

ADMINISTRATIVE TRIBUNAL

Judgement No. 483

Case No. 518: KLECKNER

Against: The Secretary-General
of the United Nations

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

Whereas, at the request of Simone Marie Kleckner, a former
staff member of the United Nations, the President of the Tribunal,
with the agreement of the Respondent, extended to 15 August 1989,
the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 August 1989, the Applicant filed an
application, the pleas of which read as follows:

"II. PLEAS

10. With regard to its competence and procedure, the Applicant
respectfully requests the Tribunal:

- (a) To find that it is competent to hear and pass
judgement upon the present application under
article 2 of its Statute;
- (b) To consider the present application receivable under
article 7 of its Statute;
- (c) To decide to hold oral proceedings of the Tribunal on
the present application in accordance with
article 8 of its Statute and chapter IV of its
Rules.

11. On the merits, the Applicant requests the Tribunal:

- (a) To rescind the decision of the Secretary-General
rejecting the unanimous recommendation of the Joint
Appeals Board to remand the Applicant's case to the
Appointment and Promotion Board for rectification;

- (b) To find that the Joint Appeals Board was correct as a matter of law in finding that the advice of the Assistant Secretary-General for Human Resources Management¹, which resulted in the Applicant's exclusion from the 1986 Promotion Register was discriminatory and unfair and was therefore ultra vires;
- (c) To find that by introducing an extraneous element into the rules governing promotion which was not the subject of proper consultation nor communicated to the staff, the Respondent violated the Staff Rules and Regulations as well as the commitment made to the Applicant regarding her promotion;
- (d) To find that as a matter of equity the Secretary-General was obliged to honor the commitment made to the Applicant which induced her to accept the functions of a higher level post in the expectation of being promoted in 1986;
- (e) To order the Respondent to respect his obligation to the application[sic] by re-submitting her recommendation for promotion to the Appointment and Promotion Board with a view to implementing any resulting promotion from 1 October 1986;
- (f) To order the Respondent to recalculate the pension benefits of the Applicant on the basis of the salary she would have received had she been promoted to the P-5 level effective 1 October 1986;
- (g) To fix, pursuant to article 9, paragraph 1 of the Statute, the amount of compensation to be paid in lieu of specific performance to [US]\$15,000, calculated as follows:
 - (i) Loss of salary and allowances, representing the difference between salary and allowances at P-4, step VII and P-5, step I, for six months;
 - (ii) Loss of pension entitlements reflecting a reduction in the Applicant's future pension (based on average life expectancy of 82 years and all applicable cost-of-living adjustments);
 - (iii) Compensatory damages for the moral and emotional injuries suffered as a result of loss of promotion."

Whereas the Respondent filed his answer on 29<December 1989;
Whereas the Applicant filed written observations on

¹ Successor OPS.

2 February 1990;

Whereas, on 9 March 1990, the Applicant submitted a request for reimbursement of costs and other expenses incurred by her counsel in preparing the appeal; and on 29 March 1990, the Respondent submitted his comments thereon;

Whereas, on 19 March 1990, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 25 April 1990, the Respondent informed the Tribunal that he had decided to promote the Applicant "retroactively to the P-5 level from 1 October 1986 and as a consequence [the Applicant would] be paid the appropriate salary and allowances and her pension entitlement [would] be recalculated;"

Whereas, on 26 April 1990, the Tribunal asked the Applicant whether she maintained her appeal and on 27 April 1990 and 3 May 1990, the Applicant informed the Tribunal that:

"[she] maintain[ed] her application insofar as it concerns the compensation due the Applicant for the moral and emotional injury sustained as a result of the unconscionable delay of almost four years in obtaining her rights as well as the request for reimbursement of legal and administrative expenses incurred in pursuing her appeal, now totalling over [US]\$3000.00."

Whereas the facts in the case are as follows:

Simone Marie Kleckner entered the service of the United Nations on 27 January 1975, as a Librarian at the P-3, step I level, in charge of the Legal Branch of the Dag Hammarskjold Library, at the Department of Conference Services (DCS). Her post was part of the Library's General Reference Section. She served initially on a series of fixed-term appointments until 16 February 1977, when she was offered a probationary appointment. On 1 November 1977, her appointment became permanent and on 1 April 1982, she was promoted to the P-4 level.

On 20 March 1986, the Secretary-General announced to the staff in ST/SGB/217 that the Organization was confronting a financial crisis and that he intended to implement immediately a

series of economy measures in order to redress the situation. One of such measures was the suspension of the 1986 promotion review process for six months.

On 9 April 1986, the Applicant applied for the job of Chief of Reference and Bibliography Section, a post at the P-5 level and was selected. On 1 July 1986, the Applicant was appointed Officer-in-Charge of the Reference and Bibliography Section and on 1 October 1986, she was officially designated Chief of the Section.

