ADMINISTRATIVE TRIBUNAL

Judgement No. 560

Case No. 598: CLAXTON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Hubert Thierry;

Whereas, on 29 June 1990, Catherine V. Claxton, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended until 15 May 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 10 May 1991, the Applicant, after making the necessary corrections, again filed an application containing the following pleas:

"II. PLEAS

1. The Applicant respectfully requests the UN Adminis- trative Tribunal

WITH REGARD TO ITS COMPETENCE AND TO PROCEDURE:

(a) to determine that it is competent to hear and pass judgement upon the present application under articles 2 and 7 of the Tribunal's Statute;

(b) to order the Respondent to produce the following documents or information:

(i)a copy of the Fourth Report of the Classification Appeals and Review Committee (CARC) dated 23 March 1987, to verify that such a report exists (...) and to know the reason for the refusal to review;

(ii)a list of all those staff members for whom the time limits of 16 June 1986 for appeals to the CARC were waived, which will show that the time limits were not strictly adhered to;

(iii)Mr. Beissel [Executive Officer, Department of Administration and Management]'s memorandum of 12 June 1989 with his signature (... is a copy of this memorandum without the signature) raising the matter as an inconsistency, to show that at least a request had been made that this case be reviewed as an inconsistency;

(iv)the Classification file of the contested former post to illustrate that no substantive review has been made;

(v)copies of the administrative decisions to promote from the General Service to the Professional category, the staff members listed below, to illustrate that many General Service staff members have been promoted to the Professional category by virtue of the level of the functions performed, irrespective of the date those duties were performed:

...

AND ON THE MERITS:

(a) to find that the Applicant was denied a substantive review of the level of her post under the prevailing appeals proceedings, and as a result has been denied due process;

(b) to find that proper procedures were not followed in response to the Applicant's efforts to have her post properly classified;

(c) to find the Applicant suffered injury to her career and morale as a result;

(d) to find that the post was at the Professional level and should have been classified as such;

(e) to order that implementation of that level be followed according to the guidelines established in ST/IC/86/27, paragraph 14 (...), effective 1 January 1985;

(f) to order payment of compensation in the amount of the difference in pay actually received by the Applicant as compared to that which she would have received had she been promoted to the Professional category under the classification implementation guidelines i.e., to be effective 1 January 1985."

Whereas the Respondent filed his answer on 14 August 1991;

Whereas the Applicant filed written observations on 18 October 1991;

Whereas, on 16 December 1991, the Applicant submitted an additional statement and on 17 January 1992, the Respondent provided comments thereon;

Whereas, on 16 March 1992, the Applicant submitted an additional statement and provided further comments on the Respondent's submission;

Whereas, on 1 April 1992, three staff members of the United Nations filed a request to intervene in the case under article 19 of the Rules of the Tribunal, which the Respondent did not support in a communication dated 24 April 1992;

Whereas, on 14 April 1992, the President of the Group on Equal Rights for Women in the United Nations filed an amicus curiae brief;

Whereas, on 15 April 1992, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 24 April 1992, the Respondent submitted an additional statement;

Whereas, on 11 May 1992, the Applicant submitted an additional document and provided a further statement and on 9 June 1992, the Respondent provided his comments thereon;

Whereas, on 13 May 1992, Counsel for the Interveners commented on the Respondent's position concerning the request for intervention;

Whereas, on 11 and 12 June 1992, the Applicant submitted additional statements and produced further documents;

Whereas, on 16 June 1992, the Respondent submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 4 February 1974. She was initially offered a three-month fixed-term appointment as a Cashier at the G-2, step III level in the Department of Public Information. Her appointment was initially extended for one year, through 3 May 1975 and then for one month, through 3 June 1975, when she separated from the service of the Organization. The Applicant re-entered the service of the Organization on 19 July 1976. She was offered a three-month fixed-term appointment as a Bilingual Clerk at the G-3, step II level at the Office of Personnel Services (OPS). On 19 October 1976, her appointment became probationary and on 1 October 1977, permanent. On 1 April 1979, the Applicant was promoted to the G-4 level as Senior Bilingual Clerk.

The International Civil Service Commission having, in July 1982, approved the establishment of a seven-level grading structure (to replace the old five-level structure) for the General Service category in New York and promulgated job classification standards for the seven levels, all General Service posts in New York were classified under procedures set out in administrative instruction ST/AI/301 of 10 March 1983.

