

PROVISORIAL TRANSLATION

ADMINISTRATIVE TRIBUNAL

Judgement No. 958

Case No. 1044: DRAZ

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Victor
Yenyi Olungu;

Whereas at the request of Sami Draz, a staff member of the United Nations, the President of
the Tribunal, with the agreement of the Respondent, extended until 30 November 1998 the time limit
for the filing of an application with the Tribunal;

Whereas, on 28 September 1998, the Applicant filed an application requesting the Tribunal

- "1. To declare itself competent in this case;
2. To declare and adjudge the application receivable;
3. To order the rescission of the final decision of the Secretary-General, as communicated to the Applicant by the Under-Secretary-General for Administration and Management in a letter dated 1 April 1998, and to draw all legal consequences arising therefrom, namely, that the Applicant should be retroactively promoted to the P-5 level with effect from July 1995;
4. To grant the Applicant compensation equivalent to two years of his net base salary for the material and mental prejudice he suffered;
5. To award the Applicant, as costs, a sum payable by the Respondent to be determined at the end of the proceedings."

Whereas the Respondent filed his answer on 4 June 1999;

Whereas the Applicant filed written observations on 28 September 1999;

Whereas, on 12 July 2000, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 14 January 1980 as an Interpreter at the P-3 level, on a probationary appointment with the Arabic Section, Interpretation Service, Conference Services Division, Geneva. On 1 February 1981, his appointment was converted into a permanent appointment. On 1 April 1982, he was promoted to the P-4 level, and on 1 September 1998 to the P-5 level. The Applicant separated from service upon retirement on 30 June 1999.

On 18 February 1994, the Applicant applied for the position of Senior Interpreter (P-5) in the Arabic Section. The Departmental Review Panel met on 7 November 1994 and unanimously recommended the candidature of the Applicant and a female candidate. The Panel noted in its report that,

“While aware of the general guidelines regarding the advancement for the status of women in the Secretariat and noting that [the female candidate] is somewhat senior to [the Applicant] in terms of her time in grade, the Panel unanimously considered that these factors were outweighed by [the Applicant’s] richer linguistic abilities and background and accordingly advised that he should be promoted against the post.”

On 25 January 1995, the Director, Conference Services Division, informed the Chairperson of the Appointment and Promotion Board (APB) that having interviewed both candidates, he recommended the Applicant for the post. He advised the APB that the percentage of “women on Professional staff” in the Interpretation Service at the P-5 level was 35.3%.

On 19 May 1995, the Chairperson of the APB requested advice and comments from the Director-General, United Nations Office at Geneva (UNOG), noting, *inter alia*:

“Having been informed of the decision taken by the Secretary-General in the light of the report taken by the Geneva Joint Appeals Board on the case of [the female candidate] who had also applied for the post, the Board noted that, as decided by the Secretary-

General, the staff member should be given due consideration for vacancies for which she was found to be qualified. Also taking into account that there was no female staff member at the P-5 level in the Arabic Interpretation Service at UNOG, and also considering [the female candidate's] qualifications equal to those of [the Applicant], the Board is inclined to recommend [the female candidate] for the post."

On 29 June 1995, the Director, Conference Services Division, replied, through the Director-General, UNOG, outlining the aptitudes and experience of each candidate and reiterating his recommendation that the Applicant be selected.

On 24 July 1995, the Secretary of the APB advised the Director-General, UNOG, that the APB had recommended the promotion of the female candidate and that its recommendation had been accepted by the Under-Secretary-General for Administration and Management. Under "Comments" it was noted that:

"Following its review of the case and after being informed of the decision taken by the Secretary-General in the light of the report of the Geneva Joint Appeals Board on the case of [the female candidate], who applied for the case, the Board did not concur with UNOG's recommendation for the promotion of [the Applicant] against the above vacancy."

On 24 July 1995, the Secretary of the APB communicated the decision to the Applicant.

On 14 September 1995, the Applicant asked the Secretary-General to review the administrative decision not to select him for the post.

On 17 September 1995, the Applicant requested that the Joint Appeals Board (JAB) recommend suspension of action of the decision. In its report of 6 October 1995, the JAB recommended rejection of his request for suspension of action as the administrative action had already been taken. On 13 October 1995, the Under-Secretary-General for Administration and Management advised the Applicant that he accepted the JAB's recommendation.

