**United Nations** **AT**

**Administrative Tribunal**

Distr.
LIMITED

AT/DEC/1086
30 January 2003

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1086

Case No. 1182: FAYACHE
No. 1186: FAYACHE
No. 1187: FAYACHE
No. 1188: FAYACHE
No. 1190: FAYACHE
No. 1191: FAYACHE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas at the request of Mohamed Larbi Fayache, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time limit for the filing of an application with the Tribunal until 31 March 2001 and thereafter until 30 June 2001;

Whereas, on 14 November and 13 December 2000, the Applicant filed two applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 6 April 2001, the Applicant filed an Application in the "first case" containing pleas which read, in part, as follows:

"**II. PLEAS.**

The Tribunal is respectfully requested to:

1. Order the Respondent, in the unlikely event it decides not to remand the present case to another [Joint Appeals Board (JAB)], … to submit to the Applicant … the *full* text of the memorandum … issued by the General Legal Division (GLD) of the Office of Legal Affairs [(OLA)], on 1 November 1999, to enable him to comment on it.

…

3. Find that the Applicant met all the requirements of Staff Rule 103.20 as well as those of ST/AI/181/Rev.10 of 26 June 1995 which was still in force in June 1999, for the payment of the education grant for his two children as of June 1999, and consequently, that [the] Chief, [United Nations Office at Geneva (UNOG)] Personnel Service, violated that ST/AI and exceeded her power when she refused to reimburse him.

…

5. Find that [the Chief, UNOG Personnel Service,] violated paragraph 4 (a) of ST/AI/181/Rev.10, … and thus vastly exceeded her authority when she asked the Applicant on 27 July 1999 to consent *"that payments [of the education grant] be made to the universities or to [his former spouse]"*, instead of him, in the absence of any statutory provision or court decision to that effect.

…

8. Order, consequently, the Respondent to immediately refund to the Applicant his educational expenses, *including those he incurred for his son Sharif during the 1998-1999 school year*, with interest at the rate of 8% as from 20 June 1999.

…

10. Order the Respondent to pay the Applicant one year net salary in compensation for the unnecessary stress and aggravation caused to him … not to mention the time involved in preparing this case.

…

12. In the event the Respondent fails to submit to the Applicant, within one month of the notification of this Tribunal's judgement on this case *a full and undoctored copy* of the above-mentioned memorandum of the GLD, order him to pay to the Applicant an additional sum equivalent to two years of his net salary as compensation for the violation of his right … to see all material related to him.

…"

Whereas, on 24 April 2001, the Applicant filed Applications in the "second case" and the "third case". The pleas in the "second case" read, in part, as follows:

"**II. PLEAS**

The Tribunal is respectfully requested:

1. To reject the JAB's *Acting* Secretary's report …

2. To find that the Geneva Panel on Discrimination also failed … to deal with the issue of discrimination

3. To find that [the United Nations Conference on Trade and Development (UNCTAD)] and [the] [Appointments and Promotion Board (APB)] violated almost all promotion guidelines and relevant [United Nations Administrative Tribunal] judgements when filling the NIIP D-1 post, including resolutions 2480B and 50/11 ...

4. To find consequently that [the successful candidate's] promotion to the NIIP D-1 post was null and void …

5. To find, consequently, that the compensation recommended by the JAB in paragraph 202 of its report was grossly inappropriate …

6. To award to the Applicant …three [years] net salary at the D-1 step VIII level to compensate him for his lack of career development … and the countless violations of due process … in connection with the *lack of consideration* which characterized his candidature to the NIIP D-1 post.

7. To award the Applicant one additional year net salary … for the excessive JAB delays in processing his case ...

…

13. Condemn the *Acting* Secretary of the Geneva JAB for his deliberate and repeated violations of due process, and especially Staff Rule 111(2)(e)(ii) and Article 18 of the Rules of Procedure and Guidelines of the Geneva JAB …"

The pleas in the "third case" read, in part, as follows:

"**II. PLEAS.**

The Tribunal is respectfully requested to:

1. In the unlikely event the Tribunal decides not to remand the present case to another JAB, reject *in toto* the … report prepared on this case by the *Acting* Secretary of the Geneva JAB ...

…

3. Find that UNOG, at [the behest of the Director of Administration, UNOG,] maliciously failed to follow in May 1999 the proper and well-known procedures relating to the determination of the marital status of United Nations staff members ...

…

6. Find that the two alleged reports drafted by the *Acting* Secretary of the JAB on this case (including the suspension of action case) blocked out essential information …

7. Find that the *Acting* Secretary's alleged *"Considerations"* … deliberately failed to discuss any of the issues raised by the Applicant.

8. Find that since the Applicant's remarriage in Switzerland, the host country is valid … UNOG should have put an end to this case in February 2000.

…

10. Find that … [the forgery of an official document by the Personnel Officer, UNOG,] constitutes a pattern of harassment of a staff representative and of a member of the Panel of Counsel …

11. Order the Secretary-General to pay to the Applicant two years net salary in compensation for the unnecessary stress and aggravation and the violation of his privacy ...

12. Order the Secretary-General to pay to the Applicant an additional one year net salary in compensation for the undue delays in the handling of this case …

…

14. Order the removal from the Applicants' Official [Status] file of [the] … memorandum of 6 April."

Whereas, on 30 April 2001, the Applicant filed an Application in the "fourth case" containing pleas which read, in part, as follows:

"**II. PLEAS**

The Tribunal is respectfully requested to:

1. Reject the report prepared by the *Acting* Secretary of the Geneva JAB ...

2. Order the Respondent to provide to the Applicant … all the documents requested by, and provided to, the *Acting* Secretary, including all APB records dealing with the selection to the NIIP D-1 post.

3. Order UNCTAD to provide the Applicant with a copy of the … Rebuttal Panel's overdue report on his rebuttal and place it in his Official Status file.

4. Order UNCTAD to immediately provide the Applicant with all five pending [performance evaluation report (PER)] and [performance appraisal system (PAS)] evaluations …

5. Award the Applicant … compensation equal to two year's net salary for UNCTAD's … refusal to provide him with the … rebuttal report and his outstanding PER and PAS evaluations.

6. Award the Applicant an additional one [year's] salary for [various] delays [with regard to his evaluation and rebuttal procedure] …

..."

Whereas, on 9 May 2001, the Applicant filed an Application in the "fifth case" containing pleas which read as follows:

"**II: PLEAS**

The Tribunal is respectfully requested to:

1. Reject *in toto* the report prepared by the *Acting* Secretary of the Geneva JAB ...

2. Order UNCTAD to immediately issue to the Applicant a more acceptable certificate of service ...

3. … [A]ward the Applicant an amount equivalent to two year's net salary in compensation for UNCTAD's unacceptable delays and later refusal to provide him with a more accurate certificate of service.

..."

Whereas, on 18 May 2001, the Applicant filed an Application in the "sixth case" containing pleas which read, in part, as follows:

"**II. PLEAS**

The Tribunal is respectfully requested to:

1. In the unlikely event the Tribunal decides not [to] remand the present case to another JAB, reject *in toto* the one-sided alleged report prepared by the *Acting* Secretary of the Geneva JAB …

…

4. Find that the Applicant's recourse cannot be called *"frivolous"*, which is defined as *"totally devoid of merit"* by the Geneva Rules of Procedure, as claimed by the *Acting* Secretary.

5. Find that [the falsification of an official document by a named Personnel Officer, UNOG,] taken together with [the decision of the Chief, Personnel Service, UNOG,] to refuse to pay the Applicant's education grant and [the decision of the Director of Administration, UNOG,] not to accept the Applicant's Tunisian divorce, constitutes a pattern of harassment of [the Applicant in his capacity as] a staff representative and … a member of the Panel of Counsel …

6. Order the Secretary-General to initiate disciplinary proceedings against [the Personnel Officer, UNOG,] for having committed this falsification.

…

10. Award the Applicant one symbolic Swiss Franc as compensation for the aggravation unnecessarily caused by [the Personnel Officer, UNOG,] on behalf of [the Director of Administration, UNOG,]."

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 30 September 2001 and periodically thereafter until 31 January 2002;

Whereas the Respondent filed an Answer in all six cases on 8 January 2002;

Whereas the Applicant requested production of documents on 18 January and 21 February 2002;

Whereas the Applicant submitted a communication on 28 February 2002;

Whereas the Applicant filed Written Observations in the "third case" on 15 March 2002; the Respondent commented thereon on 13 May 2002; and, the Applicant responded to the Respondent's comments on 31 May 2002;

Whereas the Applicant filed Written Observations in the "first case" on 8 April 2002;

Whereas the Applicant filed Written Observations in the "fourth case" on 20 April 2002;

Whereas the Applicant submitted a communication on 23 April 2002;

Whereas, at the request of the Applicant, on 6 May 2002 the Tribunal decided to postpone consideration of all six cases until its autumn session;

Whereas on 28 May 2002, Johannes van Aggelen, a staff member of the United Nations, submitted an Application for intervention in the "second" case;

Whereas the Applicant submitted a communication on 7 June 2002;

Whereas the Applicant filed Written Observations in the "second" and "fifth" cases on 28 June 2002;

Whereas the Applicant filed Written Observations in the "sixth case" on 30 June 2002;

Whereas on 3 July 2002, Sliman Bouchuiguir, a staff member of the United Nations, submitted an Application for intervention in the "second" case;

Whereas the Applicant submitted communications on 16 and 29 July and 27 September 2002;

Whereas the Applicant filed new Written Observations in the "sixth case" on 1 October 2002;

Whereas the Applicant submitted communications on 15, 16, 17, 18, 21 and 24 October 2002;

Whereas the Respondent opposed both Applications for intervention in the "second" case on 8 November 2002;

Whereas the facts common to all six cases are as follows:

The Applicant, a Tunisian national, entered the service of the Organization on 7 July 1976 on a one-year, fixed-term contract at the P-4 level as a Transnational Corporations Officer, United Nations Centre on Transnational Corporations, New York, (UNCTC). His contract was extended a number of times and, on 1 December 1984, the Applicant was granted a permanent appointment. At the time of his retirement, on 30 June 1999, the Applicant held the position of

Senior Transnational Corporations Officer, Centre on Transnational Corporations, UNCTAD, Geneva, at the P-5 level.

On 1 October 1998, the Applicant filed the first in a series of appeals with the Geneva JAB. On 31 January and 31 March 1999, the Applicant wrote to the JAB, objecting to the participation of the Acting Secretary of the JAB in his case, as he had "serious doubts about his impartiality".

On 20 March 2000, the Acting Secretary of the JAB informed the Applicant that a panel had been constituted to hear the eight appeals he had lodged with the JAB to date. On 24 March, the Applicant objected to the constitution of one panel for all of the cases. The Presiding Officer of the JAB replied on 28 March, explaining that it was in the interest of administrative justice to have the Applicant's appeals considered by one panel.

In a letter of 12 May 2000 to the Presiding Officer, the Applicant wrote that it would be totally inappropriate for the Geneva JAB to deal with a case against UNOG.

