

— ADMINISTRATIVE TRIBUNAL

Judgement No. 506

Case No. 535: BHANDARI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Jerome Ackerman, Vice-President,
presiding; Mr. Ioan Voicu; Mr. Luis de Posadas Montero;

Whereas at the request of Reena Bhandari, a staff member
of the United Nations, the President of the Tribunal, with the
agreement of the Respondent, extended to 8 February 1990, the
time-limit for the filing of an application to the Tribunal;

Whereas, on 2 February 1990, the Applicant filed an
application, containing the following pleas:

"The appellant respectfully requests the Administrative Tribunal
to:

- (a) Determine that her entry level should be corrected to the P-3 level, rather than the P-2 level that was given to her, with effect from the date of her initial appointment, i.e. 17 September 1985.
- (b) Compensate her for denial of promotion prospects from the P-3 to the P-4 level after the two-year qualifying period considered for women staff members.

- (c) Recommend her for appointment to the next available P-4 post within the Department and to recommend her promotion to the P-4 level thereafter under the Vacancy Management Scheme.

- (d) Compensate her for the loss of remuneration, negative impact on career prospects within the service, and mental anguish."

Whereas the Respondent filed his answer on 24 May 1990;
Whereas the Applicant filed written observations on
31 July 1990;

Whereas, on 1 February 1991, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

Reena Bhandari entered the service of the United Nations on 19 September 1983. She was initially offered a short-term appointment at the P-3 level, under the 300 Series of the Staff Rules, for the duration of the General Assembly. The Applicant served thereafter on a series of special service agreements from January 1984 to September 1985.

The General Assembly, at its 32nd session, had approved the establishment of a P-3 post at the Department of Public Information (DPI) for the 1978-1979 Budget Biennium in order to recruit an additional Radio Officer "with a knowledge of Hindi and special experience in current radio practice in [Asia]".

On 12 April 1984, the Administration issued a Vacancy Announcement to advertise a post of Radio Producer in the Radio and Visual Services Division of DPI. The announcement stated that although the functions of the post were classified at the P-3 level, the post was funded at the P-2 level and appointment would be made at that level. The qualifications required for the post were described as follows: "Advanced university degree in journalism. Two years' professional radio experience, ... Candidates with first level university degree and at least four years of exceptionally relevant professional experience may be considered. Languages: fluency in Hindi and English".

The Applicant applied for the post and was selected. On 5 September 1985, she was offered a two-year fixed-term appointment as Associate Radio Producer at the P-2, Step VI level. In accepting the offer on 9 September 1985, she stated: "I hereby accept this offer ... with the attached appeal ...". The appeal was contained in a letter dated 9 September 1985, to the Recruitment Officer, requesting that her entry level be retroactively corrected to P-3. On 26 September 1985, the Applicant signed a Letter of Appointment for a fixed term of two years at the P-2, Step VI level, without attaching any conditions.

On 8 November 1985, the Applicant reiterated her request for correction of her entry level in a letter to the then Deputy Director and Chief, Division of Recruitment, Professional Recruitment Service, Office of Personnel Services (OPS) on the ground that she had originally been recruited by the UN at the P-3 level and that another staff member had been recruited for an "identical post", in the same unit, at the P-3 level, resulting in unequal treatment between herself and the incumbent of the other post.

In a reply dated 27 November 1985, the Deputy Director, Division of Recruitment, Professional Recruitment Service, OPS, rejected her request, essentially on the grounds that the Vacancy Announcement had clearly indicated that the post would be funded at the P-2 level. He noted that at least five other posts in the Radio Service of the Radio and Visual Services Division had been filled in similar circumstances. In addition, in order to qualify for a P-3 level appointment, a Master's degree and six years of full-time relevant, progressive and diversified professional experience or a Bachelor's degree and eight years of the same experience were required. The offer made to the Applicant on 5 September 1985, had granted her the highest step

possible under the then current guidelines.

On 27 May 1986, the Chief, Radio Service, DPI, supported the Applicant's request for correction of her entry level to P-3 and proposed vacant alternative P-3 posts with which to fund the Applicant's upgrading. The Director of the Radio and Visual Services Division endorsed his request.

In a letter dated 15 September 1986, the Applicant reiterated her request for correction of her entry level to the then Assistant Secretary- General, OPS. On 20 January 1987, the Assistant Secretary-General, OPS, informed the Applicant that it was not possible to correct the original offer of appointment at the P-2, Step VI level. He noted, however, that, as he understood the Applicant had been "performing outstandingly at the P-3 level", OPS would give its "full support" to her case should DPI recommend her for accelerated promotion.

DPI did not recommend the Applicant for an accelerated promotion in connection with the 1986 promotion review. Although the Applicant instituted a recourse procedure, requesting the Appointment and Promotion Committee (APC) to include her name on the Promotion Register, she was unsuccessful in this regard. According to the record of the case, during its review of the Applicant's case, the APC "urged the [Appointment and Promotion] Board to communicate its deep concern regarding this irregular situation and to express its hope that the Office of Human Resources Management¹ [OHRM] could initiate administrative corrective action to redress [Ms. Bhandari's] situation".

In two letters dated 13 April 1988 and 23 June 1988, addressed to the Assistant Secretary-General, OHRM, the Applicant reiterated her requests for correction of her entry level to P-3. On 20 July 1988, the Officer-in-Charge, OHRM, informed the

¹ Successor of OPS.

Applicant that after a further review of her case, OHRM had decided to maintain its original position and therefore no further action was warranted, although DPI might wish to review her case in regard to the 1987 promotion review.

On 25 July 1988, the Applicant requested administrative review of the decision not to correct her entry level from P-2 to P-3. On 2 September 1988, the Assistant Secretary-General, OHRM, informed the Applicant that he maintained his decision on the grounds that the post was funded at the P-2 level, that the qualifications sought for the incumbent were those for recruitment at the P-2 level, that her qualifications on appointment were only at the P-2 level and that she had accepted the offer of appointment at the P-2 level.

On 30 September 1988, the Applicant lodged an appeal with the Joint Appeals Board (JAB) which, according to the record of the case, she later withdrew subject to her counsel's attempt to resolve her case outside the appellate process. As this effort was unsuccessful, she resubmitted her appeal on 16 January 1989.

The Board adopted its report on 5 June 1989. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

53. The Panel decides first to waive time-limits described in staff rule 111.2 on grounds of exceptional circumstances.
54. The Panel concludes that the appellant's short-term appointment under the 300 Series of the Staff Rules gave her no entitlement to subsequent appointment at the P-3 level under the 100 Series.
55. The Panel also concludes that the appellant was performing P-3 functions for which she was fully qualified, and that she was recruited at the P-2 level solely for budgetary reasons because the funding for her post had been improperly channelled (redeployed) to benefit another staff member.
56. The Panel concludes further that since the Organization's

pay system is founded on salary levels linked to areas of responsibility determined through classification, the level of the appellant's functions since the date of recruitment required that she be recruited and paid at the P-3 level.

57. Accordingly, the Panel recommends that the appellant's level of entry at recruitment be corrected retroactively to P-3, Step I, with effect from 17 September 1985.
58. The Panel makes no further recommendation in support of this appeal."

On 8 August 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined the case in the light of the Board's report, had decided to maintain the contested decision. The letter read in part as follows:

"... Correction of entry level is an exceptional procedure normally available within a year of initial recruitment and limited to circumstances not applicable to your case. Vacancy Announcement No. 84-B-DPI-018-NY pursuant to which you accepted employment with the Organization specifically indicated that although the functions of that post were classified at the P-3 level, the post was funded at the P-2 level and appointment would be made at that level. This was so because post UNA-27701-E-P-2-018 was budgeted at that level. As you are aware, it is only the General Assembly, through the Budget, that has the authority to establish the level of a post. Classification actions for Professional and higher posts, until accepted by the General Assembly, are not sufficient for budgetary purposes. In addition, the Secretary-General's discretionary authority to appoint a candidate at a level below that advertised was also indicated in the same Announcement".

On 2 February 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent improperly rejected the Joint Appeals

Board's recommendation and conclusions of 5 June 1989.

2. The Applicant's level of previous employment at the same job should have determined her entering qualifications at the P-3 level.

3. The Respondent has deprived of content the regulation providing for correction of entry level.

4. The Respondent has admitted that the Applicant's post was funded by the General Assembly in its 1978-79 Budget Biennium at the P-3 level.

Whereas the Respondent's principal contention is:

The entry level of the Applicant's appointment was properly determined in accordance with established policies.

The Tribunal, having deliberated from 11 February to 26 February 1991, now pronounces the following judgement:

I. The Applicant requests the Tribunal to determine that her entry level should be corrected to the P-3 level, to compensate her for denial of promotion, to recommend her for appointment to the next available P-4 post and to compensate her for the loss of remuneration and mental anguish inflicted.

II. Of these pleas, the first is fundamental. The remainder of the redress sought is closely linked to the acceptance or not of the Applicant's request to correct her entry level. In fact, the Applicant's claims for compensation for lost promotion prospects and recommendation for a promotion to the P-4 level, are only a consequence of the Applicant having been hired for a P-3 post but paid at the P-2 level.

III. In view of this, the Tribunal addresses itself, first, to

whether the Applicant is entitled to correction of her entry level.

In this regard, there is no dispute that a vacancy announcement was issued for a P-3 post, but with the proviso that the person hired would be recruited and paid at the P-2 level. In addition, the qualifications required in order to be considered for the post were reduced to enable employment of a candidate who would be eligible for recruitment at the P-2 level, but not at the P-3 level. The Applicant, aware of these circumstances, applied for the post and the post was offered to her. She accepted the offer, attaching an appeal to her acceptance and signed her Letter of Appointment a few days later without further reservations. Subsequently, the appeal, in which she requested retroactive correction of her entry level to P-3 was turned down. As a consequence, the Applicant has performed duties at the P-3 level but has been remunerated at the P-2 level.

IV. In the Tribunal's view, there are two decisive issues raised by the application: first, whether any legal requirement was violated by the Administration's action in deciding, for financial reasons, to recruit at the P-2 level for a post that was classified at the P-3 level; second, whether the Applicant's actions constitute acceptance of the offer for recruitment at the P-2 level.

V. With respect to the first issue, the Tribunal is unable to find and has not had its attention drawn to any legal requirement specifically prohibiting the Respondent from recruiting at the P-2 level for a post classified at the P-3 level, when the qualifications for the post are reduced to permit recruitment of a person who does not have P-3 qualifications. By

analogy, administrative instruction ST/AI/277, para. 7 indicates that, in the context of an upward post reclassification, it is permissible for an incumbent to continue to be remunerated on the basis of the incumbent's lower grade even though the level of the post is higher. Accordingly, the Tribunal does not find the Administration's action invalid.

VI. With respect to the second issue, it is clear that the Applicant was in no way deceived or misled regarding the level at which recruitment was being offered to her and it was open to her to decline the offer if she was dissatisfied with it. She chose not to follow that course, but instead purported, at first, to accept the offer with a proviso, in effect challenging it and later signed the Letter of Appointment without any condition. In view of the Tribunal's finding that the recruitment offer was permissible, the Tribunal concludes that the Applicant was not entitled to accept conditionally the offer of employment and it regards that action as ineffective. Her subsequent signature on the Letter of Appointment, without any purported condition, was an effective acceptance of a lawful contract of employment.

VII. In this case, the Applicant asserts that she was qualified for recruitment at the P-3 level and the Joint Appeals Board (JAB) accepted this contention. However, the Tribunal's review persuades it that the JAB erred on this point and that the Applicant's combination of education and work experience did not qualify her for recruitment at the P-3 level. But this matter is of no consequence since it has no effect upon the outcome of this case. The Tribunal, however, observes in this regard that as significant questions of personnel policy and practice may be involved in situations in which a person is recruited for, or fills a post at a level below that at which the post is

classified, the proper authorities should perhaps consider whether this ought to be the subject of definitive rules or limits.

VIII. The Applicant asserts that since her post is classified at the P-3 level, her remuneration must be at the P-3 level in order for it to comply with the principle of equal pay for equal work. The Tribunal finds that this principle has no bearing on this case.

IX. The Applicant has also suggested that her prior employment by the Organization under short-term contracts entitled her to be recruited at the P-3 level for the post in question. The JAB found no merit in this contention and, for the same reason, neither does the Tribunal. In addition, the Applicant's acceptance of her P-2 appointment renders her contention academic. Nor does the Tribunal find any evidence of prejudice against the Applicant associated with the financial considerations underlying the decision of the Administration to recruit at the P-2 level for the Applicant's post. There is nothing indicating that the redeployment of the P-3 post, which had been authorized and budgeted, was unlawfully motivated or otherwise improper. This is a managerial matter within the reasonable discretion of the Respondent.

X. For the above-mentioned reasons, the Tribunal finds that the Applicant is not entitled to correction of her entry level. This finding renders the rest of her pleas groundless. These could only have been entertained if a correction in the Applicant's entry level were proper. As a consequence, the Tribunal finds that the Applicant is not entitled to compensation for denial of promotion or for loss of remuneration as requested

in her pleas.

The Tribunal also finds that it is not within its competence to recommend the Applicant for a promotion to the P-4 level.

XI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Ioan VOICU
Member

Luis de POSADAS MONTERO
Member

New York, 26 February 1991

R. Maria VICIEN-MILBURN
Executive Secretary