On 19 December 1995, the Applicant lodged an appeal with the JAB contesting the administrative decision not to promote him. The JAB adopted its report on 6 February 1998. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

28. The Panel ... analysed whether all the applicable promotion rules and procedures had been duly applied and followed by the APB, given that 'rules and procedures regulating the promotion process contain safeguards to ensure fairness and objectivity in a process which is vital to staff members', and those rules and procedures 'should therefore be respected, correctly interpreted and properly applied'.

...

30. First, the APB took note of a decision by the Secretary-General. This refers to a letter that the Under-Secretary-General for Administration and Management addressed to ... in the context of an appeal she filed concerning her non-promotion to another post. In that letter, ... was informed that

'[i]n line with the Board's recommendation, the Secretary-General confirms that [she] will receive full and fair consideration for future vacancies for which [she] apply and are found to be qualified, and with due regard also to the applicability of the special measures to improve the status of women in the Secretariat set forth in administrative instruction ST/AI/382'.

31. The Panel recognizes that all qualifying staff members have the right to be given 'due consideration' during the promotion exercise and that all applicable promotion rules, guidelines and procedures are to be respected. However, in this regard, the Panel does not see how such a right could justify the preference by the APB of one candidate over the other.

32. ..., the APB cited the fact that 'there was no female staff member at the P-5 level in the Arabic Interpretation Service at UNOG'. Paragraphs 5 and 6 of ST/AI/382 set percentages of women in UN *departments* and *officers* under which measures to bring 'the gender balance in policy-level positions as close to 50-50 as possible' should be implemented.

33. The Panel concluded that the Arabic Interpretation Section of the Interpretation Service could not be construed as an office or a department, to which the percentages established by paragraphs 5 and 6 of ST/AI/382 refer. Furthermore, the Panel noted that in his memorandum of 25 January 1995 to the Chairperson of the APB, the Director, Conference Services Division provided percentages 'of women on Professional Staff in the Interpretation *Service*' (emphasis added) that exceeded the above-mentioned percentages.

34. ..., the APB considered that ... qualifications were equal to those of the Appellant. Paragraph 7 of ST/AI/382 provides that '[w]here male and female candidates have *equivalent* merit and suitability, preference shall be given to a woman candidate' (emphasis added). Furthermore, UNAT jurisprudence shows that affirmative action measures, *i.e.* measures to improve the status of women in the Secretariat, are 'subject to the criterion of

securing the highest standards of efficiency, competence and integrity’.

35. The Panel then noted that consideration of qualifications becomes a critical factor for there is ‘a standard under which *less qualified persons are not entitled to preferential treatment based on gender* (emphasis added). the Panel thus concluded that the main issue, as emphasized by the Appellant, was whether the Appellant and the selected candidate had equal qualification.

...

38. The candidates’ evaluation by the Director, Conference Services division, and by the Departmental Panel did not only support the Appellant’s promotion but also indicated to the APB how the qualifications of the Appellant were superior to those of ... Furthermore, the Director, Conference Services Division, recommended the Appellant after *interviewing* both ... and the Appellant. This was not a general assessment’ it was specifically conducted in connection with the potential promotion of one of the candidates. From the Departmental Panel’s report one can conclude that all pertinent factors were considered, including affirmative action guidelines, but that affirmative action was not deemed justified in light of the Appellant’s superior qualifications.

39. However, notwithstanding the recommendations by both the Director, Conference Services Division and the Departmental Panel, the APB reached a different conclusion regarding the candidates’ qualifications. The Panel recognized that evaluations by Supervisors, but Departmental Panels and by the APB itself constitute a system of checks and balances that ensures transparency and the selection of the best qualified candidates in promotion exercises. The Panel also observed that qualifications are best assessed by those familiar with the job, the performance and the potential of candidates.

40. The Panel recognizes that the APB was not bound to follow the recommendations favouring the Appellant’s promotion. However, given that the Appellant’s promotion was recommended by a panel made up of senior officials familiar with the qualifications and the potential of the candidates, the Panel believes that transparency and fairness required the APB to substantiate its conclusion that the candidates’ qualifications were equal and that affirmative action was pertinent in this case.

