



# Administrative Tribunal

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## ADMINISTRATIVE TRIBUNAL

Judgement No. 1118

Case No. 1227: KHUZAM

Against: The Secretary-General of the  
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas, on 29 April and 14 October 2000 and on 16 May 2001, Magdy Said Khuzam a former staff member of the United Nations, filed Applications 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 granted an extension of the time limit for filing an application until 3 December 200 and periodically thereafter until 31 October 2001;

Whereas, on 29 October 2001, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

### Section II: PLEAS

I respectfully request the esteemed Administrative Tribunal to:

1. For the purpose of the present case, have the following colleagues testify ...
2. Determine that, all things considered, the recommendation against the Applicant's selection ... did not keep perspective and lacked a sense of proportion.
3. Determine that the conclusions reached by the ... Departmental Panel about the Applicant's performance as evaluated in his last performance report, which were their reasons against his selection, and ...

that the Applicant did not receive full and fair consideration during the promotion process ...

4. Order that Applicant be promoted to the level of P-5 as of 1 October 1995, ... until his retirement on 30 June 1996, with all the entitlements and consequences arising therefrom, and determine a 2-year salary compensation for the injury, pain and suffering sustained.”

Whereas, on 23 March 2002, the Applicant amended his pleas by extending the list of witnesses in paragraph one thereof;

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2002 and periodically thereafter until 31 May 2002;

Whereas, the Respondent filed his Answer on 31 May 2002;

Whereas, the Applicant made additional submissions on 23, 24, and 27 June 2003, and 7 July 2003;

Whereas, on 27 June 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 27 July 1978, on a two-year fixed-term appointment at the P-2 level as an Associate Translator, Arabic Service, Translation Division, Department of Conference Services.

On 16 June 1995, the Applicant, at the time a P-4 level Reviser under permanent contract, applied for a P-5 level post of Senior Arabic Translator, in response to a circulated vacancy announcement. On 24 July, the Departmental Panel for the Department of Administration and Management reviewed the applications for the post and recommended another candidate for the position. On 28 July, the Under-Secretary-General for Administration and Management, advised the Appointment and Promotion Board (APB) that he recommended the same candidate.

On 18 August 1995, the Office of Human Resources and Management (OHRM) informed the Applicant that the Department of Administration and Management had not recommended him for the post, but invited him to provide

any additional relevant information to the APB. The Applicant responded on 30 August.

The Applicant's performance evaluation for the period 1 June 1985-April 1995 consisted primarily of "A" ratings with a few "B's". Although his job performance was generally described as excellent, in the evaluation immediately preceding his rejection for the post his ratings in the categories of sense of responsibility, dependability regarding working hours and effectiveness in planning and work organization were reduced from A to B.

On 14 September 1995, the APB recommended the other candidate for promotion. The Assistant Secretary-General, OHRM, endorsed the APB recommendation on 19 September, and, on 21 September, the Under-Secretary-General for Administration and Management appointed the recommended candidate to the post.

On 3 May 1996, the Applicant requested administrative review of this decision.

On 30 June 1996, the Applicant retired.

On 26 July 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 2 December 1999. Its considerations, and conclusions and recommendation read, in part, as follows:

*"Considerations*

...

25. ... The majority of the Panel noted that the Appellant who bore the burden of proof ... did not allege any procedural irregularity in connection with the promotion exercise for the P-5 post of Senior Arabic Translator. Nor did they think that the Appellant had offered adequate evidence to show that prejudice or some other extraneous factor had tainted the questioned decision.

26. The Panel noted that the appeal was submitted on 26 July 1996. ... [T]he majority of the Panel ... regretted that it had taken so long to complete the review of the present case. ...

*Conclusions and Recommendation*

27. In light of the foregoing, the majority of the Panel agreed that there was no adequate evidence indicating that the Appellant had not been fairly considered during the promotion exercise for the P-5 post, and that the non-selection of the Appellant had not caused any damage to his rights as a staff member.

28. The majority of the Panel agreed to make no recommendation in support of the appeal.”

The dissenting Panel member disagreed with the JAB finding. He questioned the absence of an explanation for the reduced ratings in the Applicant’s evaluation and concluded that the Applicant may not have received full and fair consideration.

On 3 March 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General agreed with the majority’s conclusion and had decided to accept its recommendation and to take no further action on his appeal.

