

VI. It remains to inquire whether, notwithstanding the silence of the rules concerning the right of short-term appointees to convert, the consistent practice of the Respondent was such as to lead the Applicant to entertain a legitimate expectation that he would be afforded such a right. As noted earlier, the Applicant admits that he did not hold any such expectation on taking up his assignment in Iraq. The Tribunal notes that the Joint Appeals Board has stated that, as a matter of practice, conversion under similar circumstances has often taken place. However, the Tribunal holds that this practice, to the extent it exists, cannot be regarded as giving rise to legal rights and obligations. The Applicant alleges that experts on short-term contracts were normally allowed to convert local currency at the end of their assignments, but he produces no evidence as to any guarantees given to him by responsible UNDP officials. He also points to the help UNDP officials extended him as being consistent with his efforts to achieve a conversion even though they knew that he was a short-term appointee. But even if these actions were as described by the Applicant, these officials may have sought to afford him the possibility of conversion as a courtesy and a privilege rather than as of right. Moreover, in a telegram to Headquarters, the UNDP Resident Representative at Baghdad stated expressly that short-term experts in Baghdad were not entitled to convert unused DSA balances and that they were so informed on arrival.

VII. In the face of these conflicting assertions, the Tribunal is unable to find a legal basis for the opinion of the UNIDO Joint Appeals Board that "the practice of allowing experts to convert accumulated local currency at their duty station is so long established that it can at least be considered as an acquired right." In the light of the wording of the UNDP Finance Manual, the Tribunal must conclude that the Respondent's practice of extending a conversion privilege to short-term appointees did not give rise to a legal entitlement on the part of the Applicant.

VIII. For these reasons, the Tribunal rejects all the pleas contained in the Application.

(Signatures)

Samar SEN
President

Herbert REIS
Vice-President

Geneva, 14 May 1986

Endre USTOR
Member

R. Maria VICIEN-MILBURN
Executive Secretary

Judgement No. 362

(Original: English)

Case No. 358:
Williamson

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

Request by a staff member of UNCTAD for the rescission of the decision not to announce a vacancy, and for compensation.

Conclusion of the Joint Appeals Board that the practice under which the vacancy notice requirement is "waived" in certain circumstances is not in accordance with the Charter and the Staff Regulations.—Recommendation to pay the Applicant compensation of \$US 1,000.—Recommendation rejected.

Article 101 of the Charter.—Secretary-General's latitude in appointing and promoting staff.—Measures adopted by the General Assembly to encourage the recruitment of staff on the widest possible geographical basis.—The Tribunal held in Judgement No. 310 (Estabial) that the restriction of the search for candidates for a given post to nationals of a group of countries violated the right of staff member under staff regulation 4.4.—Applicability of staff regulation 4.4 to the present case.—General Assembly resolutions relating to the announcement of vacancies.—Respondent's contention that the practice of a "waiver" of the vacancy notification requirement serves to fulfil the General Assembly's mandates concerning geographical distribution and that the Assembly has acquiesced in this procedure.—Finding that the Assembly did not modify staff regulation 4.4 or cancel its enactments on announcements of vacancies.—Contention rejected.—The Tribunal finds no justification for the procedure of waiver, except in an extraordinary emergency situation, or in the different case of a post being reserved for the internal promotion of a suitable staff member.—Finding that the Applicant was in fact aware of the vacancy and could have presented his candidacy.—The Tribunal holds that since the staff member has a statutory right to have "the fullest regard" given to his candidature, the burden of establishing the Administration's failure to do so does not fall on him.—Conclusion that the Applicant did not suffer any significant damage, but that there was a technical violation of his rights.

Award of compensation of \$US 1,000.—All other pleas rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Herbert Reis, Vice-President; Mr. Ahmed Osman;

Whereas on 28 May 1985, Eric Williamson, a staff member of the United Nations Conference on Trade and Development, hereinafter referred to as UNCTAD, filed an application that did not fulfil the formal requirements of Article 7 of the Rules of the Tribunal;

Whereas on 24 July 1985 the Applicant filed a corrected application, the pleas of which read as follows:

“ . . .

“(b) The Applicant requests the rescinding of the administrative decision not to advertise the vacancy of Deputy Director, Shipping Division, UNCTAD, when this vacancy arose in May 1983.

“(c) The Applicant invokes the obligations of the Secretary-General under Article 101, paragraph 3 of the United Nations Charter, article IV of the Staff Regulations, in particular regulations 4.2 and 4.4 and Staff Rule 104.14 (a) (ii).

“(d) The Applicant requests compensation for the injury sustained in an amount not less than the [US dollars] \$1,000 recommended by the Joint Appeals Board.”

Whereas the Respondent filed his answer on 4 November 1985;

Whereas the Applicant filed written observations on 17 December 1985;

Whereas the facts in the case are as follows:

Eric Williamson, a national of the United Kingdom of Great Britain and Northern Ireland, entered the service of UNCTAD on 27 July 1969. He was initially offered a two-year fixed-term appointment at the P-4, Step IV level as an Economic Affairs Officer in the Shipping Branch of the Division for

Invisibles. His appointment was extended for further fixed-term periods of three years and five years. It was retroactively converted to a probationary appointment on 1 March 1977, and to a permanent appointment on 1 March 1978.

During the course of his employment with UNCTAD, the Applicant was promoted to the Senior Officer, P-5 level as Chief, Ports Section on 1 April 1974.

In a letter dated 2 May 1978 addressed to the Secretary-General of UNCTAD, the Applicant asserted that he felt "it would be healthy—both for the Ports Section and for [him]—to consider a change [of jobs]", since he had "spent nine years in the same post" as Chief of the Ports Section. He enquired whether there were possibilities for a transfer within UNCTAD itself. In a further letter dated 31 March 1980 addressed to the Secretary-General of UNCTAD, the Applicant reiterated his request. He stated that he had served in his present post for eleven years, that the four staff members that constituted the Ports Section had worked together for more than nine years, and that none of them could expect a promotion as long as they remained in their present jobs. The Applicant added that "having been in the grade of P-5 for six years, having achieved a maximum rated performance evaluation . . . , [he] would appear to fully satisfy the requirements for promotion from P-5 to D-1". In a reply dated 29 May 1980, the Secretary-General of UNCTAD informed the Applicant that his request for a transfer within UNCTAD would be "carefully considered and [would] be kept in mind as staff changes are contemplated". In connection with the possibility of his promotion, the Secretary-General of UNCTAD stated that in light of the large number of senior staff at the P-5 level employed at the time in UNCTAD, and the few number of posts at the D-1 level, he could not "in all candour be encouraging about possibilities at the D-1 level within the foreseeable future". He added that "UNCTAD simply does not have the resources to provide the possibility for all its P-5 staff who may merit it to move to the D-1 level within UNCTAD".

On 23 May 1980 the Applicant had instituted a recourse procedure before the Applicant and Promotion Board to request that his name be included in the 1980, D-1 Principal Officer Promotion Register. He was unsuccessful in this regard. On 5 June 1981 the Applicant instituted a recourse procedure before the Appointment and Promotion Board to request that his name be included in the 1981, D-1 Principal Officer Promotion Register. He was also unsuccessful in this respect.

On 10 June 1981 the Applicant sought the assistance of the Career Development and Placement Section of the Office of Personnel Services, OPS, in order to obtain a transfer from UNCTAD. On 16 June 1981 the Applicant asked the Acting Deputy Secretary-General of UNCTAD for a transfer within UNCTAD. On 17 November 1981 the Applicant requested the Deputy Director, Shipping Division, whether the Secretary-General of UNCTAD intended to recommend him for a promotion in the year 1982. In light of what appears to have been a negative oral response, on 4 December 1981 the Applicant asked the Secretary-General of UNCTAD to examine his "suitability for promotion on its merits *as if* a vacancy within the Division did exist." In a reply dated 2 February 1982 the Secretary-General of UNCTAD reiterated that "promotion procedures do not allow UNCTAD to recommend candidates for promotion to a higher level unless a suitable post is available to implement such a recommendation".

On 19 May 1982 the Applicant instituted a recourse procedure before the Appointment and Promotion Board to request that his name be included in the 1983, D-1 Principal Officer Promotion Register. He was unsuccessful in this regard.

On 16 May 1983 the Applicant addressed a memorandum to the Chief, Career Development and Placement Unit, OPS, concerning his original request for a transfer from UNCTAD. In addition, he asked him for his views on UNCTAD's decision to reserve the post of Deputy Director of the Shipping Division of UNCTAD, which was presently vacant, "for a candidate from a restricted group of countries", and the consequent decision not to advertise the post in question for information of the staff at large.

In a memorandum dated 25 May 1983 the Applicant informed the Assistant Secretary-General for Personnel Services that he wished "to appeal against the administration decision not to advertise the vacancy of Deputy Director of the Shipping Division within UNCTAD and within the Organization according to established practice".

On 7 June 1983 the Applicant instituted a recourse procedure before the Appointment and Promotion Board, to request that his name be included in the D-1, Principal Officer 1983 Promotion Register. He was unsuccessful in this regard.

On 9 August 1983 the Officer in Charge of the Career Development and Placement Unit, OPS, informed the Applicant that because D-1 posts were "unfortunately a rather rare commodity, particularly in [his] field of specialization", he would have to consider a transfer to one of the Economic Commissions. In addition, with respect to the "only recent vacancy" in the Applicant's Division at UNCTAD, he stated: "With regard to your concern on that particular post, I have to advise you that the issuance of a vacancy announcement may be waived for a number of reasons, one of them being to honour the provisions stipulated in GA [General Assembly] Resolution 35/210".

On 15 August 1983 the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 5 February 1985. Portions of its unanimous considerations, conclusions and recommendations read as follows:

"VII. Considerations and Conclusions

"19. The Board, however, did not limit itself to the consideration of whether the waiver of a vacancy announcement in the case in question was in line with established practice, but it also considered the question whether this practice was in line with existing and binding rules and regulations, and which were the appropriate ways and means to comply with specific requests expressed by the General Assembly to secure and increase participation in the Secretariat of nationals of unrepresented and under-represented countries

"
"27. Finding that the request of the General Assembly to establish a target of 40 per cent of all vacancies arising in professional posts, subject to geographical distribution, for the appointment of nationals of unrepresented and under-represented countries is reconcilable with the conditions for recruitment set out in the Charter and the Staff Regulations, the Board examined the second question, namely whether this request of the General Assembly justifies the practice described in document A/36/495 [concerning the 'waiver' procedure whereby the vacancy notice requirement is 'waived' by the Office of Personnel Services] The Board comes to the

conclusion that this practice is not in accordance with the United Nations Charter and Staff Regulations, and that it is neither justified by the resolutions of the General Assembly on recruitment nor necessary in order to implement the General Assembly's request for a better participation of nationals of unrepresented and under-represented States in the Secretariat.

“VIII. *Recommendations*

“31. The Board gave careful consideration to the problem of how the General Assembly's request for better representation of nationals of unrepresented and under-represented States (40 per cent target) could be responded to without violating the conditions for recruitment imposed by the Charter and the Staff Regulations

“34. . . . Only the widest publicity of a vacancy within and outside the Organization can ensure that the best candidates become known to the Organization and enable it, after careful examination of each application, to choose the best candidate for filling the vacancy. The element of competition has to be present in the procedure in order to assure the highest quality of the staff within the spirit of the Charter. The Board finds that this is not the case with the recruitment practice described in the present case The vacant post was earmarked for a national of one particular country. The Government in question—upon request from OPS—added two further candidates. This practice fully disregards Staff Regulation 4.4 and three candidates from one country do not guarantee that the highest standards of efficiency, competence and integrity can be secured. The Board wishes to recall in this connection that General Assembly Resolution 33/143 of 20 December 1978 expressly requested the Secretary-General to issue every six months bulletins containing a statement of existing and future vacancies

“36. The Board therefore is of the opinion that when a post becomes vacant and if the substantive department wishes to fill that post with a national of an unrepresented or under-represented country, in complying with the General Assembly's respective requests, it should inform OPS accordingly, which then—after a careful study of the recommendation—should issue a *vacancy notice, indicating that preference will be given to candidates from unrepresented and under-represented countries.*

“38. Deviations from the rule to issue and circulate the announcement of a vacant post must, of course, be permitted, if exceptional and urgent circumstances so require These deviations or exceptions from the rule that each vacancy has to be published and widely circulated would have, however, to be clearly defined. In no way should deviations from the obligation to advertise a vacant post be discretionary, as the Respondent claims that it is currently the case It is admitted that each Administration needs a certain amount of discretion in order to function but this discretion must be exercised within a precisely given framework of rules.

“39. The Board finally proposes that clear administrative instructions be set up governing the recruitment procedure in the light of the recommendations developed in this report. Though in the case before it the Board very much appreciated the full co-operation of the Respondent, who replied extensively to all its questions and included some valuable background material, the Board found that the administrative instructions,

on which the present practice is based are scattered in various documents and that the ordinary staff member has not easy access to this material. There should be full publicity of the rules which determine the beginning or a change in the career with the United Nations.

“IX. *Equitable Remedy for the Appellant*

“42. The Board therefore finds that the Appellant has not suffered any measurable damage as a consequence of the decision in question. On the other hand, the Appellant should be granted *nominal damage*, because the administrative practice not to issue a vacancy notice for the post in question was a violation of his contract. Nominal damages, a common law term, are awarded to a plaintiff who has suffered no real pecuniary loss, although there had been an infringement of his right [footnote omitted]. The Board recommends that the sum of \$1,000.— be awarded to the Appellant”.

On 24 July 1985 the Applicant filed the Application referred to above. On 26 August 1985 the Assistant Secretary-General informed the Applicant

that:

“The Secretary-General, having re-examined your case in the light of the Board’s report, has decided:

“(a) to maintain the contested decision,

“(b) to reject the Board’s recommendation for payment of damages, and

“(c) to take no further action on this case.

“The Secretary-General’s decision is based on his conclusion that the contested decision did not violate any of your rights . . .”

Whereas the Applicant’s principal contentions are:

1. In attempting to comply with one of the considerations set forth in paragraph 3 of Article 101 of the Charter of the United Nations—namely that “due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible”, the United Nations is neglecting the first consideration set forth in paragraph 3 of Article 101—namely that “the paramount considerations 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”.

2. The present recruitment practice of the Office of Personnel Services, not to issue vacancy announcements for vacant posts, and to reserve posts for candidates of under-represented Member States, neglects the first consideration set forth in paragraph 3 of Article 101 of the Charter of the United Nations and disregards Staff Regulation 4.4.

3. The Applicant’s contractual rights have been violated by the failure of the Organization to advertise the post of Deputy Director of UNCTAD’s Shipping Division because paragraph 3 of Article 101 of the Charter and the Staff Regulations and Rules form part of the Applicant’s contract of employment.

Whereas the Respondent’s principal contentions are:

1. The Applicant has failed to establish any right to have had the post in question advertised or any damage he suffered as a result of the Respondent’s failure to do so.

2. The Secretary-General's decision was in conformity with the General Assembly's mandate on geographical distribution of posts in the Secretariat.

3. The Applicant has not established a right to promotion, which is his main grievance regarding the contested administrative decision.

4. The Applicant is not entitled to any damages, having demonstrated no injury directly related to the contested decision.

The Tribunal having deliberated from 28 April to 14 May 1986, now pronounces the following judgement:

I. The Tribunal has always recognized the considerable latitude of discretion that the Secretary-General must have in appointing and promoting staff and in filling vacancies in the Secretariat. Likewise, it has taken note of the many and long-standing measures adopted by the General Assembly throughout the history of the Organization to encourage the recruitment of staff on the widest possible geographical basis. The legal foundation for all of these actions is Article 101 of the Charter of the United Nations.

II. From time to time, the Tribunal has had to consider questions concerning promotion and recruitment in the context of rights conferred on the staff by provisions of the Staff Regulations and Rules and resolutions adopted by the General Assembly. In its recent Judgement No. 310, *Estabial* (1983), the Tribunal observed that certain rights attach by virtue of Staff Regulation 4.4, which provides that:

“Subject to the provisions of Article 101, paragraph 3, of the Charter [‘Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible’], and without prejudice to the recruitment of fresh talent at all levels, *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 . . .*” (emphasis added)

The Tribunal found that the staff member in that case was unable to have his candidature considered for a D-2 Directorship of the Division of Recruitment, Office of Personnel Services, because, as stated by the Assistant Secretary-General for Personnel Services in a memorandum to the Secretary-General, “the search for candidates for this post was restricted to nationals of French-speaking countries.” (Judgement No. 310, paragraph V). This, the Tribunal held, violated the right of the staff member under Staff Regulation 4.4.

III. The current case raises issues that likewise relate to the right of a staff member to the guarantee of Staff Regulation 4.4 that “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.” Moreover, in addition to approving Staff Regulation 4.4, the General Assembly recently has directed by resolution that the Administration shall announce “all existing vacancies” (General Assembly resolution 33/143, part I, paragraph 1 (a), 20 December 1978). It has further required that “Vacancy announcements for all posts shall be issued without delay as soon as vacancies are known.” (paragraph 12, Annex to General Assembly resolution 35/210, 17 December 1980). The Assembly thus appears to regard the timely announcement of vacancies as a safeguard of the career aspect of the international civil service of the United Nations for the Professional and higher categories.

