

Judgement No. 310

*(Original: French)*Case No. 279:
EstabialAgainst: The Secretary-General
of the United Nations

Request by a staff member of the United Nations to hold that the Respondent failed to implement staff rule 111.3, to find that the Respondent violated staff regulations 4.2, 4.3 and 4.4 by not taking the Applicant's candidature into consideration for a vacant post and to order the Respondent to make appropriate redress in accordance with the concept of reconstitution de carrière and to pay compensation.

Conclusion of the Joint Appeals Board that the Applicant's candidature was not given serious consideration by the Respondent, in breach of staff regulation 4.4.—Recommendation that the Applicant be awarded compensation or ex gratia payment for violation of implied contractual right to fair and equitable treatment, as well as additional compensation for the long delay in submitting the Respondent's reply, as noted by the Tribunal in its Judgement No. 291.—Recommendation rejected.

Question whether the Applicant's candidature has been properly taken into consideration.—Examination of all the circumstances of the case.—The Tribunal finds that the Applicant's candidature was not properly examined in substance.—The Tribunal holds that this constitutes a violation of Staff Regulations.—Question of proper interpretation of the requirement that staff should be recruited on as wide a geographical basis as possible, in the light of Article 101, paragraph 3, of the Charter of the United Nations and of article 4.2 of the Staff Regulations.—The Tribunal holds that the Secretary-General's decision limiting in advance his choice for a given post to candidates who were nationals of a particular group of countries was tainted with errors of law and prevented the Applicant from exercising his right of having his candidature examined for the post in question.—Necessity to redress the injury thereby caused.

Circumstances in which the Applicant's request for review was examined.—Excessive delay in submitting the Respondent's reply to the Joint Appeals Board.—Responsibility of the Administration for these faults.

Conclusion that the Applicant had no right to promotion.—Award of compensation equal to two months' net base salary.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Luis M. de Posadas Montero; Mr. Roger Pinto;

Whereas, on 29 April 1982, Jacques J. Estabial, a staff member of the United Nations, filed an application the pleas of which read as follows:

“. . . Applicant respectfully requests the Administrative Tribunal to *hold* that Respondent has failed to implement Staff Rule 111.3 with respect to Applicant and that Respondent's failure to meet his obligation under that Rule is such a default that Applicant's Appeal may be received by the Administrative Tribunal; to *find* that Respondent has violated Staff Regulation 4 by not considering Applicant for appointment to the post of Director of the Division of Recruitment; and to *order* that appropriate redress be made”;

Whereas by its Judgement No. 291 of 28 September 1982 the Tribunal decided that the application was not receivable because the joint appeals body provided for in the Staff Regulations had not communicated its opinion to the Secretary-General;

Whereas on 1 February 1983 the Applicant filed a new application in which he requested the Tribunal:

“A. To *order* Respondent to produce a copy of the Joint Appeals Board recommendation in his case, which was communicated to Respondent on 28 December 1982, and to allow Applicant to amend his Application if necessary in light of the Board’s recommendation; and

“B. To *declare* that his Application filed 29 April 1982 is receivable, and to consider the Application on its merits”;

Whereas the Respondent sent the Applicant a copy of the report of the Joint Appeals Board on 18 February 1983;

Whereas the Respondent filed his answer on 29 March 1983;

Whereas on 20 April 1983 the Applicant filed written observations in which he restated his pleas and requested the Tribunal:

“A. To *hold* that Respondent has failed to implement Staff Rule 111.3 with respect to Applicant;

“B. To *find* that Respondent has violated Staff Regulations 4.2, 4.3 and 4.4 with respect to Applicant by not considering his candidature for the post of Director of the Division of Recruitment;

“C. To *order* Respondent to make appropriate redress to Applicant in accordance with the concept of *reconstitution de carrière* for the damage to Applicant’s career resulting from Respondent’s failures to consider Applicant’s candidature in accordance with Staff Regulations 4.2, 4.3 and 4.4;

“D. To *order* Respondent to pay Applicant a sum equivalent to two months’ net base salary as compensation for the stress and humiliation suffered in consequence of the too long delayed responses to the Joint Appeals Board’s proceedings”;

Whereas the Applicant filed an additional document on 20 April 1983;

Whereas the facts in the case subsequent to the statement of facts contained in Judgement No. 291 are as follows:

On 28 December 1982, the Joint Appeals Board submitted its report. The conclusions and recommendations of the Board were as follows:

“*Conclusions and recommendations*”

“71. The Board concludes that the appellant’s candidature for the post at issue was not given serious consideration in accordance with basic procedural standards.