Despite the Applicant's ongoing concerns regarding the composition of the JAB, the JAB considered the Applicant's appeals and adopted separate reports for each case on 18 September 2000. Each report included a "Special remark" which reads as follows:

> "*Special remark* …
>
> …
>
> ... Firstly, the Panel notes that some of the appeals might have been completed if the Administration of UNCTC and later UNCTAD had complied with its obligations concerning the PER system. The Panel regrets that UNCTAD has displayed little efficiency in preventing or handling some of the problems. The Senior Management and the Administration of UNCTAD failed to exercise due care when they could and should have. Suffice it to refer to their inability to ensure the timely and regular completion of the [Applicant's] PERs (…) or the seven-month delay in issuing a mere certificate of service (…).
>
> ... Concerning the [Applicant], the Panel deplores the manner in which he presented his appeals. [He] frequently resorted … to offensive language against the Organization and some of its staff members. All [of the] appeals are shrouded in a flood of unfounded or unsubstantiated allegations, which did not make any contribution to the disposal of the proceedings.
>
> ... But while the [Applicant] is stubbornly bent on indiscriminate and unlimited exercise of his right to appeal, at the same time he has also engaged in a systemic

> campaign of defamation and denigration of the internal justice system. As an example, he repeatedly alleged that the JAB is manipulated by the Administration of UNOG. This could be well interpreted as an attempt … to put pressure on the Panel in its consideration of his appeals.
>
> ... While the [Applicant] constantly points alleged manipulations and violations of the rules by the Administration, the examination of his appeals revealed that the [Applicant] himself quite often fails to comply with the same rules.
>
> ... The substance and form of his appeals suggests that what motivates the [Applicant] is a distorted sense of justice. The [Applicant] appears to be much more interested in litigation itself than in dealing in good faith with the Organization and the internal justice system.
>
> ... The Panel concludes with regrets that the overall attitude of the [Applicant] amounts to an abuse of the process and a perversion of the right to appeal. The Panel also deplores the associated waste of time and money caused to the Organization."

On 12 October 2000, the Under-Secretary-General for Management advised the Applicant that, with respect to the "Special remark", the Secretary-General had given "careful consideration to, and agree[d] with, [the special remark], concerning, inter alia, the manner in which [the Applicant] ha[d] presented [his] appeals and [his] overall attitude which amount[ed] to an abuse of the appeals process and the individuals involved in that process".

Whereas the facts in the "first case" are as follows:

On 5 March 1997, the Applicant instituted divorce proceedings against his wife in the Tunisian courts. On 20 March, the Applicant's wife instituted parallel proceedings in the French courts. On 6 May, the Tribunal de Grande Instance de Bourg-en-Bresse, France, pronounced the legal separation of the parties and ordered the Applicant to pay maintenance as well as child support payments for their two sons. On 8 September 1997, the Tribunal de Grande Instance rejected a request from the Applicant's wife for reimbursement of educational expenses, on the grounds that the child support payments included such expense. The Cour d'Appel de Lyon subsequently upheld the orders of maintenance and child support.

On 12 January 1998, the Tribunal de Première Instance de Tunis pronounced the parties' divorce. Following an appeal by the Applicant's ex-wife, the divorce was confirmed by the Cour d'Appel de Tunis on 24 February 1999.

On 9 March 1999, the Applicant's ex-wife informed the Personnel Service, UNOG, that divorce proceedings had been instituted and advised them that the Applicant had been delinquent in completing the forms necessary for receipt of an education grant from the Organization. The letter was transmitted to the Applicant on 17 May with a reminder to submit his education grant request for the prior year.

On 7 July 1999, the parties' divorce was pronounced by the Tribunal de Grande Instance de Bourg-en-Bresse, which again affirmed that the child support payments to be paid by the Applicant included education expenses.

On 26 July 1999, the Applicant's ex-wife sent the Personnel Service, UNOG, evidence that she had paid most of the expenses relating to their sons' education for the previous two school years; she requested that an education grant be paid directly to her or to the children's universities. The next day, the Chief of Personnel, UNOG, wrote to the Applicant proposing such an arrangement. The Applicant replied on 6 August, refusing to consent and explaining that his child support payments included education expenses.

On 2 September 1999, the Applicant requested administrative review of the decision to "withhold the reimbursement of the educational expenses for [his] two sons".

On 6 September 1999, the Chief of Personnel, UNOG, requested the assistance of GLD in the matter. GLD replied on 1 November, advising, inter alia:

> "… education grant, like other entitlements under the Staff Regulations and Rules, is an entitlement of the staff member, and not of his or her spouse. … [I]n order for the education grants to be provided …, Mr. Fayache (and not Mrs. Fayache) must request them, and the payment can only be made to him. To claim an education grant, '[t]he claim must be accompanied by written evidence of the child's attendance [at a school], education costs and the specific amounts *paid by the staff member*. Such evidence … should be certified by the school.' (See para. 14 of ST/AI/181/Rev. 10 of 26 June 1995, paras. 14-15). …
>
> … In the light of the above, we consider that, at this time, the education grants cannot be released to either Mr. or Mrs. Fayache. The payment cannot be made to Mr. Fayache since, as we understand it, he has not fulfilled the requirements set out in ST/AI/181/Rev.10. The payment cannot be made to Mrs. Fayache either because she is not a staff member."

On 4 November 1999, the Applicant lodged an appeal in the "first case" with the JAB.

On 8 November 1999, the Chief of Personnel, UNOG, advised the Applicant that he would receive the education grant if he could "[submit] evidence that [he had] paid the educational expenses for [his] two sons, in accordance with the rule of the Organization".

On 14 January 2000, the Applicant wrote to the Presiding Officer of the JAB, requesting a copy of "the ruling issued by OLA". The Applicant repeated this request several times in the following months. On 25 April 2000, the Respondent sent selected paragraphs of GLD's memorandum to the secretariat of the JAB, for forwarding to the Applicant.

The JAB adopted its report in the "first case" on 18 September 2000. Its considerations, conclusions and recommendations read, in part, as follows:

> "***Considerations***
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> …
>
> 124. … [T]he French court determined the amount of money that [the Applicant] had to pay to his [ex-]wife both for herself and for their sons. The support payment for their sons was also covering the educational expenses. Furthermore, the French court determined this support payment taking into account that [the Applicant] was reimbursed by the Organization for most education expenses for his sons.
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> …
>
> 126. … [S]ince it is acknowledged that [the Applicant] has honoured his family support obligations, the Panel is satisfied that the [Applicant] has paid the schools as provided for under paragraph 14 of ST/AI/181 … albeit not directly but through the monthly support paid to his [ex-]wife. Accordingly, the Panel considers that the [Applicant] has … is entitled to the payment of the education grant.
>
> …
>
> ***Conclusions and Recommendations***
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> 130. In the light of the foregoing, the Panel **concludes** that the [Applicant] is entitled, under the applicable rules, to the payment of the education grant [for the school years in question].
>
> 131. Accordingly, the Panel **recommends** that the [Applicant] be paid the education grant he is entitled to, plus a 5 [per cent] interest rate …"

On 12 October 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant, and informed him that the Secretary-General had decided to accept the JAB's conclusion and recommendation.

On 6 April 2001, the Applicant filed the above-referenced Application in the "first case" with the Tribunal.

Whereas the facts in the "second case" and in the "fourth case" are as follows:

On 2 September 1993, the Applicant was transferred from New York to UNCTAD, Geneva. At that time, he held the P-5 level position of Senior Transnational Corporations Officer.

On 24 October 1996, a draft PER covering the period 2 September 1993 to 30 September 1996 was sent to the Applicant. On 28 October, he refused to sign the PER, on the basis that he did not work with the listed first reporting officer and that he worked with the listed second reporting officer for only a short period of time.

On 10 March 1997, the Assistant Secretary-General, OHRM, issued guidelines on action to be taken in appointment exercises where a staff member's performance evaluation record was incomplete. The guidelines stated that:

> "Consideration of a case will … proceed if, on the basis of the available record, the relevant AP body determines that the applicant(s) in question do not meet all or most of the requirements for the post. Consideration will be postponed only in those cases where there are missing PERs for candidates who meet all those requirements."

On 20 August 1997, the Applicant applied for the D-1 level post of Chief, National Innovation and Investment Policies Branch (NIIP), Division on Investment, Technology and Development (DITE). On 17 September, OHRM advised UNOG that certain candidates, including the Applicant, did not have up-to-date PERs. The following month, the Director, DITE, shortlisted two candidates, neither of which was the Applicant.

On 10 February 1998, a second version of the draft PER covering the period 2 September 1993 to 30 September 1996, listing different reporting officers, was sent to the Applicant. On 19 February, the Applicant returned the draft indicating that he felt it inappropriate to complete the PER when an earlier PER covering his service in New York was still outstanding. On 24

February, the Chief of UNCTAD Administrative Service urged the Applicant to complete the draft PER. On 3 March, the Applicant requested that "a more accurate draft PER" be prepared.

On 9 March 1998, the Applicant was informed that UNCTAD had recommended another candidate for the D-1 post. The Applicant responded on 17 March, asking that the APB delay its consideration of the vacancy until it received his PERs. On 26 March, the Officer-in-Charge of UNCTAD confirmed to the APB that the Applicant's PER was not up-to-date and explained that the Applicant had been unwilling to cooperate in the process. The same day, the APB met concerning the vacancy.

On 1 April 1998, the Applicant was sent a third version of the draft PER, which he again found unacceptable.

On 14 and 23 April 1998, the Applicant again asked the APB to delay its consideration of the D-1 vacancy until it received his PERs. The APB met for a second time on 23 April. On 27 April, the Office of Human Resources Management (OHRM) informed the Chief of UNCTAD Administrative Service of the difficulties in completing the Applicant's PERs, including his lack of cooperation, and stated "[i]t would be unfair to suspend the consideration of this case by the [APB] indefinitely in view of the urgent need to fill this post".

On 14 May 1998, the APB recommended one of the shortlisted candidates for promotion to the D-1 post; the Secretary-General subsequently approved the promotion.

On 15 June 1998, the Applicant asked the Assistant Secretary-General, OHRM, to stop the promotion process, but on 1 July, she replied that the promotion process could not be reopened. On 6 July, the Applicant requested administrative review of the decision to promote the successful candidate.

On 28 July 1998, the Applicant was sent a fourth version of the draft PER, which now covered the period 22 February 1994 until 30 September 1996. On 31 August, the Applicant completed his section of the PER.

On 1 October 1998, the Applicant lodged an appeal in the "second case" with the Geneva JAB.

On 7 January 1999, the Secretary-General of UNCTAD signed the Applicant's PER and, on 15 January, the Applicant appended his signature to the now-completed PER however, on 14 April, the Applicant indicated he wished to rebut the PER.

On 3 June 1999, the Applicant was provided with a draft PER for the period 1 October 1992 until 1 September 1993 ("pre-UNCTAD PER"), for his completion.

On 4 June 1999, the Applicant wrote to the Secretary-General requesting administrative review of UNCTAD's decision not to start the rebuttal process for his 1994-1996 PER and complaining that he had not received a PER for the period 30 September 1992 to 23 September 1993. He requested that his contract be extended beyond retirement until his PERs were completed. On 9 June 1999, the Applicant submitted an appeal to the JAB requesting suspension of action. He asked the JAB to recommend that his contract be extended until his PERs were completed, and that the rebuttal process "be started and completed".

On 17 June 1999, the Applicant completed and signed his pre-UNCTAD PER.

On 22 June 1999, the JAB recommended that the requested suspension of action be rejected. On 25 June, the Under-Secretary-General for Management advised the Applicant that while the Secretary-General had accepted the JAB's conclusion and had decided to take no further action in the case.

On 2 September 1999, the Applicant lodged an appeal in the "fourth case" with the Geneva JAB.

On 6 September 1999, the rebuttal panel met for the first time and, on 27 October, it met with the Applicant.

The JAB adopted its reports in the "second" and "fourth" case on 18 September 2000. Its conclusions in the "second case" read as follows:

> "***Conclusions***
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> 199. In the light of the foregoing, the Panel **concludes** first that there is no evidence of a continuous pattern of discrimination against the [Applicant] …
>
> 200. The Panel further **concludes** that the [Applicant's] allegations against the successful candidate are either without merit, unfounded or unsubstantiated, and that there is no evidence that the successful candidate was not the best qualified for the post.
>
> 201. The Panel **concludes** however that the [Applicant's] procedural rights, in particular in the promotion process, were impaired by UNCTAD's failure to prepare PERs in a timely manner, and that for this procedural irregularity the Applicant] must be compensated."

The conclusions of the JAB in the "fourth case" read as follows:

***"Conclusions***

232. … [T]he Panel **concludes** that as the Appellant's procedural rights were impaired by UNCTAD's failure to prepare PERs in a timely manner and by the delays of the rebuttal process. For these procedural irregularities, the [Applicant] must be compensated."

Its joint recommendation for both cases reads as follows:

"… The Panel **recommends** that, as compensation for the procedural irregularities noted in both [the 'second case' and the 'fourth case'], UNCTAD pay to the [Applicant] an amount equal to three months of his net base salary at the rate in effect on the date of his separation from service."

On 12 October 2000, the Under-Secretary-General for Management transmitted a copy of each of the JAB reports to the Applicant and informed him that the Secretary-General agreed with the Board's conclusion for the two cases and had decided to compensate him in accordance with the Board's unanimous joint recommendation.

On 24 and 30 April 2001, respectively, the Applicant filed the above-referenced Applications in the "second case" and in the "fourth case" with the Tribunal.

Whereas the facts in the "third case" and in the "sixth case" are as follows:

On 9 March 1999, the Applicant's ex-wife informed the Personnel Service, UNOG, that divorce proceedings had been instituted in Tunisia and France. On 17 May, the Personnel Officer, UNOG, transmitted the 9 March letter to the Applicant and reminded him of his obligations under staff rule 101.2 (c). The Applicant replied on 19 May, stating that he had complied with the maintenance and support order from the French Court and that he was divorced under Tunisian law, and requesting the Personnel Officer to inform his ex-wife that she was no longer covered by United Nations medical insurance. On 31 May, the Personnel Officer acknowledged receipt of the divorce decree from the Tunisian courts but advised the Applicant that before the divorce could be recognized by the United Nations, the French authorities should be asked to recognize it as the couple's home and matrimonial goods were in France.

On 14 June 1999, the Personnel Officer issued an IMIS personnel action form in respect of the Applicant, stating his marital status as "separated". The form contained the following "Remark": "[The Applicant] has requested to keep receiving [dependency] benefit for his wife."

On 21 June 1999, the Applicant requested suspension of action of the decision "not to recognize [his] divorce". He attached an undated letter to the Secretary-General in which he requested administrative review of the decision, and in which he claimed the IMIS "Remark" that he had asked to continue receiving dependency benefit for his ex-wife was a "blatant lie".

On 26 June 1999, the Applicant remarried in Geneva and, on 29 June, he submitted a copy of his new marriage certificate to the Organization.

Also on 29 June, the JAB produced its report. It noted that no decision had been taken on the Applicant's marital status but recommended that such decision be suspended until The Legal Counsel could clarify the matter. The Applicant was informed that the Secretary-General had decided to accept the recommendation of the JAB, in a letter of the same date from the Officer-in-Charge, Department of Management.

On 30 June 1999, the Applicant retired from service. A Personnel Payroll Clearance Action form subsequently completed indicated that the Applicant's marital status would be determined at a later date. The Applicant refused to sign the form.

On 7 July 1999, the parties' divorce was pronounced under French law.

On 27 July 1999, the Chief, Personnel Service, UNOG, informed the Applicant that GLD had advised that no action be taken by the Organization in determining the Applicant's marital status on his retirement pending the completion of divorce proceedings in Tunisia and France, and requested copies of both divorce decrees. The Applicant replied on 6 August, requesting a copy of the memorandum from GLD, indicating that he had already submitted a copy of his Tunisian divorce decree and refusing to provide the French decree.

On 3 September 1999, the Applicant lodged an appeal in the "third case" with the Geneva JAB.

On 17 January 2000, the Applicant requested administrative review of the decision "not to initiate disciplinary proceedings against [the Personnel Officer]" (the "sixth case"). On 2 April, the Applicant lodged an appeal in the "sixth case" with the JAB.

On 18 July 2000, the JAB asked the Applicant to provide copies of the divorce decrees, as well as the appellate judgements thereon. The Applicant did not comply. Upon receipt of a

subsequent request from the JAB, the French Court provided a copy of the divorce decree; the Tunisian Court did not.

The JAB adopted its report in the "third" and "sixth" cases on 18 September 2000. Its conclusions and recommendations in the "third case" read, in part, as follows:

> "**Conclusions and Recommendations**
>
> 149. In the light of the foregoing, the Panel **concludes** that the decision to postpone the determination of the [Applicant's] marital status is the only reasonable solution in view of the circumstances of the case.
>
> 150. Furthermore, the Panel **concludes** that such decision does not affect the [Applicant's] rights.
>
> 151. Accordingly, the Panel **recommends** that the present appeal be rejected."

The JAB's considerations, conclusions and recommendations in the "sixth case" read in part as follows:

> "***Considerations***
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> …
>
> 102. At the outset. the Panel wishes to point out to the [Applicant] that he is erroneously using the word "forgery". Even supposing that the contested sentence contains inaccurate information, which is not the case ..., the document would not qualify as a forgery.
>
> …
>
> 109. In the light of the [information submitted to the Personnel Service by the Applicant], the Panel is satisfied that [he] 'has requested to keep receiving dependency benefits for his wife', as stated by the Personnel Officer in the IMIS form. …
>
> …
>
> 113. Against this background, the Panel finds the [Applicant's] allegation that the Personnel Officer's action was 'fraudulous' (sic) and 'malicious', that it 'violates article 101 paragraph 3 of the Charter …', and that 'accordingly, disciplinary proceedings should have been initiated against her', to be without merit and defamatory.

> 114. To sum up, the Panel finds that the [Applicant's] attitude in this case is wholly disingenuous, and considers that this appeal is an appalling abuse of the appeal procedure.
>
> ***Conclusions and Recommendations***
>
> 115. In the light of the foregoing, the Panel *concludes* that the [Applicant's] … appeal is wholly without merit and constitutes an abuse of the right to appeal.
>
> 116. Accordingly, the Panel recommends to the Secretary-General that this appeal be *rejected***.**
>
> 117. Furthermore, the Panel *unanimously considers* that this appeal is *frivolous***,** within the meaning of article 7.3 of the United Nations Administrative Tribunal's Statute."

On 12 October 2000, the Under-Secretary-General for Management transmitted a copy of the JAB reports in the "third" and "sixth" cases, to the Applicant, and informed him that the Secretary-General agreed with the Board's conclusions and recommendations, and had decided to take no further action on the cases.

On 24 April and 18 May 2001, respectively, the Applicant filed the above-referenced Applications in the "third case" and in the "sixth case" with the Tribunal.

Whereas the facts in the "fifth case" are as follows:

On 30 June 1999, the Applicant retired from service. On 6 August, he wrote to the Secretary-General of UNCTAD, requesting a certificate of service in accordance with the provisions of staff rule 109.11. He reiterated this request on 1 September and 11 October.

On 18 October 1999, the Applicant requested administrative review of the decision not to provide him with a certificate of service. On 27 October, the Secretary-General of UNCTAD advised the Applicant that a certificate of service was being prepared and would be sent to him "in due course".

On 17 December 1999, the Applicant lodged an appeal in the "fifth case" with the JAB.

On 17 March 2000, UNCTAD sent the Applicant a certificate of service which stated, inter alia, that the Applicant's performance was "generally oustanding". The Applicant objected to the delay in production of the certificate and to the failure to rate his official conduct, on 27 March. Thereafter, on 19 May, the Applicant was sent a second certificate of service, which stated:

"[The Applicant's] performance has been generally 'outstanding'.

[The Applicant] has met the standards of conduct expected of an international civil servant.

This certificate is issued in accordance with staff rule 109.1. It cancels and supersedes certificate of service, dated 13 March 2000, previously issued …"

On 26 May 2000, the Applicant wrote to the JAB objecting to the certificate and claiming that the phrase "met the standards of conduct" amounted to a "C" rating, and that the statement that the certificate superseded the previous one would be a "red flag" for prospective employers.

The JAB adopted its report in the "fifth case" on 18 September 2000. Its considerations, conclusions and recommendations read, in part, as follows:

"***Considerations***

…

82. The Panel further finds no merit in the [Applicant's] contention that the sentence added in the new certificate, namely '[the Applicant] has met the standards of conduct expected of an international civil servant', is equivalent to a 'C' rating. This sentence was in fact added following the [Applicant's] own request. …

…

***Conclusions and Recommendations***

84. In the light of the foregoing, the Panel **concludes** that, while the UNCTAD administration should have been much more timely in delivering the requested certificate of service, the [Applicant] suffered no damage from the delay.

85. Accordingly, the Panel makes **no recommendation** in support of the present appeal."

On 12 October 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and he informed him that the Secretary-General agreed with the conclusion of the JAB and had decided to take no further action on the case.

On 9 May 2001, the Applicant filed the above-referenced Application in the "fifth case" with the Tribunal.

Whereas the Applicant's principal contentions common to all cases are:

1. The case should not have been brought before the JAB in Geneva.

2. The JAB erred in failing to establish facts or hold oral proceedings.

Whereas the Applicant's principal contentions in the "first case" are:

1. The Respondent violated the Applicant's right to see and comment on documents produced by the Respondent that were relevant to him.

2. The legal opinion produced by GLD was neither independent nor impartial, being the opinion of a party to the proceedings,

3. The Respondent acted illegally and in bad faith, discriminated against the Applicant and violated his acquired rights. Further, his actions amounted to a *détournment de pouvoir*.

Whereas the Applicant's principal contentions in the "second case" are:

1. The Respondent violated paragraph XIX of Judgement No. 507, *Fayache* (1991).

2. The Respondent has refused to substantiate that it gave the Applicant's candidature the fullest regard, as required by the jurisprudence of the Tribunal.

3. The APB was deliberately and maliciously misled about the reason for the delays in the Applicant's PERs.

4. The vacancy announcement for the post in question was tailor-made for the successful candidate.

Whereas the Applicant's principal contentions in the "third case" are:

1. The legal opinion produced by GLD is legally flawed.

2. The Respondent violated the 1961 Convention on Diplomatic Relations.

3. The Applicant was subjected to harassment and discrimination, justifying the invocation of staff rule 112.3.

Whereas the Applicant's principal contentions in the "fourth case" are:

1. The Respondent violated the Applicant's right to a fair and impartial assessment of his performance.

2. The JAB erred in the Applicant's suspension of action case by not recommending that his employment be extended until his PER, PAS and rebuttal proceedings were completed.

3. The Applicant is entitled to a "top evaluation".

Whereas the Applicant's principal contentions in the "fifth case" are:

1. The Applicant is entitled to an accurate certificate of service under staff rule 109.11.
2. The Applicant suffered serious financial loss as a result of the Respondent's actions.
3. The delay in issuing the certificate of service was retaliatory.

Whereas the Applicant's principal contentions in the "sixth case" are:

1. The application is not frivolous. The inaction of the Respondent forced the Applicant to lodge an appeal to the JAB.
2. The actions of the Personnel Officer, UNOG, were unethical, unprofessional, and in violation of the staff rules.

Whereas the Respondent's principal contentions in all six cases are:

1. The Applicant had no right to promotion but only to consideration for promotion. The Applicant was properly considered and his rights were not violated by the decision not to promote him. The process was not affected by the absence of an up-to-date PER.
2. Although consideration of the Applicant for promotion included a procedural irregularity, the Respondent's discretionary decision was not vitiated by improper motivation, nor was the Applicant subjected to harassment.
3. The award to the Applicant in respect of the delay in completion and review of his PERs constitutes adequate compensation for the injury to his procedural rights.
4. The temporary suspension in payment of education grant to the Applicant was not improperly motivated but the result of a question as to whether he was paying education fees. Upon a finding that he was indirectly paying such fees, the Applicant was paid the education grant with interest. Accordingly, his rights were not violated and he suffered no injury.

5. Postponing the determination of the Applicant's marital status for administrative purposes was not improperly motivated, but was necessitated by the complexity of the situation and the absence of relevant documentation. The delay did not harm the Applicant.

6. The delay in issuing the requested certificate of service, while regrettable, was not improperly motivated and did not cause injury to the Applicant.

7. The decision not to initiate disciplinary action against the Personnel Officer, UNOG, was properly taken. The JAB correctly found this case to be frivolous.

8. The JAB did not commit errors which could have vitiated its reports and recommendations.

The Tribunal, having deliberated from 4 to 25 November 2002, now pronounces the following Judgement:

I. The Applicant has presented the Tribunal with six Applications, which concern his personal life - and the various ways it affected his relations with the Organization - as well as certain aspects of his career. As the Applications are sufficiently related to each other to be considered jointly and without prejudice to the Applicant, the Tribunal will address them systematically in one Judgement, following the delineation of the cases in the exposition of the facts.

II. In the "first case", the Applicant and his wife lodged parallel divorce proceedings in the Tunisian and French courts, respectively. Both jurisdictions concluded on the case: while the Tribunal has not been apprised of the exact ruling of the Tunisian courts, it is aware of the exact ruling of the French courts, which ordered that the Applicant should pay maintenance and child support payments for their two sons. The education grant receivable by the Applicant from the Organization was factored into the child support calculations, and his child support payments included an amount to cover the education expenses of the children.

The issue under consideration arose from the different interpretation of the Applicant and the Administration as to how the disbursement of the education grant should be effected. According to the Administration, the education grant is payable to an employee who gives proof of having personally paid the school in question. In the instant case, the children's mother paid

the school but the Applicant paid her child support, including an education allowance, in accordance with the ruling of the French courts. The Applicant contended that as he paid the school fees, albeit indirectly via his ex-wife, he was entitled to the education grant and the Administration was being overly legalistic in denying him such. Ultimately, the Administration acceded to the Applicant's point of view and acted accordingly, paying the education grant plus interest of 5 per cent.

Accordingly, the Tribunal finds that the issue was satisfied by the Administration. The Applicant's request to be paid damages is not well founded as, in a complex and unusual situation, the Administration acted upon the advice of the Office of Legal Affairs, and that advice respected the letter of the law. Further, the Administration paid interest on the amount in question, which reasonably compensated the Applicant for any damage suffered.

The Applicant requests the production of the entire legal opinion provided by the General Legal Division, Office of Legal Affairs, on 1 November 1999. The Tribunal finds this request reasonable.

III. In the "second" and "fourth" cases, the Applicant alleges maladministration with respect to the preparation of his PERs, as well as that the failure of the Administration to prepare such PERs in a timely fashion deprived him of rightful promotion.

On 2 September 1993, the Applicant was transferred from New York to UNCTAD, Geneva. In late 1996, UNCTAD provided the Applicant with a draft PER to cover the period 2 September 1993 to 30 September 1996. The Applicant had to object to the way the PER procedure was handled by the Administration several times before the latter complied with his reasonable request that the PER be signed by those who had truly supervised his work in the given period. Meanwhile, the Applicant was competing for promotion to a D-1 level post. On 9 March 1998, he was informed that UNCTAD had recommended another candidate for the position. Despite the protestations of the Applicant, and after various delays imposed in an effort to comply with his requests for postponement of the decision, on 14 May 1998 the APB recommended the candidate endorsed by UNCTAD for the D-1 post.

When the Applicant's challenge of the PER procedure and the other candidate's promotion was brought to the attention of the JAB, in its unanimous recommendation it dissociated the PER procedure from the promotion, because it was decided that the adventures of

the Applicant with regard to the PER procedure did not legally affect the decision about the D-1 post. The JAB found, nevertheless, that the Applicant should be compensated for UNCTAD's failure to prepare his PERs in a timely manner and the delays in the rebuttal process and, on that basis, recommended that the Applicant be paid an amount equal to three months' net base salary. The Secretary-General subsequently accepted this recommendation. The Tribunal concurs with the findings and recommendation of the JAB and the decision of the Secretary-General thereon.

The Tribunal has repeatedly affirmed that the decision to promote a staff member falls within the discretion of the Secretary-General, providing he does not abuse his authority or act in such a way as to cause lack of due process, or procedural or substantive errors, and that the Tribunal cannot substitute its judgement for that of the Secretary-General in such cases. (See Judgements No. 134, *Fürst* (1969) and No. 470, *Kumar* (1989), respectively.) It has also decided "qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to an expectancy". (See Judgement No. 312, *Roberts* (1983) and see generally Judgements No. 943, *Yung* (1999); and No. 1015, *Baruch-Smith* (2001).)

In the instant case, the D-1 vacancy announcement required an "advanced degree in economics, preferably PhD". Of 13 applicants, only two were found to meet these pre-requisites. The Applicant was not among them, because he did not have an advanced degree in economics. The Tribunal finds, therefore, that all of the Applicant's allegations concerning the reasons that he was not offered the position are irrelevant to the real issue: the fact was that the Applicant was never eligible for the post.

The Applicant contends that the successful candidate did not meet the requirement of multilingualism, as established by ST/AI/207, of 23 December 1971, entitled "Language Proficiency of Staff in the Professional Category and Above" (which was later abolished by ST/AI/1999/2, "Language Proficiency and Language Incentives", of 13 May 1999). The Tribunal notes that, in the first place, the Applicant does not have a legally protected right to advance this claim because as he did not have an advanced degree in economics, he could not have been considered for the post in any event. That said, the Tribunal also finds that, even had the Applicant had such a legally protected right, the Secretary-General may, in accordance with the provisions of paragraph 2 (i) of ST/AI/207, waive the multilingualism requirement. In so

doing, there is no need for any formal decision as, in approving the promotion, the Secretary-General implicitly declares that he knows the file of the case brought to his consideration.

For these reasons, the Tribunal rejects all pleas in the "second" and "fourth" cases.

IV. With reference to the "second case", the Tribunal takes note of two Applications for intervention, one presented by Mr. Bouchuiguir and another by Mr. Van Aggelen, and notes that insofar as the intervenors are concerned, they do not have any legally protected right relevant to the present case, as neither of them was part of the promotion procedure under consideration. (See Judgement No. 303, *Panis* (1983).) Accordingly, they have not satisfied the requirements of Article 19 (1) of the Rules of the Tribunal and the Tribunal finds the Applications for intervention non-receivable.

V. In the "third" and "sixth" cases, the Applicant challenges the decision of the Administration to postpone the determination of his marital status as well as the decision of the Administration not to press forgery charges against a Personnel Officer.

It is clear from the file of this case that the Applicant and his then-wife applied for divorce in the Tunisian and French courts, respectively, and that each pursued legal action in both jurisdictions up to and including appellate-level proceedings. It is obvious that when a party wishes the Organization to recognise a right arising from a conflicted situation, that party must present all proof and documentation necessary for the establishment of his/her right. The Organization does not have the responsibility to act before the legal basis of the situation is clear and final.

Under the circumstances, it appears that notwithstanding requests from the Administration, the Applicant did not produce the necessary documents for a decision to be taken on his marital status. For example, he only produced a copy of the Tunisian appellate judgement, but not the original decree, and he refused to provide the decision of the French Court. Although the Tunisian divorce dated back to 12 January 1998 and the French divorce to 7 July 1999, on 18 July 2000 the JAB was still asking the Applicant to provide it with the decrees. Ultimately, the JAB obtained the French decree directly from the Tribunal de Grande Instance; the Tunisian Court did not respond to its request.

In the circumstances, the Tribunal finds that the Administration acted wisely in insisting on being fully informed about the legal situation of the Applicant in respect to the status of his marriage and divorce, and finds that this is all the more so given that it was also being asked to recognize a new marriage and to accord spousal status, with all the rights arising thereof, to a new wife. Accordingly, insofar as the "third case" is concerned, the Tribunal fully agrees with the considerations and conclusions of the JAB and rejects the Applicant's pleas.

The Tribunal now turns its attention to the "sixth case", wherein the Applicant attempts to challenge the decision of the Administration not to press forgery charges against the Personnel Officer, UNOG. It is clear that the Administration could have doubts as to whether or why the Applicant, who had declared his divorce from his former wife, was still asking for dependency benefits related to that marriage. The Applicant's own actions in completing the relevant questionnaires contributed to the confusion. Accordingly, the Tribunal agrees with the considerations and conclusions of the JAB on this matter, finds that no forgery was committed and rejects this plea.

Furthermore, the Tribunal takes this opportunity to underline that the instigation of disciplinary charges against an employee is the privilege of the Organization itself. The Organization, responsible as it is for personnel management, has, among other rights, the right to take disciplinary action against one or more of its employees and, if it does that unlawfully, the Administrative Tribunal will be the final arbiter of the case. It is not legally possible for anyone to compel the Administration to take disciplinary action against another party. Therefore, the Tribunal rejects the Application in the "sixth case".

VI. In the "fifth case", the Applicant seeks compensation for delays on the part of the Administration in providing him with a certificate of service after his retirement and further contends that, even once it was provided, the certificate of service rated his conduct at the "C" level.

It is evident that the Administration took more than seven months to deliver the requested certificate of service, and this fact was acknowledged by the JAB. It is intolerable that a former employee should have to apply again and again, and even ask for administrative review, in order to be given a certificate of service. However, the Applicant has failed to demonstrate that he suffered any actual harm as a result of this undue delay. Furthermore, he has not established as

well-founded his claim that the phrase "[the Applicant] has met the standards of conduct expected of an international civil servant" is equivalent to a "C" rating, especially when read in light of the prior phrase: "[the Applicant's] performance has been generally 'outstanding'".

In view of the foregoing, the Tribunal agrees with the considerations and conclusions of the JAB and, therefore, rejects the pleas in the "fifth case".

VII. In his Applications, the Applicant makes a series of contentions regarding various shortcomings he alleges occurred on the part of the JAB. The Organization's staff regulations and rules provide for an internal administration of justice system and the necessary structures therefore. In Judgement No. 1009, *Makil* (2001), the Tribunal held that

> "[it] will ordinarily operate on facts as found by the [Joint Disciplinary Committee (JDC)] or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the part of the said fact finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter".

In the cases before the Tribunal, the Tribunal has not identified any such failure, insufficiency of evidence, or prejudice, and accordingly, has operated on the fact-finding performed by the JAB.

Further, the Applicant's various allegations and accusations concerning the JAB are, in the view of the Tribunal, without merit. It is not persuaded that the JAB in Geneva, or its secretariat, acted improperly in any of the Applicant's cases.

VIII. In view of the foregoing, the Tribunal

1. Orders the Respondent to provide the Applicant with the entire text of the legal opinion provided by the General Legal Division, Office of Legal Affairs, on 1 November 1999 or, in the alternative, to pay him compensation of US$ 1,000; and,

2. Rejects all other pleas.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Omer Yousif BIREEDO
Member

Spyridon FLOGAITIS
Member

New York, 25 November 2002

Maritza STRUYVENBERG
Executive Secretary