

VI. The Tribunal acknowledges that the length of time during which the staff member assumed these increased responsibilities and the manner in which he discharged them could legitimately be included among the criteria for determining the existence of the exceptional cases mentioned in paragraph (b) of Staff Rule 103.11. The Tribunal is of opinion, however, that these factors cannot on their own be considered as decisive and that in any event the Applicant has not proved the existence of prejudice in the case under consideration.

VII. For these reasons the application is rejected.

*(Signatures)*

Suzanne BASTID  
Vice-President, presiding  
Zenon ROSSIDES  
Member

Vincent MUTUALE  
Member  
Jean HARDY  
Executive Secretary

Geneva, 19 April 1972

### Judgement No. 156

*(Original: English)*

Case No. 152:  
Garnett

Against: The Secretary-General  
of the United Nations

*Request for the rescission of a decision that the salary of a staff member who was promoted should be calculated solely at the time of promotion, without regard to changes in the salary scales during the following year.*

*Staff Rule 103.9.—Claim by the Respondent that the calculation called for by this provision should be made solely on the basis of the salary scale prevailing at the time of promotion.—The claim is rejected, as it is contrary to the wording of the aforementioned provision and inconsistent with its obvious purpose.—Question of retroactivity.—Administrative hardship and how to deal with it.—Rescission of the contested decision and obligation of the Respondent to recompute the Applicant's salary in accordance with the judgement.—Award to the Applicant, should the Respondent decide to exercise the option given him under article 9.1 of the Statute of the Tribunal, of compensation at a sum equal to the net amount of additional compensation she would have received if Staff Rule 103.9 had been properly complied with in accordance with this judgement.*

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francis T. P. Plimpton, Vice-President; Mr. Mutuale-Tshikantshe Vincent;

Whereas, on 6 October 1971, Miss Betty Garnett, a staff member of the United Nations, filed an application requesting the Tribunal:

"1. To rescind the decision not to adjust my salary, in order that, during the period 1 September 1969 to 1 September 1970, that is, the first year following my promotion from G-5 step IX to P-2 step I, my salary would remain the equivalent of one full step more than I would have received without promotion and this in accordance with the provisions of Staff Rule 103.9 (i);

"2. To order that the necessary measures be taken so that my salary during the first year following promotion (viz. 1 September 1969 to 1 September 1970) is in accordance with Staff Rule 103.9 (i).";

Whereas the Respondent filed his answer on 14 December 1971;

Whereas the Applicant filed written observations on 12 January 1972;

Whereas, on 24 March 1972, the Applicant informed the Tribunal "that the amount of money lost by [her] during the period 1 January 1970 to 31 December 1971 [was] approximately \$630";

Whereas the facts in the case are as follows:

On 1 September 1969 the Applicant, a Professional Assistant at the G-5, step IX level, was promoted to the P-2 level with the functional title of Associate Social Affairs Officer and her salary rate was computed at the P-2, step I level in accordance with Staff Rule 103.9 (i) which provides, on promotion, for an increase in salary equivalent to one full step in the new level more than the staff member would have received without promotion, except where promotion to the lowest step of the level yields a greater amount. On 1 January 1970 there was a general increase in the salary scale for the General Service category which was not taken into account in the application of Staff Rule 103.9 to the Applicant. In memoranda dated 28 September and 10 November 1970, the Applicant sought from the Office of Personnel an adjustment of the steps in her grade on the ground that, notwithstanding Staff Rule 103.9 (i), the amount of her salary during the first year following her promotion had not been one full step more than she would have received without promotion. On 14 December 1970 she was informed that the Office of Personnel could not accept for calculation purposes the salary increase of the General Service staff effective 1 January 1970 because this increase in salary was a separate administrative action taken after her promotion. On 12 January 1971 the Applicant requested the Secretary-General to review that administrative decision. In a reply dated 3 February 1971 the Director of Personnel denied the Applicant's request. On 19 February 1971 the Applicant lodged an appeal with the Joint Appeals Board, which submitted its report on 29 June 1971. The Board's conclusions and recommendations read as follows:

*"Conclusions and Recommendations*

"14. The Board finds that the appellant's salary was correctly calculated at promotion in conformity with the provisions of Staff Rule 103.9 (i) and according to the salary scales then in effect. In the Board's judgement the intervening increase in the salary scale of the General Service category does not, in the absence of an explicit retroactivity clause, entail a modification in the effects of a valid administrative decision. The Board therefore does not make any recommendation in support of the appeal."

The Member elected by the Staff appended to the report a dissenting opinion reading as follows:

"In my view, the so-called 'doctrine of non-retroactivity' does not validly apply to the case at hand because Staff Rule 103.9 (i) simply and unequivocally provides that, 'during the first year following promotion, a staff member in continuous service shall receive in salary the amount of one full step in the level to which he has been promoted more than he would have received without promotion . . .'. Appellant was promoted in September 1969 and during the year following her promotion (i.e. September 1969 to September 1970) the amount of her salary was not one full step more than she would have received without promotion because from 1 January 1970 to 1 June 1970 her salary at P-2, step 1, was \$9,593 net, while the salary she would have received in that period without promotion would have been \$9,701 net for G-5, step 10. From 1 June 1970 to 1 September 1970, with the increase in post adjustments in June 1970, the salary she received was \$9,827 net, compared to \$9,701 net without promotion, which was still not equivalent to a full step higher as required by Staff Rule 103.9 (i). Clearly, for the staff member to receive a full step, the United Nations should have recomputed her salary for the remaining months of the year following her promotion (January-September 1970) to continuously reflect the difference of one full step in her new level above the new salary for the G-5, step 10 level.

"In my judgement, the words 'during the first year following promotion' in Staff Rule 103.9 (i) constitute such an explicit provision mandating the United Nations to a recomputation of Appellant's salary in the light of new circumstances intervening during the year following promotion. It is my belief that on promotion a staff member's salary is increased by a certain minimum. Therefore, under Staff Rule 103.9 (i) the United Nations is obliged not only to calculate correctly the staff member's proper salary at the date of the promotion but mandates that the salary before and after promotion be not less than a certain minimum during the year following promotion irrespective of whether the salary gap has been due to foreseen or unforeseen fluctuations in salary.

"Based on the foregoing considerations, I am therefore obliged to dissent from the conclusions and recommendations contained in paragraph 14 of the Board's majority report and find that Appellant's salary was incorrectly calculated as provided by Staff Rule 103.9 (i). Finally, it is my further judgement that the intervening increase in the salary scale of the General Service category does entail retroactively mandating the United Nations to a recomputation or recalculation of Appellant's salary during the year following promotion. I, therefore, support the appeal."

The Secretary-General having decided on 28 July 1971 to accept the opinion of the majority of the Joint Appeals Board, the Applicant filed on 6 October 1971 the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Staff Rule 103.9 (i) imposes an obligation on the Respondent to maintain a certain minimum difference in salary before and after promotion and this for a period of one year following the effective date of promotion.
2. The question of retroactivity therefore does not arise. Whilst the initial calculation of salary will stand, if, due to any circumstances, foreseen or otherwise, the minimum difference in salary contemplated in Staff Rule 103.9 (i) is not respected, then the proper adjustment should be implemented in order to

maintain that difference for the one year following the effective date of promotion, as provided in the second sentence of the Rule.

3. Even if the doctrine of retroactivity had to be admitted as applicable to the case, the opening words of Staff Rule 103.9 (i) do constitute the retroactivity clause.

4. Those opening words have no meaning if the interpretation favoured by the Joint Appeals Board is followed.

5. Even if Staff Rule 103.9 (i) lent itself to more than one interpretation, the more evident interpretation is that which is more favourable to the Applicant.

6. It is consistent with the basic principles of justice that a person who is promoted received a higher salary than that which he used to receive before his promotion.

Whereas the Respondent's principal contentions are:

1. Staff Rule 103.9 (i) means that in fixing the promoted staff member's salary step and the date of his next salary increment in the new level, the Administration must take into account the salary increment which, without promotion, he would have received during the year following promotion, as well as the date on which he would have become eligible for that increment. The opening words of the Rule are therefore necessary.

2. The Administration is justified in limiting the scope of Staff Rule 103.9 (i) in view of the principle which establishes a presumption against retroactivity.

3. The "basic principle of justice" invoked by the Applicant was not violated.

4. The necessity of revising decisions concerning the salary status of staff members promoted from the General Service to the Professional category would bring an element of uncertainty into their salary situation and would impose undue administrative hardship on the Administration.

5. The salary scales for the Professional category and those for the General Service are governed by entirely different principles.

The Tribunal, having deliberated from 18 to 20 April 1972, now pronounces the following judgement:

I. This case involves the interpretation of Staff Rule 103.9, entitled "Salary Policy in Promotions", which reads in part:

"(i) During the first year following promotion a staff member in continuous service shall receive in salary the amount of one full step in the level to which he has been promoted more than he would have received without promotion, except where promotion to the lowest step of the level yields a greater amount. The step rate and date of salary increment in the higher salary level shall be adjusted to achieve this end."

II. The Respondent in effect claims that the calculation called for by the above clause (i) should be made, at the time of promotion (i.e., at the beginning of the first year following promotion), solely on the basis of the salary scale then prevailing in the position from which the staff member was promoted, and that increases in the salary scale for that position occurring thereafter during the first year following promotion should be disregarded.

This claim is contrary to the wording of clause (i). The initial phrase "During the first year following promotion" clearly implies a computation continuing

throughout the year and not one made solely as of the beginning of the year. To disregard increases made during the year in the salary scale for the position from which the staff member was promoted would be inconsistent with the obvious purpose of the Staff Rule to ensure that the promotion should result in his receiving during the year compensation in the amount of one step in the new position's salary scale more than he would have received in the prior position during that year. The Respondent's interpretation would require a precise statement in the Staff Rule that all calculations are to be made only at the beginning of the year and without regard to subsequent developments in the year. In the absence of any such statement, increases during the year in the salary scale of either position must clearly be taken into account.

III. No retroactivity is involved since, as stated in paragraph II above, the calculation is to be made for the entire year taking into account any changes as from their effective date.

IV. As to the claim of administrative hardship, the Tribunal observes that the Respondent, when increasing salary scales in the General Service category, need only take into account the effect of the increase on the salaries of professional staff members promoted from the General Service category during the prior year.

V. For the above reasons the Tribunal:

(a) Rescinds the Respondent's decision of 28 July 1971 and orders the Respondent to recompute the Applicant's salary for the year 1 September 1969-1 September 1970 in accordance with Staff Rule 103.9 (i) as construed above by the Tribunal; and

(b) Fixes the amount of compensation to be paid to the Applicant, should the Respondent decide to exercise the option given him under article 9.1 of the Statute of the Tribunal, at a sum equal to the net amount of additional compensation the Applicant would have received if Staff Rule 103.9 (i) had been properly complied with in accordance with this judgement.

*(Signatures)*

Suzanne BASTID  
*Vice-President, presiding*  
Francis T. P. PLIMPTON  
*Vice-President*

MUTUALE-TSHIKANTSHE Vincent  
*Member*  
Jean HARDY  
*Executive Secretary*

Geneva, 20 April 1972

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## Judgement No. 157

*(Original: English)*

**Case No. 156:**  
Nelson

**Against: The Secretary-General  
of the United Nations**

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*Termination of the employment of a staff member holding a permanent appointment, on the ground of unsatisfactory service.*

*Request for the rescission of the decision to terminate the appointment.—Contention that the real ground for termination was a suspicion of unauthorized outside employment*