41. The Panel observed that the documents before it did not indicate reasons supporting the APB conclusion that ... qualifications equalled those of the Appellant. In the absence of such evidence or justification, based on the Appellant’s recommendations for promotion, and in line with the jurisprudence cited, the Panel considers that, in this case, ... was not entitled to preferential treatment based on gender.

Conclusions and Recommendations

42. In light of the above, the Panel concludes that the relevant promotion guidelines

were not followed by the APB and therefore the latter's recommendation was flawed.

43. The Panel therefore **recommends** to the Secretary-General that the Appellant be given forthwith full and fair consideration, to which he is entitled, for promotion to a vacant P-5 post for which he is qualified.

44. The Panel also **recommends** that the Appellant be granted compensation equivalent to the difference between the Appellant's actual net monthly salary and the net monthly salary he would have received had he been promoted. For this purpose, compensation should be calculated from the date the Appellant's promotion would have taken effect until:

- a. The Appellant's retirement date at the P-4 level; or
- b. The Appellant's promotion date, should this situation arise."

On 1 April 1998, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General has examined your case in the light of the Board's report and of the documentation regarding the case. The Secretary-General, however, is not in a position to agree with the Board's conclusions.

The Secretary-General has noted the fact that the Appointment and Promotion Board (APB), when considering the filling of the P-5 vacancy for which both you and ... had applied, followed the required procedure and had a debated taking into account all the relevant documents regarding you and ... On the basis of such documentation, the APB was convinced that ... qualifications were equal to yours. The Secretary-General, in exercising his discretionary power regarding promotion of staff and in the context of all the information on the two candidates for the vacancy, first ascertained that both candidates had received full and fair consideration for the vacancy. Guided by the policies in place and the jurisprudence of the United Nations Administrative Tribunal, the Secretary-General concluded that the application of policies for preferential treatment for the female candidate, ..., was permitted since her qualifications and yours were substantially equal.

The Secretary-General thus concludes that the proper procedures were followed regarding consideration of your candidature for the P-5 vacancy in 1995. The Secretary-General has therefore decided not to accept the recommendation of the Joint Appeals Board that you be granted compensation. At the same time, the Secretary-General accepts the Board's recommendation that you be given full and faire consideration for promotion to

vacant posts for which you apply.

...”

On 2 September 1998, the Secretary of the APB advised the Director-General, UNOG that the Secretary-General had accepted the APB’s recommendation that the Applicant be promoted to a P-5 post as Senior Interpreter, Arabic Section. The same day, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary-General had approved his promotion effective 1 September 1998.

On 28 September 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The recommendation of the Appointments and Promotions Board is obviously prejudiced and the decision based thereon is therefore unlawful.

2. While the provisions to improve the status of women in the Secretariat constitute justifiable affirmative action measures, they are nevertheless discriminatory in nature and, as such, should be applied with caution and circumspection. Clearly, the requirements for applying such special provisions were not met in the present case and, as a result, the appointment of the other candidate must be considered invalid in that it was mainly, if not exclusively, based on her gender.

Whereas the Respondent's principal contentions are:

1. The Applicant does not have an automatic right to promotion.

2. The Rules and procedures regulating the promotion process have been properly followed. The Applicant has adduced no valid evidence that the process was tainted by any form of abuse of power.

3. The Secretary-General's decision not to promote the Applicant was in accordance with the general principles of the Organization regarding the improvement of the status of women in the Secretariat, as mandated by the General Assembly.

The Tribunal, having deliberated from 12 to 31 July 2000, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rescind the decision of the Secretary-General, as communicated to him by the letter of 1 April 1998. He requests the Tribunal to order that he should be promoted to the P-5 level with retroactive effect from July 1995, and that he should be awarded compensation in an amount of two years of his net base salary for material and mental prejudice and costs.

In support of his application, the Applicant alleges that the decision impugned is biased and that it is based on errors of law. He contends that such prejudice is reflected in the fact that the APB justified the promotion of the competing female candidate on the contents of an earlier letter stating that "the staff member should be given due consideration for vacancies for which she was found to be qualified", thereby suggesting that the Administration made a commitment to promote the person concerned. In the opinion of the Applicant, the error of law stems from the misinterpretation of the special provisions applicable to female staff members and from a failure to take due account of the candidates' qualifications. Indeed, the Applicant contends that by basing the promotion of the female candidate on administrative instruction ST/AI/382 of 3 March 1993, the Respondent committed an error of interpretation, since his department had already exceeded the quota set. With respect to qualifications, the Applicant shares the opinion of the JAB that the APB failed to justify its assertion that both candidates were equally qualified and notes that job performance carries more weight.