IV. On the other hand, the Administration appears to have sought in many cases to avoid issuing vacancy announcements. The record in this case shows that it has tried to establish a procedure according to which the department wishing to recruit an external candidate requests a “waiver” of the

notification requirement from the Office of Personnel Services. When that request is granted, the vacancy is not advertised. Documents brought to the attention of the Tribunal by the Respondent contain assertions by officials of the Administration that the "waiver" procedure has been requested by the General Assembly, that no statutory provision requires advertisement, and that advertisement is a costly and time-consuming procedure which should be avoided where practicable. Indeed, the Respondent asserts that notwithstanding General Assembly resolutions 33/143 and 35/210, noted above, the Tribunal should regard the Assembly as having acquiesced in the "waiver" procedure, at least where the posts involved are considered by the Administration as suitable for the appointment of external candidates who are nationals of non-represented or under-represented Member States in order to fulfil the Assembly's mandates concerning geographical distribution. The Respondent draws attention to the fact that the Administration has reported its use of this "waiver" procedure to the Assembly, which has raised no objections thereto. But the Tribunal is unable to accept this contention inasmuch as the General Assembly has not taken any action to revise or limit the guarantee it gave in adopting Staff Regulation 4.4 that existing staff members would be considered for vacancies, nor has it revised its 1978 or 1980 resolutions concerning vacancy announcements. The silence of the Assembly in making no comment on the "waiver" innovation introduced by the Administration does not negate Assembly enactments in the form of regulation and resolution. While, unquestionably, the Assembly may modify or even cancel its enactments, it has not done so.

V. The Tribunal finds hardly any justification within the governing regulatory framework for the frequent and widespread use of the "waiver" procedure. A "waiver" might be justified in the light of the responsibilities of the Organization under the Charter in an extraordinary emergency situation, for example, a peacekeeping or natural disaster relief operation. However, the Tribunal considers that in the usual instance of a vacancy arising in the Professional and higher categories which is reserved for external candidates, Staff Regulation 4.4 requires that an appropriate vacancy announcement be issued; otherwise, there is no effective way of ensuring that a qualified staff member may have an opportunity to exercise his right to present his candidacy for consideration. At the same time, the Tribunal has no reason to disagree with the suggestion made in the report of the Joint Appeals Board in this case, namely, that the Administration is entirely free to accompany a vacancy announcement with the statement that, to the extent possible, it will give preference to candidates of nonrepresented or under-represented nationalities. Moreover, the Tribunal does not consider that any vacancy announcement would be required in the entirely different case where a post is reserved exclusively for internal promotion of a staff member who has the requisite qualifications and experience.

VI. The Applicant in the current case is a staff member at grade P-5 in the United Nations Conference on Trade and Development who aspired to appointment to a D-1 vacancy in the post of Deputy Director of UNCTAD's Shipping Division. When the fixed-term appointment of the incumbent came to an end, the Secretary-General of UNCTAD decided to reserve the post for a national of an under-represented Member State. In order to give effect to this decision, UNCTAD sought a "waiver" from the normal requirement that vacancies arising in existing posts must be advertised. This waiver was sought from the Office of Personnel Services at Headquarters, which granted it. Consequently, UNCTAD did not issue a vacancy announcement; instead, it

sought candidacies for the post from a single under-represented Member State and, in due course, appointed a qualified national of that Member State. The Applicant asserts that because no vacancy announcement was issued, he was denied the right to present his candidacy for appropriate consideration. To a considerable extent, however, the case he presents is unconvincing because he knew that the vacancy in question was about to arise. The Applicant admits having this knowledge in a letter of 25 May 1983 in which he appealed to the Assistant Secretary-General, Office of Personnel Services against the decision not to advertise the vacancy. The Applicant wrote: "There will shortly be a vacancy in the Shipping Division of UNCTAD for a Deputy Director since the present incumbent retires on 31 May. As I shall be away from the office on mission and leave for four weeks from the end of June, I enquired with UNCTAD Administration when the vacancy will be advertised internally since I wish to apply for the post . . .". Given the fact of his knowledge of the vacancy, the Applicant could have presented his candidacy.

VII. The Respondent seeks to show that the Administration fully considered the Applicant for the Deputy Directorship of Shipping notwithstanding the absence of a vacancy announcement. The Respondent was well aware of the various recourse procedures instituted by the Applicant, during this period, all of which had failed. The Respondent observes that the Applicant had repeatedly sought promotion and that his persistence in this respect was well known to the UNCTAD Administration. The Respondent therefore asserts that "Applicant has not demonstrated that he had not been considered . . .". As to this particular assertion, the Tribunal holds that since the staff member has a statutory right to have "the fullest regard" given to his candidature, the burden of establishing the Administration's failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave "the fullest regard" to it.

VIII. The Tribunal does not find in the circumstances of this case that the Applicant suffered any significant or material damage, but in view of the technical violation of his rights under Staff Regulation 4.4, the Tribunal orders the Respondent to pay the Applicant \$US 1,000. The other pleas set forth in the Application are rejected.

(Signatures)

Samar SEN
President

Herbert REIS
Vice-President

Geneva, 14 May 1986

Ahmed OSMAN
Member

R. Maria VICIEN-MILBURN
Executive Secretary