On 29 October 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The recommendation to promote the other candidate lacked perspective, was disproportionate, injudicious and unfair.
2. The Departmental Panel should have demanded documentary evidence, rejected hearsay and consulted past PERs of each candidate.
3. The Applicant’s performance over his entire career should have been rated “excellent” and not “satisfactory”.
4. The delays in the appellate process were unfair, stressful and agonizing for the Applicant.

Whereas the Respondent's principal contentions are:

1. The Respondent fully and fairly considered the Applicant for promotion to the P-5 post.
2. The Applicant has not met his burden of proving prejudice or other improper motive.
3. The Applicant was not entitled to a promotion to the vacant P-5 post.

The Tribunal, having deliberated from 27 June 2003 to 24 July 2003, now pronounces the following Judgement:

I. The Applicant contests a decision by the Respondent not to promote him from his P-4 level position of Reviser, to the P-5 level position of Senior Arabic Translator. He requests the Tribunal to order that he be promoted to the P-5 level as of 11 October 1995, the day he was denied the promotion, until his retirement on 30 June 1996. He further requests the Tribunal to award to him compensation for injury, pain and suffering, in the amount equivalent to two years salary.

The Applicant alleges that he did not receive full and fair consideration on the issue of promotion to a P-5 position. Specifically, he contests the conclusions reached by the Departmental Panel, Department of Administration and Management, about his performance, as evaluated in his last performance report. These conclusions were the basis for the Panel's decision not to promote him to the P-5 post. Further, he alleges that the decision not to promote him was motivated by religious bias or prejudice.

II. In all four of the Applicant's performance evaluations covering the period from 1 June 1985 through 30 April 1995 the Applicant received a rating of "excellent". His performance was further characterized throughout as "remarkable". Throughout this ten-year period of evaluation, the Applicant received mostly "A" with a sprinkling of "B" grades. Specifically, in the period from 1 June 1985 through 31 December 1991 the Applicant received an "A" rating in the category of "Sense of responsibility and dependability as regards working hours" and in the category of "Effectiveness in planning and organization of work". In the performance evaluation immediately preceding the decision not to promote the Applicant, however, the Applicant was suddenly downgraded, without explanation, from an "A" to a "B" in both of those performance categories. In the previous three evaluations, with respect to the category of "Sense of responsibility and dependability as regards working hours", in addition to the "A" rating received by the Applicant, the Respondent had noted such comments as "He is highly responsible and has tremendous sense of commitment. He is always there whenever needed" and "He maintains an excellent record of punctuality and availability after normal working hours". With respect to the category of "Effectiveness in planning and organization of work", the Respondent noted "He

maintains an excellent balance between quantity and quality of work within the constraints of fixed deadlines”.

III. The Departmental Panel’s decision not to promote the Applicant was based solely on the “B” rating the Applicant had recently received on the two categories of performance identified above. Specifically, the Panel concluded that

“Mr. Said Khuzam’s B rating in his sense of responsibility and dependability as regards working hours, and effectiveness in planning and organization of work, had been due mainly to the fact that he had chosen to remain on the night shift and had not kept normal working hours. This had significantly diminished his dependability, in guiding and revising the work of his junior colleagues, and restricted his usefulness in the Arabic Service.”

The decision of the Departmental Panel was embraced by a majority of the JAB, which concluded that the Applicant had been fairly and fully considered, and that his rights as a staff member had not been injured. While the majority recognized the Applicant’s competence and integrity, it found that the Applicant failed to provide sufficient evidence to conclude that prejudice or some other extraneous factor or procedural irregularities had tainted the issue of promotion. The majority made no recommendation in support of the Applicant’s appeal.

IV. One member of the JAB, however, dissented, concluding that the Applicant had not been fully and fairly considered in the promotion process. The minority member noted that because there was no explanation for the sudden downgrading from “A” to “B” in the performance categories upon which the Departmental Panel based its decision not to promote, the Departmental Panel

“was misled into assessing him negatively as opposed to [the Applicant’s] colleague successful in this promotion exercise. If the Panel’s recommendation was tainted procedurally, the entire process may be affected because there is no assurance whether this might have had a ripple effect on the Appointment and Promotion Board’s subsequent decision on the appellant’s candidacy.”

The dissenting member also noted that the Applicant’s age and seniority might have been a factor in non-promotion.

The Secretary-General upheld the decision of the majority.

V. The Tribunal first considers the Applicant's claim for promotion. Generally, promotions are subject to the discretion of the Secretary-General, and staff members possess no legally enforceable right to be promoted, as stipulated by staff regulation 4.1. To quote the Tribunal in Judgment No. 362, *Williamson* (1986) "The Tribunal has always recognized the considerable latitude of discretion that the Secretary-General must have in ... promoting and in filling vacancies in the Secretariat". Thus, "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 of promotion". (See Judgement No. 958, *Draz*, (2000), para. II).

VI. The Secretary-General's discretionary power to evaluate and promote candidates, however, is neither absolute nor unfettered: the Respondent's discretion shall be reviewed when there are allegations of abuse of discretion. (See Judgment No. 870, *Choudhury and Ramchandani* (1998).) The Tribunal has consistently held that the Respondent's discretionary powers with respect to promotion are subject to staff regulation 4.2 and Article 101 of the Charter, which states that "the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity." In order to achieve this purpose, "it is indispensable that 'full and fair consideration' should be given to all applicants for a post" and that "the Respondent bears the burden of proof with respect to this issue". (See Judgment No. 1031, *Klein* (2001).) Finally, "full and consideration" should to some measurable degree meet the criterion of "fullest regard" in a reasonable manner ... [and] there must be good faith and consciousness of all the circumstances surrounding any claim. (See Judgment No. 447, *Abbas* (1989).)

VII. The Applicant was entitled to be fully and fairly considered in the promotion process. The Tribunal finds that the Respondent based its decision not to promote the Applicant on unsubstantiated or misleading facts regarding the true nature of his qualifications with respect to effectiveness, organization, punctuality and dependability, and as a result, the Applicant was not fully and fairly

considered. In reviewing the evidence presented by the parties, the Tribunal notes that the lack of explanation as to the reason for the sudden downgrading, after nine previous years of an “A” rating, should have led the Departmental Panel to question the accuracy of the downgrading. In addition, the conclusions reached by the Departmental Panel that the Applicant’s dependability was “significantly diminished” and his usefulness to the Arabic Service was “restricted” was not proportionate to a minor downgrading from “A” to “B”. Finally, the Tribunal notes that the seniority of the Applicant and the short period until retirement, may have contributed to the Respondent’s decision to downgrade the Applicant and to the weight given by the Departmental Panel to the downgrade in reaching its conclusion not to recommend the Applicant for promotion. Thus, the Tribunal finds that the Applicant did not receive full and fair consideration with respect to a promotion to the P-5 level.

VIII. The Tribunal now turns its attention to the Applicant’s allegations that the decision not to promote him was motivated by prejudice, based on his religion. The Tribunal does not find sufficient evidence to support such allegations. The Tribunal has held that where the Applicant alleges prejudice or discrimination, the burden of proof in such matters rests upon the Applicant. (See Judgements No. 312, *Roberts* (1983), and, No. 428, *Kumar* (1988).) In the instant case, the Applicant merely raises speculation as to whether discrimination or prejudice entered into the Respondent’s decision not to promote him; he provides, however, no factual basis for such assertions. The Applicant has failed to sustain his burden of proof with respect to prejudice or discrimination.

IX. The Tribunal also notes that the Applicant filed his appeal on or about 26 June 1996, but that the JAB did not issue its report until 2 December 1999, more than two years after the filing of the appeal. The Tribunal has previously held that “an inordinate delay not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering [on] an applicant.” (See Judgment No. 880, *MacMillan-Nihlén* (1998).) The Applicant has provided evidence that this excessive delay in deciding his case has caused him emotional distress and attendant physical manifestations of that stress. The Respondent’s excessive delay is not consistent with the “maximum of dispatch” necessary to “a fair review” as provided for in Staff Rule 111.2(m). (See Judgement No. 871,



*Brimicombe and Ablett* (1998).) Thus, the Tribunal finds that the Applicant should receive compensation.

X. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay the Applicant three months net base salary at the rate in effect on the date of the Applicant's separation from service for the failure to fully and fairly consider him for promotion;
2. Orders the Respondent to pay the Applicant three months net base salary for the emotional distress caused to the Applicant by the Respondent's undue delay in addressing the Applicant's claims;
3. Rejects all other claims.

(Signatures)

Mayer **Gabay**  
Vice-President

Spyridon **Flogaitis**  
Member

Jacqueline R. **Scott**  
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**  
Executive Secretary

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