II. In his defense, the Respondent cites the consistent jurisprudence of the Tribunal and states

that the Applicant has no automatic right to promotion, since appointments and promotions are within the discretion of the Secretary-General unless there is a legal obligation binding on him. He notes that the evaluation of staff for promotion purposes is a discretionary act of the Secretary-General which can only be challenged if such evaluation is tainted with prejudice, discrimination or improper motivation.

The Respondent rejects the Applicant's argument based on the statement made by the Respondent to the female candidate in the context of a previous appeal, explaining that the Applicant's application had been given full and fair consideration as evidenced by the records of the debate of the APB and the exchange of communications between the Chairperson of the APB and the Administration. The Respondent notes that a similar statement was made to the Applicant in the letter of 1 April 1998, although that was not the basis for promoting the Applicant in September 1998. Concerning the error of law, the Respondent submits that the fact that the percentage has been achieved cannot mean that the Secretary-General loses his discretionary power with respect to the promotion of staff members and to preferring a female candidate over a male candidate when their qualifications are substantially equal and he wishes to implement fully the special measures to improve the status of women in the Secretariat.

The issue here is to ascertain which rights of the Applicant have been violated by the Secretary-General's decision to promote a female member of staff in order to implement fully the special measures to improve the status of women in the Secretariat. The Tribunal will thus endeavour to analyze the facts in order to detect any possible prejudice or errors that may have tainted the above-mentioned decision. At the outset, the Tribunal upholds its jurisprudence in Judgement No. 411: *Al-Ali* (1988) that promotions are subject to the discretionary authority of the Secretary-General and that staff members have no automatic right to promotion, or to a promotion at a particular time or to a particular post. Staff members may challenge the exercise of the Secretary-General's discretionary power only if it is tainted with prejudice or discrimination or improper motivation.

In the present case, the Applicant challenges the decision of the Secretary-General as being based on prejudice, in that it considered only the competing female candidate for promotion to the P-5 post level, although he had been recommended by the Department.

The Tribunal finds that the statement by the Respondent to the female candidate does not constitute a promotion granted in advance which ruled out the consideration of candidates listed on the promotion register. Based on the history of cases submitted to it for review, the Tribunal is of the view that the impugned statement made to the female candidate is a standard statement addressed to any staff member deemed qualified to perform the duties of the post sought but who cannot be immediately promoted owing to the lack of a vacant post. Therefore, the Applicant suffered no prejudice.

The Applicant also challenges the decision of the Secretary-General as based on an error of law stemming from a misinterpretation of administrative instruction ST/AI/382 mentioned above.

The Tribunal, considering that the General Assembly has set as a goal the achievement of a 50-50 gender balance by the fiftieth anniversary of the United Nations, finds that the pursuit of that goal made by the Respondent during the period of implementation of such measures at the expense of candidates also recommended for promotion are concerned, is consistent with the exercise of discretionary authority and does not constitute an error of law as contended by the Applicant.

Lastly, the Applicant challenges the decision of the Secretary-General for failing to specify such equal qualifications as are referred to therein.

The Tribunal notes that neither the Applicant's application nor the remarks of the JAB describe clearly how the candidate selected for promotion is less qualified than the Applicant. The Tribunal finds that the promotion of a staff member is the result of a complex process within the Administration and notes that in this case both staff members (the female candidate and the Applicant) had been selected for promotion to the P-5 level. The Tribunal holds that such selection also implies consideration of the qualifications of the candidates, the formal result of which is the endorsement by the Secretary-General of the recommendation of the APB. The Tribunal recalls in this regard its Judgement No. 428: *Kumar* (1988), in which it declared 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.

III. For these reasons, the Tribunal rejects the application.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

Victor YENYI OLUNGU
Member

Geneva, 31 July 2000

Maritza STRUYVENBERG
Executive Secretary