“72. Further, although no right to promotion exists, there is a right to fair consideration for promotion, and the movement from D-1 to D-2 is one of promotion. In any event, the appellant had a right, as a current staff member, for his candidature to be properly considered in accordance with Staff Regulation 4.4.

“73. The Board takes note of the fact that the post in question is again vacant. It follows from the conclusions which it has already proffered,

that the appellant's candidature should accordingly, on this occasion, be given full and proper consideration in the context of the Staff Rules and established standards.

"74. It recommends that, in view of the serious procedural error which led to the former failure to give proper consideration to the appellant's candidature, he be awarded a sum equivalent to one month's net base salary.

"75. In the alternative, it recommends that he be granted a similar sum as an *ex gratia* acknowledgement of violation of the implied contractual right of a United Nations staff member to fair and equitable treatment by the Respondent.

"76. The Board also takes note of the Tribunal's finding (in its Judgement No. 291) that the submission of the Respondent's reply 'to the Joint Appeals Board was delayed far too long and that this fact has so far prevented the Board from communicating its opinion'. Accordingly, the Board recommends that the appellant be awarded, as an additional payment, a sum equivalent to one month's net base salary."

On 8 January 1983, Mr. Louis-Pascal Nègre was appointed Assistant Secretary-General for Personnel Services. On 17 January 1983, Mr. Igor Radovic, a Director in the Department of Technical Co-operation for Development, was appointed Director of the Division of Recruitment. On 1 February 1983 the Applicant was assigned to the Office of the Assistant Secretary-General for Personnel Services as Principal Personnel Management Officer. That same day, he filed the new application referred to earlier. On 18 February 1983, the report of the Joint Appeals Board was transmitted to the Applicant. On 3 March 1983, the Officer-in-Charge, Office of Personnel Services, informed the Applicant that the Secretary-General had decided not to accept the recommendations made by the Board in paragraphs 74, 75 and 76 of its report.

Whereas the Applicant's principal contentions are:

1. The Respondent erroneously presents the appointment of an outside candidate as a lateral transfer of a staff member.
2. The Applicant has not claimed a right to promotion. What he claims is the right to have been considered for promotion or appointment to a vacant post for which he was very well qualified.
3. Staff Rule 104.14 contains no wording to indicate that it should not be applied in determining suitability of candidates for D-2 level posts and the absence of Staff Rules does not invalidate the relevant Staff Regulations, in particular Regulations 4.2, 4.3 and 4.4.
4. The violation of the Applicant's procedural rights lay in the fact that there was neither a formal nor an informal procedure of seriously considering his candidature.
5. The Respondent has abused his discretionary power to reject the recommendations of the Joint Appeals Board.

Whereas the Respondent's principal contentions are:

1. No staff member has a right to any particular assignment and so a lateral transfer of one staff member to a vacant position cannot violate any rights of other staff members for whom such an assignment would have resulted in a promotion.
2. No staff member has a right to promotion and although the Staff Rules establish procedures to govern the manner in which recommendations are made

to the Secretary-General for appointment and promotion of staff up to the D-1 level, such procedures do not apply to the transfer of staff pursuant to Staff Regulation 1.2 nor do they apply to appointments and promotions at higher levels than D-1. It follows that consideration of the Applicant for the position of Director of Recruitment in an informal manner did not violate Applicant's procedural rights.

3. As the lateral transfer of another staff member to the position of Director of Recruitment did not violate Applicant's rights, alleged delays in hearing his appeals do not give rise to any entitlement to damages.

The Tribunal, having deliberated from 19 May to 10 June 1983, now pronounces the following judgement:

I. The Applicant and the Respondent disagree as to whether the Applicant's candidature of 15 October 1980 for the post of Director of the Division of Recruitment was ruled out without being taken into consideration or examined. As a result, the Tribunal's first task was to settle this point.

II. By a memorandum of 6 November 1980, Mr. J. O. C. Jonah, Assistant Secretary-General for Personnel Services, sent the Applicant a copy of a letter dated 30 October 1980 which he was dispatching "to all the Francophone African Member States". That letter indicated that the Secretary-General had decided that:

"for the post of Director of the Division of Recruitment, priority will be accorded to candidates from French-speaking African countries".

In his above-mentioned memorandum of 6 November 1980, Mr. Jonah informed the Applicant that:

"Having carefully examined your application, and in view of the above circumstances, I deeply regret that it cannot be given favourable consideration."

III. In a note dated 16 December 1980 addressed to Mr. Jonah, Mr. J. R. Webb, Director of the Division of Personnel Administration, stated:

"I recall at least one discussion with you, probably prior to 30 October 1980, in which you had indicated that Mr. Estabial and several other staff members had already been considered. My recollection is that you felt none of those we discussed had the qualifications you felt necessary for the post. If my recollections are correct, and your position has not changed, I would say that the consideration required under 4.4 has been given and that the response to Mr. Estabial could be framed in these terms."

On 19 December 1980, Mr. Jonah wrote in the margin of this note: "this is correct". He added:

"Frankly speaking, even if the Secretary-General had not decided on a French-speaking African, I would have found it difficult to recommend Mr. Estabial for the post of Director."

IV. In a letter dated 3 February 1981 addressed to the Applicant, Mr. Jonah stated that the Applicant's candidature

"was very carefully examined, but it was felt that it could not be given favourable consideration".

V. By that date, the Secretary-General had already approved, in mid-January 1981, Mr. Jonah's recommendation that Mr. Louis-Pascal Nègre (Mali) be appointed to the post of Director of the Division of Recruitment.

In his memorandum of 14 January 1981 to the Secretary-General, Mr. Jonah stated:

“2. In accordance with your decision, the search for candidates for this post was restricted to nationals of French-speaking African countries. The job description was sent to the Permanent Missions of those countries requesting nominations of suitable candidates; in addition roster candidates as well as staff members from the above region were considered.”

VI. The Tribunal finds that it follows from the above-mentioned documents that the Applicant's candidature could not be taken into consideration and thus examined. According to the Secretary-General's decision to which Mr. Jonah referred on two occasions, the only candidatures that could be examined were those of candidates from French-speaking African countries. This is the essence of the memorandum of 6 November 1980 addressed to the Applicant, in which Mr. Jonah attributed to the “above circumstances”, namely, to the decision to reserve the post for candidates from French-speaking African countries, the refusal to take the Applicant's candidature into consideration. At that stage, those circumstances alone had motivated the refusal to take the Applicant's candidature into consideration.

VII. At a later stage, in his note of 16 December 1980, the Director of the Division of Personnel Administration reminded Mr. Jonah that he seemed to recall that, at some date, probably prior to 30 October 1980, Mr. Jonah had indicated that the candidatures of Mr. Estabial and several other staff members had been considered and that he had felt that none of those discussed had the qualifications he felt necessary for the post. At the same time, the Director of the Division of Personnel Administration gave only a very vague indication of the date on which that conversation had taken place—“probably prior to 30 October 1980”. Mr. Jonah was not any more specific. Now, if this conversation took place prior to 15 October 1980, the date on which the Applicant submitted his candidature, it could not have constituted consideration of a candidature which had not yet been submitted. In his marginal note to the above-mentioned note, however, Mr. Jonah wrote that, even if the Secretary-General had not “decided” on a French-speaking African,

“I would have found it difficult to recommend Mr. Estabial for the post of Director”.

This marginal note implies therefore that Mr. Jonah did not take the Applicant's candidature into consideration because of the Secretary-General's decision.

VIII. Similarly, in his memorandum of 14 January 1981, Mr. Jonah, in recommending the appointment of Mr. Nègre, indicated clearly that the search for internal or outside candidates had been limited to French-speaking Africans and that he had only examined the applications of such candidates.

It was only on 3 February 1981, in his letter to the Applicant, that Mr. Jonah stated that the Applicant's candidature had been very carefully examined.

IX. In fact, the Tribunal finds that the Applicant's candidature was not taken into consideration by the Administration and was therefore not examined in substance.

X. The two parties are agreed as to the law applicable in the case. In his letter of 3 February 1981, Mr. Jonah wrote to the Applicant:

“Under Staff Regulation 4.4, ‘the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations.’”

XI. Mr. Jonah had correctly interpreted the relevant provisions of the Charter and the Staff Regulations in a memorandum dated 10 March 1980 addressed to Heads of Departments and Offices (reproduced in document A/C.5/35/WG.1/CRP.3 of 13 November 1980, page 6):

“4. In the Fifth Committee there was some criticism that candidates from over-represented countries are discouraged from applying regardless of their qualifications. This gives the erroneous impression that we are not concerned with competence. Our policy must be to consider all candidates. If there are several equally qualified candidates, priority will be given to those from unrepresented and under-represented countries, to women, and to young candidates in the order given as mandated by the General Assembly. However, superior candidates, that is, whose outstanding merit is clearly established, should always be put forward with other candidates for review by the Appointment and Promotion machinery even if they are from over-represented countries. This would particularly apply to female candidates.”

XII. Thus, quite apart from any other reasons, the fact that the Administration did not take the Applicant's candidature into consideration constitutes a violation of the Staff Regulations.

XIII. Even if the Applicant's candidature had, as the Respondent maintains, been examined either formally or informally, which in the Tribunal's view was not the case, the decision to rule out the Applicant's candidature would have violated the Staff Regulations, because it appears that, in filling the vacant post of Director of the Division of Recruitment, the Secretary-General tied his choice in advance by limiting candidatures to nationals of French-speaking African States.

XIV. In so doing, he believed that he was applying correctly the last sentence of Article 101, paragraph 3, of the United Nations Charter, which provides that:

“Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible”,

a provision which is reiterated in the last sentence of Staff Regulation 4.2. The Tribunal attaches very great importance to these provisions. But while they allow the Secretary-General to invite candidatures in order to implement them, he cannot refuse to consider the candidatures of United Nations staff members for a vacant post.

This is so because the Charter itself (first sentence of Article 101, paragraph 3) provides 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”, while Staff Regulation 4.2 (first sentence) provides that:

“The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity for securing the highest standards of efficiency, competence and integrity.”

It was not for the Secretary-General to alter these conditions laid down by the Charter and the Staff Regulations by establishing as a “paramount” condition the search, however legitimate, for “as wide a geographical basis as possible”, thereby eliminating the paramount condition set by the Charter in the interests of the service.

XV. In his most recent submission, the Respondent described the Secretary-General's decision to fill the vacant post as a "lateral transfer", but this "lateral transfer" was actually the result of the appointment and did not therefore alter the fact that the Secretary-General had invited applications and filled the vacant post on the basis of erroneous legal conditions.

XVI. The Tribunal finds that the decisions of the Secretary-General described in the letter of 30 October 1980 and the memorandum of 14 January 1981 are tainted with errors of law and prevented the Applicant from exercising his right to have his candidature for a vacant post examined on the basis of all the conditions established by the Charter and the Staff Regulations. The Applicant's candidature was not given such an examination. The Applicant lost any chance of success that his candidature might have had if the procedure correctly explained in Mr. Jonah's memorandum of 10 March 1980 (mentioned in paragraph XI above) had been followed.

XVII. The Administration's responsibility is therefore entailed and the injury thereby caused to the Applicant must be remedied.