In accordance with the administrative instruction, a description of the post encumbered by the Applicant was prepared for initial classification and submitted to the Classification Service. The Applicant signed the administrative form P-270, certified by the Executive Officer, OPS, on 7 August 1984. The Applicant's post was initially classified at the G-6 level.

On 13 June 1984, the Assistant Secretary-General, OPS, announced to the staff in ST/IC/84/45 the establishment of the

Classification Review Group "to review the overall results of the classification exercise currently being undertaken in respect of posts in the General Service and related categories in New York". On 23 December 1985, the Executive Officer, OPS, informed the Applicant that the Classification Review Group had, in accordance with ST/IC/84/45, classified her post of Recruitment Assistant at the G-7 level.

On 28 April 1986, the Assistant Secretary-General, OPS, informed the staff in ST/IC/86/27 "of the action taken with respect to the classification exercise for posts in the General Service ... categories at United Nations Headquarters and to outline future action, in particular with respect to the implementation of the results of the exercise and the related appeals procedure." According to paragraph 6 of ST/IC/86/27, "Staff members or departments [in New York] wishing to appeal against the results of the classification exercise must submit their appeals ... by 16 June 1986, with the proviso that, in exceptional cases where a staff member is absent from Headquarters before that date, an appeal may be submitted at a correspondingly later date." The New York General Service Classification Appeals and Review Committee (NYGSCARC) was established with effect from 16 May 1986, to hear these appeals.

On 16 October 1986, the Applicant wrote to the Assistant Secretary- General, OPS, requesting review by the Classification Section of the G-7 level classification of her post. She argued that the duties of her post were "substantive in nature" and would be "more appropriately in the Junior Professional, rather than the Senior General Service category." The Applicant attached to her appeal a revised job description. On 31 December 1986, the Applicant again wrote to the Assistant Secretary-General, OPS, explaining the delay in the submission of her appeal. She stated, inter alia, that she had filed her appeal with four months delay because the circumstances in her case were exceptional as: "it was necessary for [her] to clarify perspectives and perceptions of the overall situation with [her] superiors before taking the matter

further."

In a reply dated 7 January 1987, the Assistant Secretary-General, OPS, informed the Applicant that her communication of 16 October 1986 had been referred to the Classification Section, which, in turn had sent it on to NYGSCARC. He concluded: "Replies concerning all appeals will be sent out by the Classification Section in due course."

On 1 May 1987, the Applicant wrote to the Assistant Secretary-General for Human Resources Management (OHRM[1]), asking that, in accordance with ST/IC/86/27/Add.5, the classification of her post be reviewed and that a "substantive review" be conducted "within the context of the intention of this exercise, i.e. to classify posts in a manner compatible with the respective level of functions performed".

In a memorandum dated 18 August 1987, the Assistant Secretary-General, OHRM, advised the Applicant that her request for review of the classification of her post was not receivable, as the classification decision on her post was based on a recommendation by the Classification Review Group and the deadline for appeals against decisions based thereon was 16 June 1986.

In a letter dated 18 September 1987, the Applicant expressed her understanding that her initial appeal was "duly filed and awaiting consideration by [NYGSCARC] on its merits". In a reply dated 14 December 1988, the Assistant Secretary-General, OHRM, advised the Applicant that the prior communications attached to her letter, requesting review of the classification of her post had been "located" and transmitted to NYGSCARC, which "in its fourth report [dated 28 January 1987], declined to review the appeal on the basis that it had been filed four months after 16 June 1986, the date established in information circular ST/IC/86/27 as the date for submission of such appeals." He added: "Submissions after this date were acceptable in cases of staff members who were absent from

[1] Successor of OPS.

Headquarters and could not meet the deadline. You have not suggested such a reason or presented any other one for the delay in submission."

On 13 January 1989, the Applicant asked the Secretary-General to review the administrative decision not to review the classification of her post. On 11 February 1989, the Applicant filed a preliminary statement of appeal with the Joint Appeals Board.

On 8 March 1989, the Assistant Secretary-General, OHRM, informed the Applicant that there was "no basis for the Secretary-General to reverse the decision by the New York General Service Classification Appeals and Review Committee not to review [her] appeal against [her] post classification", essentially on the ground that her appeal had been submitted on 16 October 1986, "four months after the 16 June 1986 deadline established in para. 6 of information circular ST/IC/86/27 for the submission of such appeals."

In a memorandum dated 12 June 1989, the Executive Officer, Department of Administration and Management, asked the Chief, Classification Service, if his office "could clarify if the proportion of functions outlined in [the Applicant's] JD[Job Description] NO3137 similar to those performed by professional officers, justify classification of the post at the professional level." He noted that the Applicant's "case was not included in the review of inconsistencies, despite the recognition to this effect by the Department ..." This "inconsistency review" had been conducted by a Working Group set up by the Assistant Secretary-General, OHRM, pursuant to ST/IC/87/24 of 4 May 1987. Its mandate was to "focus primarily on the managerial and organizational problems that the classification exercise may have created."

The Classification Service, after conducting its review, concluded that the functions of the Applicant's post were not comparable in content to those of the posts cited by the Department as comparators in the review. On 6 November 1989, the Executive

Officer, Department of Administration and Management, informed the Applicant that the Department had been advised by the Classification Service of the results of their review and that there would be "no change in the classified level of [her] job" as a result of the inconsistency review.

On 12 December 1989, the Applicant asked the Secretary-General to review the administrative decision not to change the level of the classification of her post. She argued essentially that, contrary to ST/IC/86/27, she had been denied a substantive review of the classification of her post. In a reply dated 11 January 1990, the Officer-in-Charge, OHRM, advised the Applicant, inter alia, that the mandate of the Working Group established by the Assistant Secretary-General, OHRM, to carry out an overall review of the outcome of the classification exercise was to

"2. ... 'focus primarily on the managerial and organizational problems which the classification exercise may have created'; it was not to be a 'mechanism for reviewing individual cases' for which appeals procedures had already been established.

3. The main area of concern identified by the Working Group was the perception that posts having allegedly the same job content either within the same department or in other departments or offices had been graded differently. Further to the Group's recommendation, the Assistant Secretary-General for Human Resources Management instructed the Classification Section (now Compensation and Classification Service) to (1) verify whether the functions of posts identified as inconsistencies by departments were identical or sufficiently similar to those of the posts cited as comparators to conclude that the posts, had they been reviewed together, would have been classified at the same level; and (2) to determine the correct level of the posts judged comparable in stage one of the review. It was not the purpose of the inconsistency study to determine whether the classification of a post, on its own merits, was correct; this was properly the mandate of the General Service Classification Appeals and Review Committee. Accordingly, if a post was judged not to be comparable to the posts cited as comparators, the functions of the post were not analyzed further to determine whether the grade level was correct.

4. ... This conclusion does not address whether the initial classification decision on the level of your post was correct and, accordingly, cannot be construed as a new administrative decision subject to appeal under staff rule 111.2(a)."

On 28 February 1990, the Applicant lodged an appeal with the Joint Appeals Board. On 30 March 1990, the Presiding Officer of the Joint Appeals Board advised the Applicant that her appeal could not be entertained as "it requests a 'substantive evaluation of the classified level' of that post, which is not within the Board's competence" and also as "it requests the review of a decision that emanates from a joint appeals body established specifically for the purpose of considering classification appeals, i.e. the Classification Appeals and Review Committee."

On 12 November 1990, the Chief of the Administrative Review Unit informed the Applicant that the Secretary-General had "no objection to the direct submission of [her] case to the Tribunal, but only insofar as it relate[d] to NYGSCARC's decision not to consider the substance of [her] appeal because it was not filed within the stated time limits."

On 10 May 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The initial classification of the post in question was erroneous, as there was substantial evidence that the post was at the Junior Professional and not at the Senior General Service level.

2. The Applicant has been repeatedly denied due process as her appeal against the classification of the post in question was never reviewed by any joint appeals body.

3. The Applicant was not responsible for the delayed filing of her initial appeal.

4. The Respondent took almost two years after the submission of the Applicant's appeal before informing her that it was time-barred.

Whereas the Respondent's principal contentions are:

1. The classification of the Applicant's post at the G-7 level was a proper exercise of administrative discretion in accord with the Applicant's terms and conditions of employment.

2. The Applicant's rights were not violated as her appeal against the classification of the post she occupied was time-barred.