On 15 September 1986, the Assistant Secretary-General for Personnel Services had announced to the staff in ST/IC/86/48 the procedures to be followed in connection with the 1986 promotion review. The Appointment and Promotion Board (APB) was finally constituted in December 1986 and commenced its review of staff eligible for promotion in February 1987. At a meeting held on 12 March 1987, members of the APB raised a question concerning promotion of staff who had already separated from the service of the Organization. On 13 March 1987, the Assistant Secretary-General for Human Resources Management (OHRM) advised the Chairman of the Board that "one of the essential conditions for promotion is that the staff member be in the active service of the Organization at the time of implementation of the promotion by the issuance of a P-5 action". He emphasized that "a promotion is precluded, therefore, in situations where the staff member is deceased, separated from the Organization or on special leave without pay at this particular moment".

The Applicant, who had been recommended for promotion to the P-5 level by her Department, reached the mandatory retirement age on 31 March 1987 and separated from the service of the Organization on that date. A request of 22 September 1986, by her Department, for the exceptional extension of her services beyond retirement age had been turned down - on account of the financial crisis confronting the Organization.

On 17 June 1987, the Assistant Secretary-General, OHRM, announced to the staff in ST/IC/87/35, the 1986 Senior Officer (P-5)

Promotion Register. The Register contained the names of staff that the Secretary-General, having considered the recommendations of the APB, had agreed to include in the Register. In accordance with the package of economy measures designed to redress the financial crisis set forth in ST/SGB/217, promotions from all Registers were implemented retroactive to 1 October 1986 and not 1 April 1986.

According to a statement by the Representative of the Respondent before the Joint Appeals Board (JAB), when the 1986 APB was considering promotions to the P-5 level, it noted that "Mrs. Kleckner had been recommended for promotion in 1986 by her Department (DCS)" and "was well aware of the fact that she was performing P-5 level functions". Accordingly, "on this basis [the APB] recommended the inclusion of [Mrs. Kleckner's] name in the Register". However, since the Board completed its promotion review after the date of Mrs. Kleckner's separation from service, "her name and the names of five other staff members, no longer in service but initially included [in the Register], were deleted from the 1986 Promotion Register when the latter were issued [by the Assistant Secretary-General, OHRM, later in 1987]".

The Applicant's name was not included in the Senior Officer (P-5) Promotion Register and on 3 July 1987, she instituted a recourse procedure, requesting the Secretary-General to include her name therein. She argued essentially, that her name would have been included in the Register, had she not been considered to be among the category of staff who had been separated from service at the time promotions were implemented, in accordance with the advice given to the APB by the Assistant Secretary-General, OHRM. The Applicant was unsuccessful in her recourse.

On 23 April 1988, the Applicant requested the Secretary-General to review the administrative decision not to include her name in the 1986 Senior Officer (P-5) Promotion Register. Having received no reply from the Secretary-General, on 10 June 1988, the Applicant lodged an appeal with the JAB. The Board adopted its report on 21 December 1988. Its conclusions and

recommendation read as follows:

"Conclusions and recommendation

26. The Panel concludes that the advice of the Assistant Secretary-General of 13 March 1987, that a promotion is precluded in situations where the staff member is not in active service at the time of the implementation of the promotion by the issuance of the P-5 action, was not a legitimate exercise of the authority delegated to him by the Secretary-General since it violated the principles of equity and fairness, and that it should therefore not have been applied by the APB.
27. Consequently, the Panel recommends that the appellant's case be remanded to the APB for rectification."

On 3 March 1989, the Under-Secretary-General for Administration and 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 his discretionary decision not to promote you to the P-5 level following your separation from service upon your retirement on 31 March 1987. The Secretary-General has noted that you had the benefit of a full and fair review of your case by the appropriate appointment and promotion bodies in the 1986 annual promotion review. In this connection, the Tribunal has consistently held that qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy.

Furthermore, in the context of the financial crisis and in accordance with established policy and practice, you were not included in the 1986 Promotion Register since you were already separated from the Organization before completion of the 1986 promotion review.

Notwithstanding the above, the Secretary-General has decided, taking into account the entire circumstances of your case, to grant you a special post allowance to the P-5 level for a three month period from 1 January 1987 to 31 March 1987 in accordance with the relevant staff rules and to take no further action on the matter.

...".

On 14 August 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was entitled to a fair and adequate consideration for promotion.

2. The memorandum of 13 March 1987, by the Assistant Secretary-General, OHRM, to the Chairman of the APB clearly constituted an undue interference with the independent functioning of the APB, which was prejudicial to the Applicant.

3. It would be contrary to every notion of fairness and equity to deny the Applicant her promotion because of unforeseen delays occasioned by the Respondent.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's established policy not to grant valedictory promotions is a valid exercise of administrative discretion in the interests of the Organization and is consistent with the Staff Regulations which envisage retirement at age 60.

2. The Applicant's rights were not violated by suspension of the 1986 promotion review for six months because of the financial crisis.

The Tribunal, having deliberated from 26 April to 25 May 1990, now pronounces the following judgement:

I. The Tribunal has been informed by the Respondent, at the commencement of its deliberations, that on 17 April 1990, the Assistant Secretary-General for Human Resources Management (OHRM) informed the Applicant that he had decided to promote her retroactively to the P-5 level, from 1 October 1986 until the date of her retirement.

In reply to a question put by the Tribunal, the Applicant informed the Tribunal that she maintained her application "insofar

as it concerns the compensation due [to her] for the moral and emotional injury sustained as a result of the unconscionable delay of almost four years in obtaining her rights as well as the request for reimbursement of legal and administrative expenses incurred in pursuing her appeal, now totalling over [US]\$3000."

II. Accordingly, the questions now presented to the Tribunal are:

(a) Whether, as the Applicant claims, she is entitled to compensation "for the moral and emotional injury sustained as a result of the unconscionable delay of almost four years in obtaining her rights ...";

(b) Whether the Applicant's Counsel is entitled to "reimbursement of legal and administrative expenses incurred in pursuing [the Applicant's] appeal ...".

III. The Applicant, having reached the mandatory age of separation from service, retired from the Organization effective 31 March 1987.

Although the Applicant had been recommended for a promotion to the P-5 level by the Department of Conference Services, in connection with the 1986 promotion review exercise, the Appointment and Promotion Board (APB) did not consider the Department's recommendation until 1987, on account of the financial crisis of the Organization. As an economy measure designed to redress this crisis, promotions from the 1986 Registers were implemented with retroactive effect from 1 October 1986, for pay purposes and with retroactive effect from 1 April 1986, for seniority purposes. The Applicant's name was not included in the Senior Officer (P-5) Promotion Register. The Applicant contends that this was solely because of a communication of 13 March 1987, from the Assistant Secretary-General, OHRM, to the APB, to the effect that "one of the essential conditions for promotion [is] that the staff member be in active service of the Organization at the time of the implementation of the promotion by the issuance of a P.5 action form".

IV. In the light of the decision of 17 April 1990, by the Assistant Secretary-General, OHRM, the Tribunal need not determine whether the 13 March 1987 statement conveyed by the Assistant Secretary-General, OHRM, to the APB correctly stated a rule applicable to promotions, nor whether the interpretation given by the Respondent as to its effect on the Applicant was correct.

V. The Tribunal must determine what loss, if any, the Applicant suffered by the Respondent's delay of four years in reviewing the Applicant's case, review which led him to decide on 17 April 1990, to promote her retroactively to the P-5 level from 1 October 1986.

VI. The Tribunal notes that in its report dated 21 December 1988, the Joint Appeals Board (JAB) recommended that the Applicant's case "be remanded to the APB for rectification" in light of its finding that the statement conveyed to the APB by the Assistant Secretary-General, OHRM, on 13 March 1987 "was not a legitimate exercise of the authority delegated to him by the Secretary-General since it violated the principles of equity and fairness, and ... should therefore not have been applied by the APB". The Tribunal further notes that the Respondent did not accept the JAB's recommendation, but decided, on 3 March 1989, to grant the Applicant "a special post allowance to the P-5 level for a three-month period from 1 January 1987 ... and to take no further action on the matter."

VII. The Tribunal notes that the Applicant had an excellent service record; her performance evaluation reports indicate that she was an outstanding staff member and she was highly regarded by her supervisors. The Tribunal finds that the Respondent's delay in admitting that the Applicant would have been entitled to a promotion to the P-5 level, had the financial crisis of the Organization not prompted the ruling conveyed by the Assistant Secretary-General, OHRM, to the APB in March 1987, was an inordinately long delay and

caused the Applicant unnecessary injury. Therefore the Administration's responsibility is entailed. The Applicant has suffered a wrong for which she is entitled to compensation. The Tribunal assesses the amount of compensation due to the Applicant at US\$2,000. This compensation should be paid in addition to the three months of special post allowance to the P-5 level, payable to her in accordance with the Secretary-General's decision of 3 March 1989 on the JAB's recommendation.

VIII. According to Counsel for the Applicant, the amount of legal and other administrative expenses incurred in pursuing the appeal is over US\$3,000. The Respondent has contested Counsel for the Applicant's request for legal costs on the ground that Counsel for the Applicant served on the Panel of Counsel when he prepared and submitted the application and was therefore not entitled to any remuneration.

IX. In this connection, the Tribunal reiterates its holding in Judgement No. 237, Powell, paragraph XXIX, (1979) that:

"As regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December 1950 that in view of the simplicity of its proceedings [as laid down in its Rules] the Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal".

In addition, the Tribunal recalls that, as in Janitschek, Judgement No. 449 (1989), the request for costs has been made in this case "without amending the Applicant's pleas and cannot be properly introduced by inclusion in the Applicant's written submissions".

The Tribunal concurs with the Respondent, that as Counsel for

the Applicant served on the Panel of Counsel when he agreed to represent her, he is not entitled to reimbursement of his legal expenses. In accordance with ST/AI/163/Rev.1 on Assistance and Representation by Counsel in Disciplinary and Appeal Cases, the Organization provides staff with legal assistance free of charge. Accordingly, the Tribunal holds that Counsel for the Applicant has no right to charge for legal assistance. Consequently, the Tribunal rejects the Applicant's claim in this regard.

X. In the light of the foregoing, the Tribunal orders the Respondent to pay to the Applicant compensation in the amount of US\$2,000.

XI. All other pleas are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Francisco A. FORTEZA
Member

Geneva, 25 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary