
ADMINISTRATIVE TRIBUNAL

Judgement No. 452

Case No. 446: ACEBES

Against: The Secretary-General
of the United Nations

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

Whereas, on 14 October 1987, Francisco Acebes del Rio, a
staff member of the United Nations, filed an application which did
not fulfil all the formal requirements of article 7 of the Rules of
the Tribunal;

Whereas the Applicant, after making the necessary correc-
tions, again filed the application on 26 October 1987;

Whereas the pleas of the application read in part as follows:

"The Applicant respectfully requests the Tribunal:

A. (i) To request the Respondent to document the authority to
partially extend to the international Field Service category
the mandate of the General Assembly 33/143 of 20 December
1978 that requested the Secretary-General under section I,
paragraph 1(g) that 'Movement of staff from the [local]
General Service category to the Professional category should
be ... conducted exclusively through competitive methods of
selection from General Service staff ...'.

(ii) To request the Respondent to document the extension and
dates of consultations with the Field Service staff
representatives on a matter that the Secretary-General had
pointed out to be 'not only of intense interest to Member
States but of deep concern to the staff and to himself as
Secretary-General' and had expressed his intention 'to
consult with the representatives of the staff, in accordance

with staff regulations 8.1 and 8.2' as indicated in para 10 of ST/IC/79/5 dated 22 January 1979 The Secretary-General's intention was reiterated in cable MBP-1920-8 of 23 August 1978 ... sent on his behalf by Mr. Webb, then Director of Personnel Administration, that states under para AAA 'Secretary-General confirms opinion he expressed at meeting Geneva 4 July 1978 that all concerned should have equal opportunity to have their views taken into account before decisions affecting Secretariat as a whole are made'.

(iii) To request the Respondent to document the legal authority to apply Personal Transitional Allowances in lieu of promotion to the right grade and step to international staff.

(iv) To request the Respondent to document with names and grades her contention ... that the formula applied in conversions from the FS to the P category until 1978 resulted in inequities, and that the new formula guarantees the existing take-home pay.

(v) To request the respondent to provide evidence of the number of promotions enforced until 1980 which were not based in monetary terms or were granted at the same salary level

...

B. (i) To rescind the administrative decision of 22 March 1982 ... and its revision of 2 December 1982 ... whereby the Applicant is promoted in the same level.

(ii) To rescind the administrative decision of 6 May 1983 ... to declare erroneous the statements made by Mr. Jonah as ASG [Assistant Secretary-General] for Personnel Services on 25 November 1980 ... that 'conversion of a Field Service Officer to the Professional category is not considered a promotion' and that 'the level in the Professional category is determined entirely on the basis of the net base salary in the Field Service category plus the fixed portion of the monthly mission subsistence allowance'.

C. (i) To request the Respondent to retroactively promote the Applicant to the P-3 level in the manner recommended by the Joint Appeals Board.

(ii) To request the Respondent to reconsider, in consultation with the duly elected Field Service staff representatives, the appropriateness of including the FS-5 level in particular, and the FS category as a whole, in the

competitive examinations as recommended by the Joint Appeals Board.

- D. Should the Secretary-General decide to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1, of the Statute the Applicant requests compensation by an amount equal to the financial losses suffered by the Applicant, estimated in US\$17,000 in his appeal to the Secretary-General dated 15 June 1983
- E. The Applicant respectfully asks the Tribunal to adopt the recommendation of the Joint Appeals Board and recommend the award of three months net compensation for moral, economic and career damage caused to the Applicant due to the almost three years delay of the Respondent's reply"

Whereas the Tribunal rendered its Judgement No. 399 (Walsh) on 9 November 1987;

Whereas, on 8 April, 2 June, 28 June, 18 July, 25 August and 10 October 1988, there was an exchange of correspondence between the Applicant and the Respondent, communicated to the Tribunal, on how the Respondent proposed to apply Judgement No. 399 to the Applicant's case;

Whereas the Respondent filed his answer on 10 November 1988;

Whereas, on 10 January 1989, the Applicant filed written observations in which he requested the Tribunal:

- "i) To request Respondent to rescind all administrative actions whereby Applicant is 'promoted' in the same level.
- ii) To request Respondent to promote Applicant to P-3 effective 1 March 1982 in strict compliance with Judgement No. 399, Walsh, paragraph XVII b).
- iii) To request Respondent, in order to partially redress the wrong done, to promote Applicant to P-4 effective 1 April 1985 as Applicant would have been promoted, had Respondent replied within the time prescribed by the Staff Rules, on the basis of incumbency of a post classified at that level effective September 1984 and outstanding performance at the said post.
- iv) To request Respondent to reconsider, in consultation with the duly elected Field Service staff bodies, the appropriateness of including the FS-5 level in particular, and the Field

Service category as a whole, in the competitive examinations.

- v) To adopt the recommendation of the Joint Appeals Board and request the Respondent to award compensation for moral, economic and career damage caused to Applicant by Respondent's inordinate delays in replying to the Joint Appeals Board and to Applicant."

Whereas, on 21 February 1989, the President of the Tribunal put a question to the Respondent under article 10 of the Rules of the Tribunal and, on 27 February 1989, the Respondent provided an answer thereto;

Whereas, on 9 March 1989, the President of the Tribunal put a question to the Applicant under article 10 of the Rules of the Tribunal and, on 13 March 1989, the Applicant provided an answer thereto;

Whereas, on 15 March 1989, the Respondent submitted comments on the answer provided by the Applicant;

Whereas, the Applicant submitted additional observations on 20 April 1989;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on 9 May 1960 as a Field Service Officer. He served at various duty stations until his assignment to the Economic Commission for Latin America (ECLA) on 1 February 1975. On 1 January 1980 the Applicant, while remaining on the Headquarters payroll as a Field Service Officer, was temporarily assigned to the professional post of Chief of the Documents and Publications Reproduction and Distribution Section. This post was opened for the 1981 competitive examination for promotion to the Professional category. The Applicant, who by then had attained the FS-5 level, step XI, passed the examination and was, on 1 March 1982, promoted from the Field Service category to the Professional category and transferred to ECLA against the post he encumbered.

A computation of the Applicant's level and step and his

remuneration upon promotion to the Professional category was made by a Personnel Officer at Headquarters on 22 March 1982 and sent to ECLA on 31 March 1982. The methodology followed for such computation was similar to that described in the statement of facts of Judgement No. 399 (Walsh). The Applicant's last base salary in the Field Service category (FS-5, step XI) was compared to the nearest base salary at the Professional level (P-2, step VIII) to determine the Applicant's level and step of conversion. Next, his total net remuneration (i.e. net base salary plus monthly mission allowance plus language allowance) at the FS-5, step XI level was computed. Then the total net remuneration (i.e. net base salary plus post adjustment plus assignment allowance) at the P-2, step VIII level was computed. The Applicant's total net remuneration at the FS-5, step XI exceeded his total net remuneration at P-2, step VIII and this difference (\$2,032.13) was considered to be the amount of a personal transitional allowance. Finally, in view of staff rule 103.9(i), one step was added to the Applicant's salary after conversion and his level was established at P-2, step IX. The Applicant having objected to that computation, a revised computation was made on 2 December 1982 which included the language allowance as part of the Field Service base salary and resulted in the Applicant's promotion to P-2, step X with a personal transitional allowance of \$1,055.37.

After an exchange of correspondence between the Applicant and the Office of Personnel Services, the Applicant on 15 June 1983 addressed a request for administrative review to the Secretary-General. On 1 September 1983, having received no reply, he lodged an appeal with the Joint Appeals Board. The Board adopted its report on 10 February 1987. The Board's recommendations read as follows:

"1. In order to give true effect to staff rule 103.9, the Panel recommends that the level at which the appellant was placed in the Professional category be adjusted with retroactive effect from 1 March 1982. This may be done either by converting the Appellant from FS-5 to P-2 and then

promoting him to the P-3 level, or by adopting the Jonah [Assistant Secretary-General]/Nottidge [Chief, Rules and Procedures Section, OPS] formula for conversion from FS-5, namely that the level in the Professional category be 'determined entirely on the basis of the net [base] salary in the Field Service category plus the fixed portion of the mission subsistence allowance.'

2. The Board recommends the award of three months net compensation for damages caused to the Appellant due to the unjustified delay of the Respondent's reply. This is based on Administrative Tribunal Judgement 327, Ridler which states, 'that successive delays caused by the Respondent have been abusive and bordered on denying due process to the Applicant. The Tribunal states, once again, that the Respondent is bound as a matter of law to respect the Institution of the Joint Appeals Board.' (at paragraph IX).

3. Since there is no legislative mandate for including the Field Service category in the competitive examination system and no detailed justification given for the administrative decision to do so, the Administration should reconsider, in consultation with the duly elected representatives of the Field Service category, the appropriateness of continuing with this policy. Moreover, the Administration should develop and widely publicize, in consultation with Field Service representatives, a consistent and fair policy for conversion of Field Service staff to the Professional category to avoid the plethora of claims and disputes that have arisen with regard to this procedure."

On 29 July 1987 the Assistant Secretary-General for Human Resources Management informed the Applicant that:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the contested decision concerning your promotion from FS-5 to P-2 with a Personal Transitional Allowance. The Secretary-General's decision is based on his conclusion that your promotion was in accordance with the personnel policy announced to the staff in ST/SGB/173, ST/AI/268 and ST/AI/279, paragraph 17, and consistent with the methodology in force for computation of level and step upon promotion from Field Service to the Professional category. The Secretary-General has also decided to reject your claim for compensation for delay on the basis that the delay in the respondent's reply cannot be regarded as having caused any loss to you.

It should be noted that there is presently a case before the

Administrative Tribunal (Walsh) that raises issues similar to your case. The Administration undertakes to review its decision in your case as soon as the Tribunal has delivered its Judgement in Walsh, and undertakes to advise you of the results of that review."

On 14 October 1987 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The inclusion of the Field Service category in the competitive examinations has no legal basis and was not subject of consultations with Field Service staff representatives as requested by the Secretary-General.

2. There are no legal grounds for the establishment of personal transitional allowances for the international category of Field Service.

3. The conversion formula enforced in 1977-78 lacked research, was based in inconclusive facts, was not consulted with Field Service staff representatives, aggravated the inconsistencies by introducing an unlawful allowance which varies according to the duty station and will cause the Applicant an estimated loss of US\$17,000 up to the end of his active service, and needs the discretionary authority of the Secretary-General to be implemented.

4. Contrary to other successful participants in the competitive examination for promotion, the Applicant has not been promoted but simply transferred from one international category to another to his financial and seniority detriment.

Whereas the Respondent's principal contentions are:

1. The rules governing promotion from General Service and other categories are established in duly promulgated Administrative Instructions which bind the Applicant. As the Applicant is seeking the benefit of a promotion as a result of the 1981 competitive examination, which was organized pursuant to administrative instruction ST/AI/279, he can hardly, at the same time, question the

legal basis for the Instruction. The Secretary-General had acted, insofar as the General Service category is concerned, in compliance with General Assembly resolution 33/143. He clearly had the authority, as chief administrative officer of the Organization under Article 97 of the Charter, to extend this examination procedure to related categories. This decision was incorporated into instructions duly issued pursuant to the provisions set out in chapter VIII of the Staff Regulations and Rules for consultation with the staff representative organs.

2. The rules governing the competitive examination provide that Field Service staff at the FS-5 level will be promoted to the P-2 level of the Professional category. Consequently, the Applicant has no right to promotion to the P-3 level.

The Tribunal, having deliberated from 31 May to 6 June 1989, now pronounces the following judgement:

I. This case presents a situation quite similar to that in Walsh, Judgement No. 399 (1987). As in Walsh, the Applicant here was a member of the Field Service staff who was promoted to the Professional category following his success in a competitive examination pursuant to the provisions of ST/AI/279 promulgated by the Secretary-General in his implementation of General Assembly resolution 33/143 of 20 December 1978. Originally the methodology for determining the Applicant's emoluments upon his promotion to P-2 was the same as that employed in the Walsh case including a personal transitional allowance. After issuance of the Walsh judgement, the calculation methodology was modified by the Administration in an effort to cure the deficiency found in it by the Tribunal in Walsh. That is, the difference between the invariable element of the monthly mission allowance and the assignment allowance was added to the Applicant's net base salary and language allowance for the purpose of determining his Professional category level and step.

II. Although the nearest net base salary figure in the Professional category would literally have been at the P-3 level, for the purpose of applying ST/AI/279 the Respondent determined it to be the highest step in the P-2 level because ST/AI/279 did not provide for promotion to a level higher than P-2. To the Applicant's FS-5 salary recalculated in accordance with Walsh the Administration added the amount of one full step between the two highest steps of the P-2 level plus the proportionate amount of a step increase in the FS-5 level to which the Applicant had become entitled. The difference between this total (\$25,923.33) and the base salary at the P-2, step XI level (\$24,663.24) was \$1,260.09. This was established as the amount of a personal transitional allowance to be added to the P-2, step XI salary. In the Respondent's view, this met the requirements of staff rule 103.9. The net effect was that the Applicant received \$2,127.37 more in total emoluments following promotion to the highest step of the P-2 level than he had been receiving at the FS-5, step XI level.

III. Unlike the situation in Walsh, since the Applicant here after promotion found himself at the highest step of the P-2 level he was not faced with the problem of future step increases being lost because of their being absorbed by the personal transitional allowance. He was simply not eligible for further step increases until he was promoted to a level higher than P-2. That promotion did not, in fact, occur until 1 April 1985, approximately three years after his promotion to P-2, and his emoluments remained the same during that period. The Tribunal notes that had the Applicant remained in the Field Service category at FS-5 for two additional years, his step increases for the first and second years would have been \$385 per year. Had he been promoted to FS-6 from FS-5, step XI, at the end of two years his salary would have been approximately the same, around \$25,200, as was used by the Administration in calculating his personal transitional allowance. However, by reason of his promotion to the Professional category

effective in 1982, he received the additional amount two years earlier.

IV. Because the Applicant found himself at the highest step of the P-2 level following his promotion, he asked the Tribunal in this case to deal, inter alia, with his request for promotion to the P-3 rather than the P-2 level as the reward for his success in the competitive examination, a question which there was no need to address in Walsh.

V. In addition, the Applicant seeks rescission of the administrative actions involving his "promotion" to P-2. The Applicant at an early stage in the proceeding took the position that he would have been better off had he remained in the Field Service category. In view of what has been said above, the Tribunal has difficulty understanding this contention even assuming that the Applicant's accumulated seniority in the FS-5 category (which was lost upon his promotion to the Professional category) had resulted in a prompt promotion to FS-6. The Tribunal also has difficulty understanding how after seven years the Applicant could now meaningfully be returned to the Field Service category and his career since 1982 reconstructed.

VI. As the Tribunal sees it, the pivotal question in this case is that involving the Applicant's claim for promotion to P-3 instead of P-2 as of 1 March 1982, as well as a related question regarding the propriety of the personal transitional allowance. Before dealing with these questions, however, it is appropriate to discuss other contentions raised by the Applicant.

VII. First, the Applicant asserts - and the Joint Appeals Board in its report agreed - that nothing in the General Assembly resolution providing for promotion to the Professional category through the competitive examination process dealt with the Field Service staff

and that inclusion of the Field Service staff through the FS-5 level was a matter decided by the Secretary-General. Because of this and because the Applicant asserts that an Assistant Secretary-General recognized on 27 November 1979 that FS-5 and P-2 grades were equivalent, the Applicant argues that, as applied to the FS-5 grade, the competitive examination procedure could not result in a promotion, and that the Secretary-General therefore acted improperly in extending the competitive examination procedure to the FS-5 grade. On this theory, the equivalence between FS-5 and P-2 means that no promotion can be involved as a result of the competitive examination if movement from FS-5 is limited to P-2. But, in this case, the Applicant received greater compensation and received it earlier by reason of his promotion than the compensation he would have received had he remained in the Field Service category - even with a promotion to FS-6.

VIII. Moreover, the Applicant argues - and this also appears to have been concurred in by the Joint Appeals Board - that the Field Service category cannot be considered a category related to the General Service category. Hence, according to the Applicant, the Secretary-General was not acting within his authority when he promulgated ST/AI/279, at least in so far as its application to the FS-5 category is concerned.

IX. One difficulty with these contentions is that the Applicant must be taken to have read ST/AI/279 and to have been aware that it provided for promotion only to the P-1 and P-2 levels. Yet he elected to avail himself of the opportunity for promotion under ST/AI/279 when he applied and was successful in the competitive examination for the position he then encumbered with full knowledge that the position had been reserved by the Central Examination Board as one open to a General Service or Field Service aspirant through the competitive examination procedure. The Tribunal does not consider it appropriate for a staff member to seek to avail himself

or herself of the benefits of a promotion procedure such as that provided in ST/AI/279 and, having been successful, then to challenge the authority of the Secretary-General to have promulgated the procedure in the first place. To be sure, the Applicant did not anticipate that the ultimate outcome of successfully utilizing the competitive examination procedure might not be to his liking, but that alone is not a sufficient basis for the Tribunal to entertain his attack on the Secretary-General's authority.

X. Apart from this, the Tribunal does not agree that movement from FS-5 to P-2 cannot be viewed as a promotion. Because the opportunities in the Professional category and the potential for advancement there are broader in scope than in the Field Service, a transfer to the Professional category may reasonably be viewed by the Respondent as a promotion. Moreover, the Tribunal finds that it was not unreasonable or beyond the discretionary authority of the Respondent for him to have included the Field Service category in the competitive examination procedure, as he did, subject of course to compliance with other applicable Staff Regulations and Rules.

XI. It is also asserted by the Applicant and essentially confirmed by the Joint Appeals Board that there was no evidence before the Board that before ST/AI/279 was promulgated, there was consultation with Field Service staff representatives regarding inclusion of the Field Service staff in the competitive examination process as provided in staff rule 108.1. The Tribunal inquired as to this and received satisfactory evidence from the Respondent that, in fact, the consultation provided for under the staff rule in effect at the time occurred.

XII. The Tribunal turns now to the central issues in the case. The Applicant contends that, on the basis of the Tribunal's decision in Walsh and staff rule 103.9, he should have been promoted to P-3, step V rather than P-2, step XI. This, because the nearest base

salary in the Professional category to his Field Service salary (recalculated in accordance with Walsh) was P-3, step IV, not P-2, step XI. The Applicant's contention lacks merit. To begin with, ST/AI/279, under which his promotion occurred, makes no provision for promotion to a level above P-2 and the Tribunal is not empowered to change the unambiguous terms of that administrative instruction.

Secondly, the language of the Tribunal in the Walsh decision which is quoted by the Applicant in support of his contention must be read in the context of Walsh. When so read, that language does not support the Applicant's contention.

XIII. In Walsh, the Tribunal was dealing with a situation in which the Field Service salary when translated into the Professional category was not at the highest step of the P-2 category. Hence, when the Tribunal interpreted ST/AI/279 and staff rule 103.9 in that case, it was doing so only in the context of the P-2 level.

Moreover, unlike the situation precipitating the Walsh case, the Administration's final methodology in arriving at the Applicant's salary here did not result in compensation lower than the amount he was receiving in the Field Service category. As shown above, the Applicant's compensation was increased, and this would be true even if the Applicant had not received an assignment allowance. In short, the defect found by the Tribunal in Walsh was corrected in the Applicant's situation. The Applicant here received more than he was earning in the Field Service category and he is therefore unable to contend that what occurred could not reasonably be viewed as a promotion.

XIV. Although the Tribunal understands the result sought to be reached by the Joint Appeals Board, for the reasons set forth above the Tribunal finds no basis for directing or requesting the Applicant's conversion to P-2 and promotion to P-3, much less to P-4 effective 1 April 1985, as requested by the Applicant. Paragraph 17 of ST/AI/279, as previously noted, provides for promotion - not

conversion - and also provides that successful candidates at the FS-5 level will be recommended for promotion to P-2. It may well be that inadequate account was taken of the potential effect on FS-5 officers at the highest steps of that level who were successful in the competitive examination, but the solution for this is legislative in nature, and not a matter within the competence of the Tribunal.

XV. Notwithstanding the Applicant's contentions, the Tribunal does not find the personal transitional allowance in this case to have the defect noted in Walsh. The reason is that in this case it was not the personal transitional allowance that adversely affected the Applicant's step increases in P-2. It was the fact that the Applicant was at the highest step of the P-2 level. Hence, the comments of the Tribunal in paragraph XIII of Walsh have no application here and, although paragraph 17 of ST/AI/279 does not specifically provide for the use of a personal transitional allowance in the case of promotions from the Field Service category, the Tribunal, without prejudging any other case, does not find its use in this case to have been unreasonable.

XVI. The Applicant has made several requests that documentation or evidence be furnished by the Respondent. With respect to each, the Applicant explains the point or points sought to be shown or established in support of the Applicant's contentions. In view of the Tribunal's disposition of the various contentions and the Tribunal's decision in the Walsh case, no useful purpose would be served by granting any of these requests and they are accordingly denied.

XVII. The Joint Appeals Board found, and the Tribunal concurs, that the Respondent without justification delayed his reply to the Applicant's appeal for three years. The Board also recommended the award of compensation for damages thereby caused to the Applicant,

citing the Tribunal's decision in Ridler, Judgement No. 327 (1984).

The Tribunal agrees in principle with the Board, but finds that the appropriate compensation to the Applicant for injury due to inordinate delay is \$1,000.

XVIII. Although for the reasons explained above the Tribunal is unable to sustain the Applicant's contentions, the Administration may wish to consider, in cases such as this, providing sufficient information in advance regarding details as to remuneration in order to assist staff members in making their choice.

XIX. For the foregoing reasons, the Tribunal:

(1) Awards compensation to the Applicant in the amount of \$1,000 for injury sustained as a result of procedural delay;

(2) Rejects all other pleas.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Ahmed OSMAN
Member

Francisco A. FORTEZA
Member

Geneva, 6 June 1989

Jean HARDY
Acting Executive Secretary