element, it seems obvious that this is indeed the meaning of "salary" for purposes of promotion from the General Service to the Professional category.

Therefore, the Applicant argues that any different definition of "salary" in the context of promotion from the General Service to the Professional category, as the Respondent suggests, would not be in conformity with Staff Regulations, Annex 1, paragraph 3 (b).

IV. To counter that interpretation of the term "salary" for the purpose of implementing staff rule 103.5, the Respondent relies on two main arguments.

In his first argument, the Respondent invokes an agreement reached by CCAQ at its twenty-fourth session (March 1963) according to which, in the case of promotion from the General Service to the Professional category, the comparison of the net salary in the General Service category should be made with the net salary plus post adjustment in the Professional category. With regard to this argument, the Tribunal recalls its Judgement No. 254, Fernández-López (1980), paragraph VI, stating that:

"the Tribunal ... deems it sufficient to observe that a rule adopted through interorganizational consultations - if it goes beyond a simple interpretation of existing regulations and rules - cannot be considered as governing the relations between the Administration and the staff of an organization. To be applicable, such a rule must be incorporated in the individual terms of appointment or in rules duly established by the international organization concerned."

V. Taking into consideration the above-quoted paragraph of Judgement No. 254, the Tribunal notes the following:

(a) The agreement of CCAQ goes beyond a simple interpretation of existing regulations and rules;

(b) It was never incorporated in the IMO Staff Regulations and Rules;

(c) It was not announced to the staff members.

For these reasons, the Tribunal cannot sustain the Respondent's argument in this regard.

VI. Next, the Respondent invokes the power of the Secretary-General to interpret the relevant rules in such a way as to:

(a) Ensure fair consistency of treatment of staff;

(b) Respect the overall purpose and intent of the rule.

While not questioning the authority of the Secretary-General to interpret relevant texts reasonably, that is not to say that the plain meaning of a text may be changed by the exercise of such power. Indeed, the Tribunal finds no need for interpretation when a text is clear. That is the case here. In reality, the difficulty encountered by the Respondent in applying the relevant text does not arise from uncertainty about its meaning. The fact is that, despite the existence of the CCAQ agreement since March 1963, the Respondent for years did not follow it, but instead followed its Staff Regulations literally in applying staff rule 103.5. The reason for this, as the Respondent explains, was that cost of living changes in London for many years were negligible, and therefore their impact on General Service salaries and Professional post adjustment was slight. Thus inclusion of post adjustment in the methodology would have made no difference in the selection of the appropriate step in the Professional category.

VII. Because this situation changed, the inclusion of post adjustment in the salary of the Professional category in the context of a promotion from the General Service to the Professional category was thought desirable by the Respondent, and this is understandable.

Otherwise, the placement in the Professional category is distorted

by what is, in effect, an apples-oranges comparison. But to achieve this end required not merely an exercise by the Secretary-General of his power to interpret a text. The Tribunal considers that what is involved here is an effort to amend, in the form of interpretation, an existing clear text to accommodate new circumstances. The Tribunal is not empowered to legislate. If the Organization wishes to make a change to avoid what it considers an absurd result, it must initiate appropriate legislative action which might, for example, be comparable to that taken by ILO with respect to the same situation. Therefore, the Respondent's argument in this regard must also fail.

VIII. The Tribunal recognizes that, in other contexts, the Administration has not interpreted "salary" in strict accordance with IMO Staff Regulations, Annex 1, paragraph 3 (b), and that it did so in order to achieve sensible results just as it seeks to do in this case. For obvious reasons, those interpretations were not contested, and the Tribunal does not consider that they have the effect of enlarging the Respondent's authority in the present case.

The Tribunal can only reiterate that it is not its function, in the face of a clear legislative text, to effect an amendment by interpreting the text to reach a result other than that commanded by the text.

IX. The Tribunal considers it especially significant that, although IMO had ample opportunity to do so, it elected not to make any legislative change comparable to that made by ILO in response to the CCAQ recommendation as to the methodology for promotions from the General Service to the Professional category.

X. The Tribunal concludes that the contested administrative decision does not conform to the Staff Regulations.

For the foregoing reasons, the Tribunal:

(1) Rescinds the administrative decision of 17 August 1987

to reduce the Applicant's step from step VI to step IV;

(2) Orders the Respondent to restore the situation of the Applicant in all respects to what it would have been if the contested decision had not been taken.

(Signatures)

Jerome ACKERMAN  
Vice-President, presiding

Ahmed OSMAN  
Member

Francisco A. FORTEZA  
Member

Geneva, 5 June 1989

Jean HARDY  
Acting Executive Secretary