XVIII. In his pleas received on 20 April 1983, the Applicant requests the Tribunal:

"D. To *order* Respondent to pay Applicant a sum equivalent to two months' net base salary as compensation for the stress and humiliation suffered in consequence of the too long delayed responses to the Joint Appeals Board's proceedings."

In its Judgement No. 291 of 28 September 1982, the Tribunal recognized that "the Administration's answer to the Joint Appeals Board was delayed far too long". The Board finally adopted its report on 28 December 1982. On 3 December 1980, the Applicant had requested a review of the decision taken on 6 November 1980. The Secretary-General's reply to this request for a review was addressed to the Applicant on 3 February 1981, after the date on which the Secretary-General had decided to fill the vacant post for which the Applicant had applied. Following this appointment in mid-January 1981, the Applicant filed an appeal on 29 January 1981 which he supplemented on 12 February 1981 after receiving on 3 February 1981 the Secretary-General's answer to his request for a review. The Administration's reply to the Joint Appeals Board was not sent until 18 June 1982.

XIX. The Tribunal notes that the Secretary-General's reply to the request for a review was sent to the Applicant only after the Secretary-General had decided to fill the vacancy. The Applicant was thus informed indirectly that his request had been rejected without being told the reasons. The Administration then waited nearly 18 months before communicating its reply to the Joint Appeals Board.

XX. The circumstances in which the Applicant was informed of the rejection of his request for a review and the excessive delay on the part of the Administration in connection with the hearing of his appeal, and, in particular, in sending its reply to the Joint Appeals Board, constitute a fault which entails the responsibility of the Administration. In the course of this long period of waiting and uncertainty, at the time when he was nearing retirement, the Applicant suffered a definite injury for which the Administration must make redress.

XXI. The injury caused to the Applicant by the Administration's refusal to take his candidature into consideration, and, in any case, by the fact that, in making the appointment to the vacant post, the Administration bound and

restricted itself by legally erroneous conditions which automatically eliminated the Applicant, cannot be equated with the loss of salary and allowances which the Applicant suffered as a result of not being promoted in January 1981. The fact is that the Applicant did not have a right to promotion. While the Secretary-General was under the strict obligation to respect the rules of form and substance applicable in the case, he was free to choose among the various candidates.

XXII. In view of the overall circumstances of the case, the Tribunal decides that the Applicant shall be fairly compensated for the injury he sustained as a result both of the refusal to take his candidature into consideration and of the delays caused in the hearing of his appeal, by the award of overall compensation equivalent to two months of his net base salary as at 29 January 1981, the date on which he filed an appeal with the Joint Appeals Board.

(Signatures)

Arnold KEAN

Vice-President, presiding

Luis M. de POSADAS MONTERO

Member

Geneva, 10 June 1983

Roger PINTO
Member

Jean HARDY
Executive Secretary

Judgement No. 311

(Original: English)

Case No. 304:
Schurz

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

Request by a staff member of UNIDO for recognition of her right to be considered for promotion to the Professional category in accordance with the rules in force prior to the adoption of General Assembly resolution 33/143.

Conclusion of the Joint Appeals Board that information circular ST/IC/81/19 introduced conditions not contained in Judgement No. 266 (Capiro) or which were required by the pre-1979 system of promotion.—Recommendation that the Applicant should be promoted retroactively to the Professional category.—Recommendation rejected.

Interpretation of administrative instruction ST/AI/268/Add.1 and of information circular ST/IC/81/19.—The Tribunal finds that the Applicant is not entitled to benefit from these provisions.—Question of the conformity of information circular ST/IC/81/19 with Judgement No. 266.—Question of acquired rights in the context of transition from one system of promotion to another.—Finding in Judgement No. 295 (Sue-Ting-Len) that the mere length of the staff member's service and the nature of her activities could not be invoked as acquired rights at the time the new system was introduced.—Finding in Judgement No. 296 (Sun) that information circular ST/IC/81/19 gave proper effect to the considerations which determine what allowance should be made for acquired rights in the event of the introduction of a new system of promotion.—The Tribunal concludes that the Applicant is not entitled to claim the benefit of acquired rights.

Application rejected.
