



# Administrative Tribunal

Distr.: Limited  
30 September 2004

Original: English

---

## ADMINISTRATIVE TRIBUNAL

Judgement No. 1171

Case No. 1263: MUNGAI

Against: The Secretary-General of the  
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Ms. Jacqueline R. Scott; Mr. Dayendra Sena Wijewardane;

Whereas at the request of Joseph Mungai, a staff member of the United Nations Centre for Human Settlements (hereinafter referred to as Habitat), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 October 2001 and periodically thereafter until 30 June 2002;

Whereas, on 28 June 2002, the Applicant filed an Application containing pleas which read as follows:

“Section II: PLEAS

...

8. On the merits, the Applicant respectfully requests the Tribunal to find:

(a) that the Applicant's appeal was submitted properly in that the decision under dispute was 18 August 1998 and he filed his request on 9 October 1998, within the time limits established by the Staff Rules;

(b) that the Nairobi Joint Appeals Board [(JAB)] misdirected itself in arriving at this conclusion and its subsequent recommendation to the Secretary-General that the appeal be rejected.

9. Whereafter the Applicant most respectfully requests the Administrative Tribunal to order:

(a) that the recommendations of the JAB, and consequently, the decision of the Secretary-General be set aside; and

(b) that the Applicant's promotion be effective retroactively either as of 27 July 1987 when the Applicant took over the duties and responsibilities of the post of Secretary to the Commission on Human Settlements/Chief of External Relations or as of 1 October 1992 when the position in question became available ..."

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 December 2002 and periodically thereafter until 13 June 2003;

Whereas the Respondent filed his Answer on 17 June 2003;

Whereas the facts in the case are as follows:

The Applicant entered the service of Habitat on 1 August 1979, on a five-month fixed-term appointment as an External Relations Officer at the P-3 level, Office of the Executive Director (OED). His fixed-term appointment was subsequently renewed a series of times and, on 1 April 1985, he was promoted to the P-4 level.

On 27 July 1987, the Applicant assumed significant new responsibilities. In addition to his regular duties, he took over duties normally performed by a P-2 level Associate External Relations Officer. He also acted as Secretary to the Commission on Human Settlements and Chief of External Relations, which duties had previously been performed by a D-1 level staff member.

On 14 March 1991, the Applicant was granted a permanent appointment. On 11 March 1992, he was designated Acting Secretary of the Commission/Chief of Protocol, OED. Although this was a P-5 level position, the post was not available as it was still encumbered. Accordingly, the Applicant remained at the P-4 level. On 25 August, the Director, OED and Special Programmes, recommended that he be promoted to the P-5 level. With effect from 1 October, the incumbent of the P-5 post was promoted, but the P-5 post was temporarily assigned to the Secretariat of Habitat II. When the P-5 post returned on 1 January 1994, the Applicant was charged against it, although he was not promoted to the P-5 level. He was subsequently granted a special post allowance (SPA) from 1 January 1994 until 30 April 1997.

On 18 August 1998, the Applicant was advised that his promotion to the P-5 level had been approved and would take effect on 1 September.

On 9 October 1998, the Applicant requested administrative review of the effective date of his promotion.

On 1 December 1998, the Director, OED and Special Programmes, advised the Human Resources Management Service (HRMS), United Nations Office at Nairobi (UNON), that he concurred with the assertion that the Applicant's promotion had been "unfairly delayed by a combination of several administrative technicalities and oversights" and strongly recommended that the promotion be made retroactive to 1 October 1992. Thereafter, on 7 December, the Chief, HRMS, UNON, proposed that the Applicant be retroactively granted an SPA for the period 1 May 1997 until 31 August 1998 and that, "for the purpose of promotion only, ... his seniority-in-grade at P-5 level [be considered as] effective 1 January 1994". None of these proposals was implemented.

On 23 February 1999, the Applicant lodged an appeal with the JAB in Nairobi. On 10 August 2000, the Secretary of the JAB advised the Applicant that a conciliatory solution might be possible, and asked if he was in agreement with the institution of a conciliatory process. The Applicant indicated his agreement but the file does not reflect any further action in this respect.

The JAB adopted its report on 31 January 2001. Its considerations, conclusions and recommendations read, in part, as follows:

**"Considerations**

The panel considered the issue of receivability *rationae temporis*. The panel noted that the Appellant had presented his present appeal in February 1999 while his pleas are directed towards a (retroactive) promotion which, in his view, should have taken place latest in 1994.

...

Because the Appellant was not able to put forward a satisfactory explanation for the untimely submission of his appeal, the panel was not in a position to grant him a waiver of those time limits. Consequently, the panel rejects the present appeal as unreceivable.

**Conclusions and Recommendations**

In the light of the foregoing considerations, the panel concludes that the present appeal is time barred.

The panel recommends to the Secretary-General that the appeal be rejected."

On 6 April 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's conclusion and recommendation, and to take no further action on his appeal.

On 28 June 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred in finding the appeal time-barred. The Applicant did not appeal his previous non-promotion but the effective date of his promotion, which appeal could only be filed once his promotion had been approved.
2. The Applicant is entitled to an SPA for the period 27 July 1987 to 30 September 1992.

Whereas the Respondent's principal contentions are:

1. The appeal to the JAB was manifestly time-barred having been filed more than eleven years after the Applicant believed that he was entitled to a promotion, and he has cited no extraordinary circumstances that would warrant a waiver of the time limits.
2. The decision of the JAB not to waive the time limits was properly taken.
3. The Applicant's claim in relation to an SPA is not receivable.

The Tribunal, having deliberated from 24 June to 23 July 2004, now pronounces the following Judgement:

- I. This case concerns the promotion of an apparently well-qualified staff member to the P-5 level. His promotion was not contentious, but the date upon which it was made effective is the subject of dispute.

II. The Applicant's supervisor, the Director, OED and Special Programmes, recommended that he be promoted to the P-5 level on 25 August 1992. At that time, and indeed for many years before, the Applicant was the effective Head of the Secretariat of the Commission and of the External Relations Unit. In addition, he was performing the functions and responsibilities of his own P-4 level post as External Relations Officer as well as doing the work of the P-2 level Associate Officer of that Unit. On 1 October 1992, a P-5 post became available against which the Applicant could have been promoted. He had been, as stated, performing at or above this level for more than six years, and he had seven years seniority-in-grade at the P-4 level. However, it was not until six years later, on 18 August 1998, that the Applicant was advised that his promotion to the P-5 level had been approved and would take effect on 1 September 1998. The instant case arose from that administrative decision.

III. The case raises a preliminary issue with regards to receivability *ratione temporis*. On 9 October 1998, well within the specified time limit, the Applicant - whilst expressing his appreciation for "this welcome decision" and thanking the management for it - requested administrative review of the effective date of his promotion on the grounds that it had been unduly delayed "by a combination of several administrative technicalities", a description which the Tribunal finds compellingly understated. No concrete action was taken by the Administration on this request, but correspondence dragged on until at least 7 December. The possibility of some conciliatory solution was held out, but none of the proposals from UNON were effectively dealt with or adopted, despite the Applicant's willingness.

The Applicant filed his appeal with the JAB on 23 February 1999. On 10 August 2000, the JAB advised him that

"a conciliatory solution of this appeal might be possible, particularly in view of the fact that HRMS has already written to OHRM, at Headquarters, with a request to approve your retroactive promotion to 1994 when you were first appointed to the post in question",

and asked if he was in agreement with the institution of a conciliatory process. The Applicant signified his agreement to this proposal on 15 August. It would appear that any efforts made in this regard were unsuccessful.

In its report of 31 January 2001, which was accepted by the Secretary-General on 6 April, the JAB concluded that the appeal was out of time and not receivable. The basis of this finding was that the Applicant had considered himself eligible for promotion as far back as 1994, but had submitted his appeal only in 1999. In this regard, the Tribunal finds the reasoning of the JAB unconvincing and erroneous. The Applicant did not lodge an appeal because he thought he should be promoted, but appealed an administrative decision that was made on 18 August 1998, following which there was some continuing discussion and correspondence which was allowed to trail off inconclusively. The Applicant rightly points out in his Application that the premise under which the JAB proceeded was mistaken. The issue at hand is the *effective* date of the Applicant's promotion, and he could not have submitted an appeal without knowing that date. He was made aware of it only on 18 August 1998, and the Tribunal does not consider anything which transpired after that date as depriving the Applicant of his rights. It finds, therefore, that his appeal was receivable, and that the JAB erred in rejecting it as time-barred.

IV. When the Tribunal takes a decision such as this, it is faced with two options: either it may remand the case for consideration on the merits, or it may proceed itself on the substantive appeal. The Tribunal notes that the provisions of article 7 (1) of the Statute of the Tribunal provide as follows:

“An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal.”

In the instant case, as the matter has been before the joint body and given that the facts of the case are not in dispute, the Tribunal sees little value in remanding the case to the JAB and thus further extending the length of time this case has already taken in the pursuit of administrative justice.

V. The Tribunal will then consider the question of the effective date of the Applicant's promotion. As with all matters related to appointment and promotion, the Tribunal would normally consider the effective date of promotion to fall within the discretion of the relevant body and would be reluctant to interfere. (See Judgements

No. 828, *Shamapande* (1997) and No. 834, *Kumar* (1997).) Nonetheless, it falls within the purview of the Tribunal to determine whether the decision as to the effective date of the Applicant's promotion was a proper exercise of the Respondent's discretion. (See generally Judgements No. 1031, *Klein* (2001) and No. 1115, *Ruser* (2003).) It finds that it was not.

This is an exceptional case. Apart from references in the file to the promotion having being delayed unfairly by "a combination of administrative delays and oversights", no explanation has been offered by the Respondent for the inordinate delay it took to make a decision. This is further aggravated by the fact that no follow-up seems to have taken place with regard to several possible solutions that were put forward by the Administration itself, and it is clear that efforts to find a reasonable solution were allowed to drift. What is more, the staff member in question had been acceptably performing the duties of the post in question, in addition to discharging the duties of at least two other posts, since July 1987. There is no issue that the Applicant was not worthy of promotion.

Whilst the Tribunal acknowledges that a staff member has no right to a promotion, it is nonetheless of the view that when a person worthy of a promotion is in fact promoted, it is manifestly unreasonable that he should be asked to bear the consequences of inordinate delay for which he was in no way responsible. When the Respondent has the option of an equitable course of action and one that is not, the Tribunal expects it to pursue the former. The failure to choose an equitable - and available - alternative rendered the decision arbitrary and the correction of such a decision is in no way a substitution of the judgement of the Tribunal for that of the Administration but one that the Tribunal assumes would have been the decision the appropriate body would have made, had it given its mind properly to the issue.

The Tribunal therefore concludes that the Applicant's promotion should be made retroactive to 1 October 1992, when the post became available.

VI. The Tribunal must next turn its attention to the consequences of the inordinate and excessive delay on the part of the Respondent in this case. Whilst the record demonstrates that the Applicant has borne this maladministration with considerable personal dignity, which earned the respect of the colleagues with whom he worked on a daily basis, it is clear that it generated a high level of stress. In addition, whilst the Tribunal has rectified the effective date of the Applicant's promotion, it cannot place

him in the position he would have enjoyed had he been promoted in 1992, as he may have been deprived of subsequent career opportunities. In this regard, the Tribunal recalls its Judgement No. 1136, *Sabet & Skeldon* (2003), wherein it held:

“[T]he Applicants suffered considerably from all these delays. Merely to restore retroactively the situation that should have been that of the two Applicants when they worked at the United Nations cannot enable the two Applicants to relive all those years during which they were deprived of their proper status.”

In the instant case, the Applicant was disadvantaged from considering movement within the United Nations system to higher or even lateral posts. In its recent Judgement No. 1104, *Tang* (2003), the Tribunal cited Judgement No. 880, *MacMillan-Nihlén* (1998) and recalled that

“an Applicant does not have to show any specific damages from undue delay, since ‘... an inordinate delay “not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering to an applicant”’ (see also Judgements No. 353, *El- Bolkany*, (1985) and No. 414, *Apete*, (1988)).”

Accordingly, the Tribunal awards a sum of \$25,000 as compensation to the Applicant on this ground.

VII. The Applicant raises certain contentions in relation to his SPA. The Tribunal notes that this plea did not form part of his initial request for administrative review, as required by staff rule 111.2 (a) and that, therefore, the issue is improperly before the Tribunal. It recalls its jurisprudence in Judgement No. 571, *Noble* (1992), wherein it held that “the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision ... renders any further consideration of that decision by the Tribunal beyond its competence”. Accordingly, the issue of the Applicant’s SPA is rejected as non-receivable, *ratione materiae*.

VIII. In view of the foregoing, the Tribunal:

1. Orders that the effective date of the Applicant’s promotion to the P-5 level be made 1 October 1992, for both the purposes of seniority and



salary, and that all necessary adjustments be made to his salary, emoluments, and pension, minus the SPA he received;

2. Awards the Applicant \$25,000 in compensation; and,
3. Rejects all other pleas.

*(Signatures)*

**Kevin Haugh**  
First Vice-President

**Jacqueline R. Scott**  
Member

**Dayendra Sena Wijewardane**  
Member

Geneva, 23 July 2004

**Maritza Struyvenberg**  
Executive Secretary