United Nations AT/DEC/1248

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1248

Case No. 1340 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Ms. Brigitte Stern; 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 31 January 2003 and periodically thereafter until 31 January 2004;

Whereas, on 31 January 2004, the Applicant filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, re-filed the 31 January Application on 20 February, requesting the Tribunal, inter alia:

"11. …

(c) *to find* that the Applicant had a legitimate expectation to receive special post allowance (SPA) for the period of time she was performing the duties of a [D-1] post;

(d) *to find* that … the Administration wrongfully denied the Applicant the opportunity for promotion;

(e) *to order* the Secretary-General to pay, retroactively, the special post allowance (SPA) for the period of time she was performing the duties of a [D-1] post;

(f) *to order* the Secretary-General to pay the Applicant monetary damages in the amount equal to the higher salary she would have received had

> she been promoted, together with a lump sum reflecting the actuarial difference in her pension, in view of the Administration's deliberate, wrongful denial to the Applicant [of] the opportunity for promotion."

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 23 May 2004 and once thereafter until 23 June 2004;

Whereas the Respondent filed his Answer on 28 May 2004;

Whereas the Applicant filed Written Observations on 30 September 2004;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

> "***Employment History***
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> … The [Applicant] joined the Organization on 1 October 1959 under a three-month fixed-term appointment at the G-2 level as a Clerk-Typist [in the] … Department of Economic and Social Affairs (DESA). …. The [Applicant's] appointment was converted to permanent on 1 October 1961 …
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> … [Between April 1975 and March 1993, the Applicant was promoted several times, and at the material time she was serving as a] P-5 … Senior Economic Affairs Officer in the Division of Public Administration and Development Management, Department for Development Support and Management Services (DPADM, DDSMS). On 30 September 1998, she retired from the Organization.
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> ***Summary of the facts***
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> … On 15 May 1995 … [the Applicant] applied for the post of Chief, Social Development Management Branch (post no. UNA-45240-E-D-1-002), Division of Environment Management and Social Development (SDMB, DEMSD), DDSMS, at the D-1 level.
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> … On 15 September 1995, [the] Under-Secretary-General for Administration and Management issued a memorandum concerning implementation of the special measures related to the [then] financial situation … The memorandum stated, in part:
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> > 'Recruitment at all levels, up to and including the Director (D-2) level, is suspended with effect from 15 September 1995, until further notice […] Special post allowances will not be granted to staff members who assume temporarily the duties of posts affected by this suspension.'
>
> … Replying to a memorandum of 15 September 1995 from … [the] Executive Officer, DDSMS, … [the Office of Human Resources Management (OHRM)] wrote on 28 September as follows:

> 'I recommend your approval to temporarily reassign [the Applicant] (P-5) against (post no. UNA-45240-E-D-1-002) pending the meeting of the departmental panel and presentation to the [Appointment and Promotion Board (APB)]. [T]his assignment will be strictly limited to three months … No SPA will be granted for the assumption of these higher functions.'

…

… On 4 December 1995, … [the Applicant was designated] Officer-in-Charge (OiC), [SDMB], DEMSD, 'with immediate effect and until further notice.'

… [On] 2 August 1996, [the Applicant] requested … [to] be paid … SPA to the D-1 level.

In her reply of 7 August 1996, [the Executive Officer, DDSMS,] wrote:

> '… I regret to inform you that in view of the redeployment exercise which is still ongoing, all requests for SPAs have to be put on hold. At any rate, even if there were no moratorium on the granting of SPAs, the D-1 post is not available.
>
> Pursuant to the General Assembly mandate of 6.4% post reduction to achieve savings for the biennium, the SDMB D-1 post had to be included among the posts that were frozen; in this case, through 31 July 1996. In addition, following [the] recent abolition of 41 … posts which included two D-1 posts, [the Under-Secretary-General for DDSMS] has approved the reassignment of those D-1 staff against vacant … D-1 posts (the D-1 SDMB post included) …'

… … [O]n 8 August 1996, the DDSMS Executive Office issued a Personnel Action [form] showing a change in [the Applicant's] functional title to [OiC], SDMB, DEMSD, effective 4 December 1995. Her post number was shown as UNA 45500-EP-5-001 and her level was shown as P-5.

… On 2 January 1997, [the Applicant] applied for three D-1 posts in Public Administration …

…

… … On 20 August 1997 [the Applicant] applied for the D-1 post of Principal Officer, Office of the Special Adviser on Gender Issues and Advancement of Women …

…

… … On 12 February 1998 [the Applicant] applied for the D-1 post of Chief, Intergovernmental Support Services & Implementation Branch …

… On 25 March 1998, [the Applicant was advised that it would not be possible to grant her an SPA for the period served as OiC, SDMB, DEMSD.]"

On 21 May 1998, the Applicant requested the Secretary-General to review the administrative decision denying her request for SPA.

On 23 October 1998, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 18 June 2001. Its considerations, conclusions and recommendations read, in part, as follows:

> "***Considerations***
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> 26. The Panel had, in the first instance to consider the question of receivability …
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> 27. … The Panel noted that in her request for review, the Appellant had only contested the decision not to grant her [an] SPA. The Panel therefore decided to limit its considerations to the issues dealing with the Appellant's request for SPA, including her non-promotion to the post in question, as all other issues were not properly before the Board.
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> …
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> 29. … The fact that the Appellant had performed higher level functions was not in dispute in this case. …
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> …
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> 31. The Panel … could not find any evidence tending to prove that the contested decision was vitiated by arbitrariness or any other extraneous factor.
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> …
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> 33. The Panel observed however, that the Administration's handling of the Appellant's case has been defective in many respects. Firstly, the Appellant was placed against a D-1 post which did not exist … The Panel observed that neither DDSMS nor OHRM had ascertained the availability of the post before the Appellant was placed against it. Secondly, the Panel observed that no Personnel Action [form] had been issued regarding this 'fictitious' assignment, which moreover, had been let to continue for more than the three months allowed by OHRM. These administrative irregularities. … added to the uncertainties surrounding the Appellant's assignment and promotion prospects, and misguided her into the impression that she was occupying a higher-level post.
>
> *Conclusions and Recommendations*
>
> 34. The Panel concluded that the administrative decisions not to grant SPA to the Appellant and not to promote her to the D-1 post were within the discretion of the Secretary-General, and that such discretion was properly exercised. It further concluded that there has been no violation of the Appellant's terms of appointment, but that the Administration's mishandling of the Appellant's case resulted in substantial harm to the Appellant's career prospects. It unanimously recommended that the Appellant be granted

monetary compensation in the amount of US$2,500 on account of these administrative irregularities.

35. The Panel made no other recommendations with respect to this appeal."

On 24 January 2002, the JAB adopted an Addendum to its report, concerning the discovery of a procedural oversight, which was subsequently rectified. The JAB concluded that there was no need to change any part of its original Report and proceeded to re-submit its Report of 18 June 2001 without any changes thereto, together with the Addendum.

On 29 July 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General had decided to accept the JAB's findings and conclusions and, in accordance with its unanimous recommendation, to compensate her in the amount of $2,500.

On 13 January 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant had legitimate expectation to receive an SPA for the period of time she was performing the duties of the D-1 level post.

2. The JAB erred in limiting its consideration only to the issues dealing with the Applicant's request for SPA and her non-promotion to the post in question, and in determining that "all other issues were not properly before the Board".

3. By its deliberate actions and non-actions between 1995 and 1998, the Administration wrongfully denied the Applicant the opportunity for promotion.

4. The amount of compensation recommended by the JAB and paid by the Respondent did not adequately compensate the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal is restricted to the administrative decision she requested the Secretary-General to review on 21 May 1998; all other claims are not receivable.

2. The Applicant's claim that she was not afforded an opportunity for promotion to the D-1 level between 1995 and 1998 is time-barred.

3. The Applicant had no right to an SPA, and the Administration properly exercised its discretion in not granting her this allowance.

4. The Applicant has already been adequately compensated for any administrative defects in her temporary assignment to post UNA-45240-E-D-1-002.

The Tribunal, having deliberated from 27 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant's claim for SPA is relatively straightforward and easy to understand. She claims payment of SPA or its equivalent for the period from 4 December 1995 until 31 August 1996, being the period when she was assigned the duties of OiC, SDMB, DEMSD, which were the duties and responsibilities of a D-1 post, whereas she occupied a P-5 post and was paid accordingly. She claims that she had a legal expectation to be paid SPA for the said period.

II. Unfortunately the same cannot be said of the Applicant's claim for compensation, arising from her allegation that she was wrongly denied promotion from 1995 until her retirement from the Organization in 1998. This claim is far from straightforward. It is difficult to understand it and it is difficult to understand what case she makes. This part of the claim appears to contain irreconcilable conflicts or contradictions.

During that period, the Applicant applied for no less than six posts at the D-1 level. She did not enjoy promotion. She is, however, at pains to point out that she is not alleging that she was wrongfully or maliciously denied appointment to any one of these particular positions. Rather, she makes the case that, whilst she was awaiting the processing of her application for promotion to the D-1 post of Chief, SDMB, DEMSD, she was so deceived, misled and denied proper treatment that her general promotion prospects were jeopardised and diminished. She claims that in consequence, she has suffered the loss of the additional remuneration which she would have enjoyed had she been promoted, together with a continuing loss of pension entitlements as her pension entitlements would have been calculated by reference to her salary at the time of her retirement. Post UNA-45240-E-D-1-002 was the very post to which the Applicant had been assigned as OiC and duties of which she had discharged between 4 December 1995 and 31 August 1996, being the period for which the payment of SPA or its equivalent is now claimed. It would appear from the record that there was never

funding available from which SPA could have been paid to the Applicant, as the post had initially been frozen and, thereafter, allegedly unbeknownst to the Applicant at the time, two different staff members at the D-1 level had successively occupied the said post, albeit that the duties of the post had been discharged by the Applicant. She describes the two said staff members as "refugees from abolished posts" who had been "simply lodged against the post on the manning table" and that they "did not perform its functions, which the Applicant had carried out".

The Tribunal has insurmountable difficulties trying to understand the factual basis said to be behind the said part of the Applicant's claim, that she was **wrongfully denied opportunities for promotion,** which, it is stressed, is a different claim to one alleging that she was not promoted to any one of the vacancies for which she had applied or to a claim *simpliciter* that **she was not promoted**. This somewhat unusual approach may have been adopted by the Applicant's counsel as a legal stratagem in the hopes of avoiding a rejection of the non-promotion aspects of the Applicant's claim on the basis that administrative review had not been sought in relation to them. Alternatively, and perhaps more likely, it might have been adopted because her counsel was aware that the Applicant lacked evidence which could establish procedural or due process violations, or establish that she had been wrongfully denied appointment to any one of those positions or that her non-promotion was as a result of any prejudice or other extraneous factor, so that any claim for compensation for her non-appointment to any one of them was doomed to failure.

III. As previously stated, the Applicant had applied for promotion to no less than six different D-1 posts during the period in question. The JAB had interpreted her claim, as then made, as a claim that she had been wrongfully denied promotion to one of the said posts and the Tribunal believes that this interpretation was fully understandable in the light of the manner in which that claim was then phrased. It is in her proceedings before this Tribunal that the Applicant is at pains to stress that the JAB did not interpret her claim in accordance with her intentions and that it had misconstrued her claim.

Based on its understanding of the Applicant's appeal to the JAB, the JAB had declined to consider that part of her claim which sought compensation for denial of promotion, on the grounds that this part of the claim was irreceivable. Here, again, the Tribunal considers this conclusion was correct in light of the claim as understood by

the JAB, as a claim that she had been wrongly denied promotion to one of the posts for which she had applied. The JAB found that the Applicant had, in her letter to the Secretary-General of 21 May 1998, confined herself to seeking administrative review of the decision not to pay her SPA and to her claim that she was wrongly denied promotion to post UNA-45240-E-E-1-002. The JAB thus found that claims that the Applicant had not been promoted to any other position for which she had applied were not properly before it. In the view of the Tribunal, this finding was correct in all of the surrounding circumstances.

IV. In these proceedings, the Respondent not only argues that these aspects of the Applicant's claim are irreceivable by reason of the Applicant's failure to seek administrative review of the decisions concerned, as required by staff rule 111.2 (a), but further submits that her claim is time-barred in relation to all non-promotion aspects, including her application for post UNA-45240-E-D-1-002, the functions of which had been merged with those of another Branch within the Department.

V. It is clear from the record, that the Applicant had been fully aware that she had not been successful in her applications for promotion for a long time prior to requesting administrative review.

Staff rule 111.2 (a) provides, inter alia, that "a letter to the Secretary-General requesting that the administrative decision be reviewed … must be sent within two months from the date the staff member received **notification of the decision in writing**". (Emphasis added by the Tribunal.) The Applicant argues that she never received written notification of any of the decisions not to grant her promotion, so that the time limit envisaged by staff rule 111.2 (a) cannot be said to have run against her.

In quite recent times the Tribunal has clarified the purpose of the staff rule and the requirement therein of written notification of a decision prior to the commencement of proceedings for review thereof. See Judgement No. 1157, *Andronov* (2003) where the Tribunal stated, inter alia:

> "There is no dispute as to what an 'administrative decision' is. It is acceptable by all administrative law systems, that an 'administrative decision' is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually

> referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions."

This is so, for were the staff rule to be strictly construed so that written notification was to be prerequisite to the exercise by the staff member of his or her right to invoke the jurisdiction of the JAB and in turn the Tribunal, then the rights of the staff member could be held up indefinitely, if not ultimately defeated, should the Administration decline to issue written notification of a decision to a staff member detrimentally affected by same.

The Tribunal in *Andronov* (*ibid*.) added that

> "As stated in previous jurisprudence, the countdown for the deadlines of appeals begins only when the contested decisions and their relevant details are known to the Applicant. Staff rule 111.2(a) indicates, procedurally, the point in time from which the counting towards the deadline begins for initiating an appeal process. However, if a decision is not made in writing and is unknown to the staff member concerned, the point of time for starting the process is from the time the staff member knew or should have known of the said decision. This is particularly so in cases of implied administrative decisions, as otherwise the right to legal and judicial protection could easily be jeopardized." (See also Judgement No. 1046, *Diaz de Wessely* (2002).)

The Tribunal therefore decides that time should be deemed to have commenced to run from the time when a staff member, exercising due diligence, would have become aware or became aware of the decision in respect of which review is to be sought. Accordingly, the Tribunal is satisfied that it lacks the jurisdiction to adjudicate upon a claim arising from the non-appointment of the Applicant to any one of the vacancies for which she had applied, as she was aware that she had not been successful on any application for a lot more than two months before she wrote her letter seeking administrative review and she did not seek review of any of the decisions not to have appointed her to any of those positions for which she had made application. If these matters are taken out of the equation or removed from the Tribunal's considerations,

then there is no evidence which could support a finding that the Applicant was denied promotion prospects or that she has suffered financial loss. This becomes self-evident if one asks rhetorically *"What promotion opportunities was the Applicant denied?"* or *"What promotion is it said the Applicant would have probably enjoyed were it not for the actions of which she complains?"* If one cannot answer such questions then there is no factual basis upon which a finding could be made.

In these circumstances, the Tribunal must decline to consider that part of the Applicant's claim in which she seeks compensation for wrongful denial of promotion prospects. It will now deal with that part of her claim in which she claims payment of SPA or its equivalent.

VI. In her letter of 21 May 1998 to the Secretary-General, the Applicant sought administrative review of the decision not to award her SPA for the period when she had carried out the duties and responsibilities of the D-1 post. She had first sought such payment by her memorandum of 2 August 1996 to the Executive Officer, DDSMS, wherein she had stated that

> "since [she had] been performing the full duties and responsibilities of a post at a clearly recognizable higher level for more than three months, [she would] appreciate receiving a special post allowance to the D-1 level in accordance with staff rule 103.11 (b)".

There was a delay of almost one year and nine months between the time when the Applicant was informed that her application for SPA was being rejected and her writing to the Secretary-General seeking administrative review of that decision, so it would appear that this claim was made out of time as well.

The Executive Officer replied by memorandum of 7 August 1996, when she informed the Applicant that SPA would not be available (i) because of the moratorium which had been imposed on the granting thereof; and (ii) that the SDMD D-1 post, whose duties she had been performing, had in the first instance been frozen and latterly was used to temporarily accommodate two other D-1 staff whose overhead posts were abolished. The Executive Officer's reference to the moratorium in her said memorandum was clearly a reference to a decision which had been taken by the Under-Secretary-General for Administration and Management, which had been circulated to all Heads of Departments and Offices, in which he had announced a number of cost-saving measures which he considered necessary in the prevailing financial

circumstances. It, inter alia, suspended recruitment at all levels up to the D-2 level from 15 September 1995 until further notice and it precluded the granting of SPA to any staff member who assumed temporarily the duties of posts affected by the said suspension. The Tribunal cannot assume that the Applicant was unaware of the said "moratorium" when she agreed to assume the duties of the D-1 post or that it remained in force throughout the period in which she had carried out those duties. Surely if she had been unaware of it or if she had been assured by someone in authority that she was to be paid SPA, notwithstanding the said moratorium, she would have immediately pointed this out to the Executive Officer in response to the said memorandum of 7 August 1996.

The Applicant bases her claim for payment of SPA on her assertion that she had enjoyed a legal expectation that she would enjoy such a benefit. A legal expectancy arises when the person claiming such benefit can establish that there is an obligation on the Administration to confer the said benefit or to make the said payment arising from what was a promise or effectively a promise or assurance that the money would be paid or the benefit would accrue to the claimant in return for some consideration or action being given or foregone by the claimant. In essence, the claimant need establish something tantamount to an agreement or a promise and to establish circumstances where it could be unconscionable on the part of the Administration not to honour the said promise. The Tribunal has previously pronounced itself on this matter in Judgement No. 1082, *Yearwood* (2002) as follows:

> "there can be cases where a legal expectancy or legitimate expectation … can be established on the basis of unequivocal promises made by persons with appropriate authority … [V]ague, uncertain and unsubstantiated assertions fall far short of what it would be necessary to establish, in order to justify a finding that the Applicant had enjoyed any legal or binding expectation … As stated by the Tribunal in [Judgement No. 1030, *Jensen* (2001)]:
>
> > 'The Tribunal is satisfied that even if the Applicant could establish that he genuinely entertained such an expectation, it would not bind or create any obligation on the part of the Respondent to so retain the Applicant unless the Applicant could establish first, that such an expectation was reasonably entertained, and second that it resulted from some promise made by or on behalf of the Respondent by someone who had actual, or at least ostensible, authority to make such a promise, so that it would become legally binding upon him'."

In this case, the Applicant neither asserts nor seeks to establish anything amounting to a promise that SPA would be paid. SPA, is by definition, a discretionary benefit payable in exceptional circumstances rather than a benefit which a staff member would enjoy as of right for performing duties and responsibilities at the higher level. See Judgements No. 336, *Maqueda Sanchez* (1984), where the Tribunal stated that "staff employed by the United Nations are often asked to render services of a character and at a level superior to those for which they have been appointed or employed", and No. 1212, *Tekolla* (2004), where the Tribunal reaffirmed that it

> "fully appreciates that the payment of SPA is not a staff member's absolute entitlement and that under staff rule 103.11(b) and PD/1/84/Rev.1 the Respondent possesses discretionary authority in this matter. This has also been confirmed by the Tribunal in its jurisprudence (See, for example, Judgement No. 1057, *Da Silva* (2002).) However, this is a *quasi* judicial discretion which cannot be exercised capriciously or arbitrarily."

VII. In all of the circumstances, the Applicant has failed to establish any legitimate expectancy to have been paid SPA, let alone something which was tantamount to an agreement to pay same. She cannot invoke or demonstrate any extraordinary circumstances let alone circumstances which would leave it unconscionable that it should not be paid, particularly when there was in force a prohibition against payment arising from the Under-Secretary-General for Administration and Management's said moratorium. In these circumstances, the Applicant's claim for the payment of SPA or its equivalent is likewise rejected.

VIII. There remains the issue of the adequacy of the amount of US$ 2,500 recommended by the JAB and paid by the Respondent to the Applicant to compensate her for the poor treatment afforded to her when she had applied for promotion to post UNA-45240-E-D-1-002 and when she agreed to perform the duties of OiC, SDMB, DEMSD, with the encouragement of her superiors that they would support her candidacy. It is clear from the record that she was encouraged by promises which were not fully honoured and that she was kept in the dark as to the changing circumstances which militated against her chances of achieving this promotion. Whilst there is no evidence to suggest that this ill treatment arose from malice or ill-will on the part of her superiors, nonetheless the Tribunal agrees with the Applicant that the sum of US$ 2,500 is not adequate compensation for the wrong done. The Tribunal accordingly

awards to her a further sum of US$ 5,000 for this wrong done, making in total the sum of US$ 7,500 under this heading.

IX. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid additional compensation in the amount of US$ 5000, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and
2. Rejects all other pleas.

(*Signatures*)

Kevin **Haugh**
Vice-President, presiding

Brigitte **Stern**
Member

Goh Joon Seng
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**
Executive Secretary