The Tribunal, having deliberated from 2 to 30 June 1992, now pronounces the following judgement:

I. The Tribunal, in the first place, examined its competence under article 7.1 of its Statute. The facts relevant to this issue are as follows:

1. The Applicant, on 28 February 1990, filed her statement of appeal to the Joint Appeals Board (JAB), challenging the decisions of the Administration, rejecting her appeal against the classification of her post on the ground that it was time-barred. In her submission to the JAB, the Applicant also challenged the decision by the Compensation and Classification Service that there was no inconsistency in the classification of the Applicant's post, as compared to other allegedly similar posts.

2. Upon receipt of the Applicant's submission, on 30 March 1990, the Presiding Officer of the JAB, on his own authority and, apparently, without consulting the members of the JAB panel which should have been set up to consider the appeal, informed the Applicant that, since her appeal challenged the decisions of the New York General Service Classification Appeals and Review Committee (NYGSCARC) and that "since the Committee functions in parallel with the JAB, its decisions should be appealed directly to the UNAT". The Presiding Officer of the JAB, apart from acting on his own initiative, instead of consulting the Board, overlooked the fact that the Applicant not only challenged the decisions of NYGSCARC,

but was also appealing against the decision of the Working Group created by the Assistant Secretary-General for Human Resources Management (OHRM) for the purpose of focusing "on the managerial and organizational problems that the classification exercise may have created" (the inconsistency review). (Information circular ST/IC/87/24).

3. The Tribunal notes that the two recourses are altogether different.In the first, the Applicant appealed against the refusal by NYGSCARC to consider her appeal against the classification of her post. This appeal had been filed after the expiration of the time-limit fixed for its submission. In the second, the Applicant appealed against the recommendation by the Working Group created to investigate inconsistencies. This group is of a completely different nature from NYGSCARC and, therefore, cannot be considered as being parallel to the JAB. Accordingly, its decisions cannot be appealed directly to the Tribunal, except through the procedure established in article 7.1 of the Tribunal's Statute.

4. Pursuant to the decision by the Presiding Officer of the JAB - a decision tainted by the defects mentioned above - the Applicant sought the authorization of the Secretary-General to appeal directly to the Tribunal. The Secretary-General consented, but, limited his consent to: "The NYGSCARC's decision not to consider the substance of your appeal because it was not filed within the stated time limits." He did not refer to the appeal against the recommendation by the Working Group on inconsistencies which should have been considered by the JAB.

5. In accordance with article 18, paragraph 1 of its Rules, on 5 June 1992, the Tribunal informed the parties that "in the course of its deliberations, the Tribunal has found a defect in procedure that would warrant remanding the case to the Joint Appeals Board, in accordance with article 9, paragraph 2 of the Tribunal's Statute" and asked the Respondent whether he "desires the appeal with respect to the 'inconsistency review' remanded to the Joint

Appeals Board or whether the Respondent wishes the Tribunal to decide that matter."

6. The Tribunal, having received the Respondent's reply on the same date, stating that he "wishes that the matter be decided by the Tribunal" considered that the requirements of article 7.1 of its Statute had been fulfilled.

II. As far as appeal against the administrative decisions that rejected the Applicant's claims regarding reclassification of her post is concerned, the Tribunal concurs with the Respondent's view that both the first appeal and its reiteration were time-barred. The time-limit was fixed by ST/IC/86/27, paragraph 6, at 16 June 1986, and the only exceptions were "exceptional cases where a staff member is absent from Headquarters". The Applicant first submitted her appeal on 16 October 1986, and requested that it be considered on its merits for the reasons set forth in her later letter dated 31 December l986, i.e. that several recourses filed after the deadline had been considered by NYGSCARC and because the delay was due to her need to "clarify perspectives and perceptions of the overall situation with [her] superiors before taking the matter further". The Tribunal had before it the list of appeals for which the deadline of 16 June 1986 was waived and found that paragraph 6 of ST/IC/86/27 was properly applied, the Applicant's situation being completely different from that of staff whose tardiness in filing appeals was waived. No issue of discrimination can, thus, be raised on this account.

As for the need "to clarify perspectives and perceptions" invoked by the Applicant, the Tribunal finds that paragraph 6 of ST/IC/86/27 does not permit the time-limit to be waived on such grounds.

III. The Applicant challenges the results of the inconsistency review on the ground that they were the consequence of procedurally defective actions taken by the Administration and that they were tainted with prejudice, chiefly as a result of the alleged sexual harassment of the Applicant by one of her superiors. The Tribunal,

having examined the report of the Working Group on inconsistencies, has concluded that this review was conducted in an entirely fair manner and that the reasons for its conclusions on the Applicant's case were adequately explained. The Applicant, in her application to the Tribunal, submits that she was "never interviewed by anyone relating to this case as to the exact nature of the duties". In this respect, the Tribunal notes that the inconsistency review, according to ST/IC/87/24, was not a "mechanism for reviewing individual cases". As the Officer-in-Charge of OHRM rightly says in his memorandum to the Applicant dated 11 January 1990, "It was not the purpose of the inconsistency study to determine whether the classification of a post on its merits was correct". The scope of the Working Group's task was, as it is said in ST/IC/87/24, to "focus primarily on the managerial and organizational problems that the classification exercise may have created". This being the purpose of setting up the Group, it is evident that personal interviews or audits of the nature envisaged by the Applicant were not a necessary part of its work.

IV. The Applicant in her pleas requested the production of several documents; most were in the file before the Tribunal. The Tribunal finds that the others are irrelevant.

V. The Applicant also claims that the results of the inconsistency review were flawed in her case as a consequence of alleged sexual harassment. The Tribunal has not found any evidence to show that the alleged sexual harassment had any bearing, either on the outcome of the inconsistency review or, indeed, on the classification of her post to which her recourse was directed or on NYGSCARC's invocation of the time limits to bar her appeal. In this respect, it is to be noted that the Tribunal had before it a list of all the UN officials who played a role in any recourse submitted by the Applicant. The name of the person allegedly involved in sexual harassment is not included. Consequently, the Tribunal will not

enter into the question whether the alleged sexual harassment occurred. The Tribunal trusts that, as appears to be essential, a full investigation will be conducted with respect to the extremely disturbing allegations made by the Applicant and others.

VI. Although, as set forth above, the Tribunal has found no connection between allegations of sexual harassment made by the Applicant against a senior official of the Organization and either the post classification, the issue of time-bar, or any issue related to the inconsistency review, the Tribunal is aware from various submissions to it in this case of apparently widespread and understandable concerns among female staff members regarding the subject of sexual harassment. While the Tribunal does not ordinarily comment on issues that are not directly before it, these concerns are of very special importance, not only to staff members whose personal rights are at stake, but also to the Organization itself. The latter has strong interests in protecting staff rights, as well as in protecting itself against the consequences of their abrogation through misconduct by officials. Accordingly,the Tribunal considers it appropriate to comment on these staff concerns.

VII. Article 8 of the United Nations Charter, action by the General Assembly,and the Tribunal's jurisprudence make it crystal clear that the terms of appointment of every staff member include the right to be free from invidious gender-based discrimination by any official of the Organization. The corollary is that officials engaging in such serious misconduct have obviously failed to fulfil their moral and contractual obligations to the Organization. As a matter of principle, it is unacceptable for such reprehensible and disrespectful conduct to be tolerated at any level. This is especially so in an Organization such as the United Nations which must serve as a model for harmony and co-operation. It goes without saying that subjecting the Organization to the potential severe

financial consequences that may be precipitated by such misconduct is a great disservice to it.

VIII. Sexual harassment is clearly a form of prohibited gender-based discrimination. In any case in which sexual harassment is alleged, the facts and circumstances will have to be examined carefully and thoroughly to determine what, if anything, occurred and whether it constituted sexual harassment. These may not be simple tasks. Be that as it may, any staff member with a bona fide complaint of sexual harassment, may choose to refer the matter initially to the Panel on Discrimination and Other Grievances and may also seek review and redress by the Secretary-General under staff rule 111.2. To aid in his review, the Secretary-General is surely bound to conduct promptly such reasonable investigations as the situation calls for. The staff member making the allegations must, of course, participate, without obstructing, in such investigations or possibly be subject to loss of the right to remedial action. If the staff member is dissatisfied with the outcome of the Secretary-General's review and of the consideration by the JAB, an appeal to the Tribunal would be available.

IX. An application for intervention has been submitted in this case. As this application refers solely to the alleged sexual harassment and the Tribunal has ruled that this matter had no bearing on the decisions of the Administration that the Applicant is challenging, the application for intervention is not receivable.

X. For the above-mentioned reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Hubert THIERRY
Member

Geneva, 30 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary