

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1245

Case No. 1337

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, Vice-President, presiding; Ms. Jacqueline R. Scott; Mr. Goh Joon Seng;

Whereas at the request of a former staff member of the United Nations, 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 mid-June 2002 and periodically thereafter until 31 January 2004;

Whereas, on 28 January 2004, the Applicant filed an Application requesting the Tribunal, *inter alia*:

“10. ...

- (a) *To order the Respondent* to duly compensate the Applicant for her lost pension income due to pervasive discrimination during her ... career [with the United Nations].
- (b) *To order the Respondent* to pay the Applicant additional moral damages, at the Tribunal's discretion, as partial redress for the injuries suffered by the Applicant as a result of the Respondent's discrimination against the Applicant and decision of refusing promotion to the P5 level until a little more than one year before retirement.
- (c) *To take judicial note* that the [Joint Appeals Board (JAB)] Panel did not investigate the discrimination charges made by the Applicant.”

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 11 May 2004 and once thereafter until 30 May;

Whereas the Respondent filed his Answer on 28 May 2004;

Whereas, on 22 April 2005, the Applicant filed Written Observations amending her pleas as follows;

“25. The Applicant requests that the [Administrative Tribunal] review the decisions of appointment and promotion to P-5 Senior Systems Analyst positions, in order to ascertain the degree to which the processes were full and fair. ...

26. The Applicant requests that the [Administrative Tribunal] ... consider recommending that the Applicant receive the full amount of net salary US\$21,177.12 ... [with] interest.

27. ... [T]he Applicant ... urges the Tribunal to ... order the Respondent to:

...

c) Pay the Applicant additional moral damages in the amount of six months' net salary.”

Whereas, on 30 June 2005, the Tribunal put questions to the Respondent and the Respondent provided answers thereto on 7 July;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

“Employment History

... The [Applicant] joined the Organization on 11 October 1981 with the Electronic Data Processing and Information Systems Division in the then Department of Administration, Finance and Management, as a Programmer/Analyst at the P-3 level on a two-year fixed-term appointment, which was regularly extended. Effective 1 April 1986, she was promoted to the P-4 level. ... On 1 June 1995, [the Applicant's] fixed-term appointment was converted to permanent. Effective 1 November 2000, [she] was promoted to the P-5 level. [On 31 March 2002, the Applicant separated from service upon her retirement].

Summary of the Facts

... In July 1997, a vacancy announcement for the post of Senior Systems Analyst at the P-5 level ... was circulated ...

... [On] 15 August 1997 ... the [Applicant] submitted her application for the P-5 post ... [and] on 21 August 1997, [she] was interviewed ... Four days later, on 25 August 1997, she left for a mission assignment in Maputo, Mozambique.

... Prior to her departure, the [Applicant] verbally informed [a Personnel Officer in the Office of Human Resources Management (OHRM)] about her Mozambique mission and told him that, if there was a need to contact her during the following weeks, she could be reached by e-mail ... According to the [Applicant], she gave the same message to [the] Executive Officer, Department of Conference Services. However, [the latter] denied having received such a message from the [Applicant].

... [The Appointment and Promotion Board (APB)] concluded that the qualifications of [a] staff member other than the Applicant ... were superior ...

... In a letter dated 29 August 1997 addressed to the [Applicant] and mailed to [her New York office, she was advised] ... that ... another candidate [had been recommended] for the P-5 post. [She was further advised] to submit additional information relevant to her suitability for the vacant P-5 post in accordance with administrative instruction ST/AI/413 [entitled "Placement and Promotion" of 25 March 1996] within ten days of 29 August 1997 if she wished to do so.

... On 29 September 1997, the Assistant Secretary-General[, OHRM,] endorsed the APB's recommendation. ...

... The [Applicant] returned to her office from the Mozambique mission on 6 October 1997. In an e-mail dated 14 October ... [she] requested that she be given an opportunity to submit additional information relevant to her suitability for the P-5 post in question, even though the deadline ... had passed. In a separate memorandum also dated 14 October 1997, the [Applicant] submitted additional information. However, as it had completed its work on the filling of the P-5 post ..., the APB never reviewed the additional information submitted by the [Applicant]."

On 1 December 1997, the Applicant requested the Secretary-General to review the administrative decision not to promote her to the P-5 level post of Senior Systems Analyst.

On 13 March and 22 April 1998, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 19 November 2001. Its considerations, conclusions and recommendation read, in part, as follows:

"Considerations

...

22. The Appellant elaborated upon the past 'discriminatory actions'... The Panel noted that the events mentioned ... dated back to the 1980s and the

early 1990s. It also noted that those events had nothing to do with the subject matter of the present appeal ...

23. ... Staff rule 111.2 (k) precludes [the] JAB from considering the substantive issues of relative efficiency of the competing candidates in a promotion exercise. ...

24. ... [T]he Panel nevertheless could ... look into the issues of the procedural irregularities alleged by the Appellant.

...

32. The Panel ... was of [the] undivided view that by sending the letter to her office at Headquarters and not through the UNDP office in Mozambique, the Administration failed in its most elementary responsibility as a good employer to take care of a special but reasonable request of its staff. ...

33. Nevertheless, the Panel did not think that it could be said that, had she had an opportunity to timely submit additional information to the appointment and promotion bodies, the Appellant would have been recommended for promotion to the P-5 post of Senior Systems Analyst. In the view of the Panel, if the Administration had been a bit more diligent and sensitive in its handling of the promotion exercise at issue, the present case would most probably not have arisen to the level of an appeal. ...

...

Conclusions and recommendation

...

36. The Panel ... *unanimously agreed* that, given the special verbal request from the Appellant, the Administration had an affirmative duty to send the notification letter to her ... in Mozambique, and that it failed to notify the Appellant of her non-selection within the meaning of paragraph 11 of ST/AI/413 when it sent the notification letter to her office at Headquarters.

37. The Panel thus *unanimously recommends* that the Appellant be paid three months net base salary ... as ... compensation for the failure to respect her due process right to notification under paragraph 11 of ST/AI/413.

...”

On 12 July 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

“The Secretary-General considers that [the issue of the Respondent’s failure to follow your request regarding the way to contact you while on mission in Mozambique] would not have arisen if you had indicated in writing on your application for the vacancy where and how you should be contacted, rather than merely making a verbal request to a human resources officer who is involved only at the beginning of a promotion exercise and who has no involvement in the subsequent stages. However, since this was not made clear

to you at that time, the Secretary-General has decided to accept the Board's recommendation for compensation."

On 28 January 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred in deciding not to look into the Applicant's allegations of discrimination and in recommending compensation only for violation of the Applicant's due process rights.
2. The Applicant suffered systematic discrimination since joining the Organization and throughout her career.
3. The Respondent failed to apply the instructions of ST/AI/412 of 5 January 1996, entitled "Special Measures for the Achievement of Gender Equality", in the promotion exercise which is the subject of the present Application.
4. Although the Respondent decided to accept the JAB's recommendation and to compensate the Applicant, he failed to actually pay that sum in full.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal is restricted to the allegation of discrimination in the decision not to promote her to the P-5 Senior Systems Analyst post.
2. The Applicant had no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion.
3. There is no evidence of prejudice or other extraneous considerations in the Administration's decision not to promote the Applicant.
4. The Respondent paid the Applicant the correct amount in compensation.

The Tribunal, having deliberated from 23 June to 22 July 2005, now pronounces the following Judgement:

- I. The Applicant seeks review of a decision of the JAB, awarding her three months' net base salary for violation of her due process rights in connection with her application for promotion to the post of Senior Systems Analyst at the P-5 level. The

Applicant challenges the JAB decision on two grounds. In her Application to the Tribunal, the Applicant accepts the JAB's decision to compensate her for said due process violations, but challenges the actual amount of money paid to her by the Respondent with respect to that award. In addition, the Applicant asserts that the JAB did not go far enough; the JAB failed to address her larger claim for compensation for alleged discrimination against her and for violation of ST/AI/412 with respect to her promotion opportunities during her employment with the United Nations.

Since the Applicant does not contest the award by the JAB of compensation for the violation of her due process rights under ST/AI/413, the only question relating to this issue is whether the Applicant received the correct amount of money from the Respondent. The Respondent paid to the Applicant the sum of US\$ 16,539.75, but the Applicant alleges that she is entitled to US\$ 21,177.12. The difference between the two amounts represents the post allowance which the Applicant believes should be included in the calculation of the "net salary" awarded to her by the JAB.

The Tribunal notes that net base salary does not include any post allowance and is calculated by subtracting a staff member's staff assessment from his/her gross salary. As the amount paid to the Applicant equals her net base salary as properly calculated, she is entitled to no more. The Tribunal rejects the Applicant's claim in this respect.

II. The Tribunal next turns to the issue of alleged gender discrimination against the Applicant.

The Tribunal has long recognized the considerable latitude of discretion enjoyed by the Secretary-General in matters of appointments and promotions. (See Judgements No. 362, *Williamson* (1986) and No. 958, *Draz* (2000), citing Judgement No. 411, *Al-Ali* (1988).) Furthermore, the Tribunal has reaffirmed in *Draz* 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 [of promotion]". Of course, this latitude is not limitless; the Secretary-General is constrained to act without bias, prejudice or improper motive, and he may not exercise his discretion in an arbitrary or capricious manner (see Judgment No. 834, *Kumar* (1997)). The burden of proving any discrimination or abuse of discretion, however, lies upon the one claiming it, and he or she must prove by adducing evidence the claim. In Judgement No. 1122, *Lopes Braga*

(2003), the Tribunal held that: “[w]ith respect to whether a discretionary decision, such as the decision not to promote the Applicant, has been tainted by prejudice, discrimination or improper motive the burden of proving such prejudice or improper motive is on the Applicant”.

III. In support of her argument that the Applicant was not promoted because of her gender, the Applicant generally recites her employment history. She alleges that throughout the tenure of her employment, commencing from the very first moment of hire, she was discriminated against. As evidence of this, she alleges that when she was hired she was classified at the level of P-3, despite the fact that she was ranked by the Respondent as the overall most qualified candidate, and that the second best qualified candidate, by the Respondent’s own ranking, was brought in to the Organization at the P-4 level. In addition, the Applicant produces evidence of numerous positions to which she applied and for which she was rejected. At every turn, the Applicant asserts that she was always equally or more qualified than the candidates who were selected for those positions. Finally, the Applicant produces her outstanding performance reviews recorded over the course of many years of employment and the numerous accolades and commendations earned by her for work she performed during the course of her employment.

In short, the Applicant asserts that given her education, many talents, skills, and excellent recommendations, there is no explanation other than discrimination for the fact that she had not been promoted to a P-5 post.

IV. The Tribunal cannot agree. In reaching its conclusion, the Tribunal first notes that, as to the events set out by the Applicant that relate to employment actions and promotion exercises which occurred in the past, the Tribunal will not consider these events in relation to the matter at hand, as such matters are time-barred and, therefore, not properly before this Tribunal. Since the Applicant chose not to challenge those alleged events in a timely fashion at the time of their occurrence, she cannot now raise them.

V. As to the claims by the Applicant with respect to the promotion to the P-5 post which is the subject of this case, the Tribunal further finds that the Applicant has not provided sufficient evidence of discrimination. While the Tribunal appreciates her frustration at not being chosen for the P-5 post, after having applied to many in the

past, especially in light of the exceptional performance ratings given to her by the Respondent over the course of her employment, the Tribunal cannot say that the failure to promote with respect to the post in question was the result of discrimination. The Tribunal recognizes the many components that comprise a decision to promote and will not substitute its judgement for that of the Secretary-General unless there is evidence of abuse of discretion. Having fully reviewed the record, the Tribunal finds that the Applicant was not chosen for the position, based on an assessment by the APB - which assessment was reasonable in light of the qualifications of each candidate - that another staff member was more qualified. This was a reasonable exercise of the Secretary-General's discretion, which was not arbitrary or capricious and which was not motivated by bias, prejudice or discrimination. The Applicant's claim for discrimination is rejected.

VI. The Tribunal now turns to the additional issue raised by the Applicant, of whether the failure of the Respondent to promote the Applicant to a P-5 position was a violation of the Organization's gender equality rules, as set out in ST/AI/412. In Judgement No. 1056, *Katz* (2002), the Tribunal held that, in addition to constraints to act without prejudice, bias, or improper motive, the discretionary powers of the Secretary-General are further

“governed by the relevant provisions of the United Nations Charter and by General Assembly resolutions. In this regard the Tribunal notes the requirements of ST/AI/412, which provide that special measures for the achievement of gender equality within the Secretariat must be instituted towards achieving the goal of ‘50-50 parity between men and women both overall and for positions at the D-1 level and above by the year 2000’.”

The Tribunal further notes the considerable flexibility in promotion requirements with respect to qualified women “in order to increase the number of women considered for promotions”; for example flexibility regarding seniority. Moreover, the Tribunal has reaffirmed in *Katz*, citing *Draz*, that

“the implementation of special measures for the achievement of gender equality, in compliance with General Assembly resolutions, is fully consistent with the exercise of the Secretary-General's discretionary authority, even if such measures are at the expense of other candidates”.

Moreover, in Judgement No. 671, *Grinblat* (1994) the Tribunal noted General Assembly resolutions 44/185, 45/239 and 46/100, “all of which recalled Articles 8 and 101 of the Charter and urged the Secretary-General to strengthen his efforts to increase the number of women, particularly in senior and policy-making posts” and concluded as follows:

“XVII. The Tribunal recognizes that the various resolutions for improvement of the status of women in the Secretariat which have been referred to and statements of the Secretary-General have conceded the existence of an unsatisfactory history with respect to the recruitment and promotion of women that does not accord with Article 8 of the Charter. In such circumstances, the Tribunal considers that Article 8 of the Charter must be regarded as a source of authority for reasonable efforts to improve the status of women. It would be anomalous indeed if this unsatisfactory history had to remain unremedied for an unduly long period. Unless affirmative action measures are taken towards ameliorating the effects of this past history, they will, without doubt, be perpetuated for many years. This is incompatible with the objectives of Article 8, as recognized by the General Assembly. Hence, the Tribunal concludes that Article 8 permits the adoption of reasonable affirmative action measures for improvement of the status of women.

...

XIX. ... The Tribunal considers that, as long as affirmative action is required to redress the gender imbalance with which the Secretary-General and the General Assembly have been concerned, Article 8 of the Charter would permit, as a reasonable measure, preferential treatment to women candidates where their qualifications are substantially equal to the qualifications of competing male candidates ...”

VII. ST/AI/412 is the codification of the gender equality rules envisioned by the General Assembly and the Secretariat. In addition to allowing preferential treatment for women, ST/AI/412 also sets forth obligations of the Administration in ensuring that the goals of the administrative instruction are met. In summary, it requires the Respondent to actively engage in efforts to achieve gender equality, including to identify and secure qualified woman candidates for vacant posts.

This is consistent with the directive of the Assistant Secretary-General, OHRM, who, in his memorandum to all Heads of Departments and Offices of 27 January 1995, addressed the issue of the Respondent’s role in achieving gender parity. In that memorandum, the Assistant Secretary-General advised: “As you know, the Secretary-General has committed himself on several occasions to improve the status of

women in the Secretariat. ... I am requesting you to make every effort to identify qualified women candidates for your vacancies.”

The Tribunal, having reviewed the relevant documents relating to the promotion exercise, notes that the Applicant in this case was short-listed for the position. The Tribunal finds that the Respondent was fully cognizant of his obligations under ST/AI/412 and exercised them appropriately when he determined that another staff member was more qualified for the post.

VIII. For the foregoing reasons, the Tribunal rejects all pleas.

(Signatures)

Spyridon **Flogaitis**
Vice-President, presiding

Jacqueline R. **Scott**
Member

Goh Joon Seng
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**
Executive Secretary

STATEMENT BY MR. FLOGAITIS AND MR. GOH

We would like to add the following statement to the above Judgement:

I. On 7 July 2005, the Respondent submitted to the Tribunal a number of documents, following a request for additional information and documentation deemed by the Tribunal to be pertinent to this case.

II. In his cover letter of the same date, the Respondent stipulated that, in order to respect confidentiality, he was transmitting these documents “on the strict condition that they are not released to the Applicant”.

III. The Tribunal recalls the provisions of article 17 of the Rules of the Tribunal, contained in Chapter V, entitled “Additional documentation during the proceedings”, which states as follows: “The Tribunal may at any stage of the proceedings call for the production of documents or of such other evidence as may be required”.

IV. The Tribunal understands, and is sensitive to, the duty of the Administration to protect third party interests or interests of the Organization in judicial proceedings. However, at the same time, it finds unacceptable the fact that the Respondent provides requested documentation on the condition of confidentiality. The Tribunal is *duty-bound* to render justice and nothing can prevent it from doing so.

V. Moreover, it is a well-established rule of administrative law, deriving directly from the Rule of Law, that when the Tribunal requests the Respondent to produce documents, he should comply. Naturally, the Respondent may express his preference that such documents are not released to an applicant, because of concerns with regard to confidentiality, or because a document is classified. However, it is for the Tribunal, after careful consideration of such a document, to decide whether or not to release it to the other party. This is the reason for the inclusion of article 17 in the Rules, that is, to grant the Tribunal the power to search anywhere the truth might be hidden.

VI. In the instant case, the Tribunal does not accept and will not abide by the condition imposed. However, the Tribunal is aware of and will respect and balance any need for confidentiality against the need for disclosure to ensure justice to parties before it. In this, the Tribunal is, and will always remain, the sole judge. The Tribunal requested the production of the documentation in question as a necessary step in establishing the facts, pursuant to the provisions of article 17.

VII. Moreover, the Tribunal finds that it is impossible for anyone competing for a post to establish discrimination and request judicial review, unless he or she has full access to the file. Being prevented from having full access may jeopardize the person’s rights and interests. The Respondent may argue that disclosure of a file would

not respect confidentiality, but this must be balanced with the right of an applicant to defend him or herself. Otherwise, a violation of due process rights may occur.

VIII. Finally, the Tribunal finds the documents produced pertinent to this case. In fact, they provide all necessary information to allay any suspicion of discrimination against the Applicant. Reasons and explanations are provided as to why the other candidate was proposed for the position, and, as they appear to be based on bare facts - such as the difference in field experience required for the post in question - they seem to the Tribunal not to be tainted by any extraneous factors.

(Signatures)

Spyridon Flogaitis
Vice-President

Goh Joon Seng
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary