

ADMINISTRATIVE TRIBUNAL

Judgement No. 390

Case No. 406: WALTER

Against: The Secretary General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Luis de Posadas Montero, Vice-President,  
presiding; Mr. Endre Ustor; Mr. Roger Pinto;

Whereas, on 5 August 1986, Genevieve Walter, a staff member  
of the United Nations, filed an application that did not fulfil the  
formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 20 October 1986, the Applicant, after making the  
necessary corrections, filed an application, the pleas of which  
read as follows:

"The Applicant respectfully requests that the Tribunal shall:

- (i) Order the Respondent to implement her promotion from G-5 to P-2 with effect from 1 December 1982; and
- (ii) Find that the abolition in 1983 of the UNITAR post to which the Appellant was assigned was not in conformity with the Staff Rules, amounting in fact to a détournement de pouvoir; and that such abolition was accordingly an invalid pretext for her reassignment away from UNITAR; and
- (iii) Order the Respondent to pay to her such sum as the Tribunal shall see fit in regard to the Respondent's unjustified and unlawful delay in replying to the Applicant's appeals in the

Joint Appeals Board for 28 and 22 months, respectively, to her distress, pain and damage."

Whereas the Respondent filed his answer on 21 January 1987;

Whereas the Applicant filed written observations on 25 February 1987;

Whereas, on 12 May 1987, the Tribunal requested the Respondent to produce additional documents and to provide additional information;

Whereas, on 13 May 1987, the Respondent answered the questions put to him by the Tribunal;

Whereas, on 14 May 1987, the Tribunal requested the Respondent to produce additional documents and to provide additional information;

Whereas, on 18 May 1987, the Respondent produced additional documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 27 May 1963. She was initially offered a three-month fixed-term appointment at the G-2 level as a Conference Typist in the English Typing Unit of the Department of Conference Services. Her appointment was extended for a further fixed-term period of three months, and on 27 November 1963 it was converted to a probationary appointment. Effective 1 January 1964, she was promoted to the G-3 level, and on 1 May 1965, she was granted a permanent appointment. On 30 September 1968, the Applicant separated from the service of the United Nations.

On 1 November 1968, the Applicant was recruited by the United Nations Institute for Training and Research (UNITAR). She was initially offered a three-month fixed-term appointment as a Clerk-typist at the G-3 level that was extended for a further fixed-term period of one year. On 1 February 1970, her appointment was converted to a probationary appointment and on 1 November 1970 to a

permanent appointment in the United Nations Secretariat, governed by the 100 Series of the United Nations Staff Rules, indicating her assignment to UNITAR. Effective 1 April 1971, she was promoted to the G-4 level. On 1 April 1975, she was promoted to the G-5 level and her functional title was changed to Administrative Assistant.

At a meeting held on 1 December 1982, the UNITAR Appointment and Promotion Board considered a series of recommendations for promotion made by Mr. Davidson Nicol, the Executive Director then in office. The Applicant was included among the staff recommended for promotion from the General Service to the Professional category. According to the minutes of the meeting, the Board decided that it would "not take up individual cases for consideration". In a letter dated 2 December 1982, the Chairman of the Board informed the Executive Director that the Board had "agreed unanimously to postpone review of the cases presented to it in order to enable the UNITAR Administration to provide members of the Board with further information" concerning the proposed promotions in the staffing table; the relationship between the "proposals for promotion and the future resource situation of UNITAR" and advice from the United Nations Appointment and Promotion Board on some recommendations that involved "basic principles of promotion policy". He concluded as follows:

"The Board emphasized that its decision should not be construed as a rejection of the cases presented, and that it would be available to review them early in 1983 when the UNITAR Administration would be in a position to provide it with the required information."

An exchange of correspondence ensued between the Executive Director and the Chairman of the Board. In a letter dated 16 December 1982 addressed to the Chairman of the Board, the Executive Director reiterated his recommendation to promote the Applicant. On the same date, the Executive Director wrote a letter to the Applicant which reads as follows:

"Dear Ms. Walter,

I am pleased to inform you about your promotion to P-2 with effect from 1 December 1982.

The appropriate step will be decided by me in consultation with the Finance and Administration Section soon.

I am sorry that because of the financial constraints now alleviated, this promotion could not be made earlier or with retroactive effect.

I am grateful to you for the outstanding contribution you have made to the work of the Institute and you have my best wishes for the future."

In a memorandum dated 22 December 1982, the Executive Director notified the Chief, Finance and Administration, UNITAR, that "after full consultation with the Appointment and Promotion Board and its Chairman" and "by virtue of the powers conferred on [him] by [the UNITAR] Statute on staffing of the Institute", he had decided to promote a series of UNITAR staff members. The Applicant was included among them.

On 23 December 1982, a Personnel Action form was issued to implement the Applicant's promotion to the P-2 level, effective 1 December 1982, as "approved by Executive Director, UNITAR and Under-Secretary-General, United Nations, vide his memorandum ... of 16 December 1982."

Mr. Davidson Nicol's term as Executive Director of UNITAR expired on 31 December 1982, and he was succeeded by Mr. Michel Doo Kingué.

On 4 January 1983, the Chief, Finance and Administration, UNITAR, informed the Applicant that the new Executive Director had suspended the decision taken by Mr. Davidson Nicol on her promotion until he had the opportunity to examine the case "in the light of the views expressed on [the] matter by the UNITAR Board of Trustees as well as the UNITAR Appointment and Promotion Board."

On 8 March 1983, the Applicant wrote to the Chief, Finance and Administration, UNITAR, to inquire when the administrative action to suspend her promotion would be lifted. On 11 March 1983, the Applicant requested the Chief, Administrative Review Unit, Office of Personnel Services, to review the decision to suspend the implementation of her promotion.

In a memorandum dated 4 April 1983, the Chief, Finance and Administration, UNITAR, notified the Applicant that the Executive Director had authorized him to inform her that the Appointment and Promotion Board had not endorsed the previous Executive Director's recommendation to promote her from the G-5 to the P-2 level "for reasons of general personnel policy". On 21 March 1983, the Acting Chief, Administrative Review Unit, notified the Applicant that her letter of 11 March 1983 had been treated as a request for review of an administrative decision under staff rule 111.3(a) then in force.

On 17 May 1983, the Applicant lodged an appeal with the Joint Appeals Board, hereinafter referred to as the "first appeal".

In a letter dated 29 September 1983, the Executive Director informed the Applicant that on account of the Institute's financial situation, her post would be abolished, effective 31 December 1983. In addition, he noted that UNITAR was undertaking negotiations with the United Nations Office of Personnel Services in order that UNITAR staff members whose posts were to be abolished should be absorbed by the United Nations Secretariat. However, if those negotiations did not succeed, and OPS faced "serious difficulties" in reassigning the Applicant within the Secretariat, her appointment would be terminated for abolition of post in accordance with the provisions of staff regulation 9.1(a).

On 13 October 1983, the Applicant requested the Secretary-General to review the administrative decision to abolish her post effective 31 December 1983. Not having received a reply from the Secretary-General, on 14 November 1983 the Applicant lodged an appeal with the Joint Appeals Board, hereinafter referred to as the "second appeal".

On 22 December 1983, the Chief, General Recruitment Section, OPS, notified the Applicant that the UNITAR Executive Director had agreed to extend her services with UNITAR through 30 January 1984 and that, in the meantime, he was trying to place her in the Secretariat. In a letter dated 27 January 1984, the Officer-in-Charge, OPS, informed the Applicant that effective 1 February 1984 she would be assigned within the United Nations Secretariat for three months. During that period, the Office of Personnel Services would "on a priority basis" endeavour to reassign her to a suitable vacancy. If these efforts were unsuccessful, the United Nations Administration would have no alternative but to initiate proceedings to terminate her appointment for abolition of post.

The Applicant was initially assigned to the Staff Service at the Office of Personnel Services and was then reassigned effective 8 April 1985 to the Office of the Co-ordinator for the Improvement of the Status of Women in the Secretariat.

The Joint Appeals Board adopted its report on the Applicant's appeals on 16 April 1986. Its conclusions and recommendation concerning the "first appeal" read as follows:

"Conclusions and Recommendation

42. The Panel concludes that the previous Executive Director had acted within his authority to promote the appellant to the P-2 level within UNITAR. Accordingly, the Panel recommends that the promotion should be implemented from 1 December 1982 for the remainder of her assignment with UNITAR.
43. The Panel also concludes that there was no evidence of discriminatory treatment.
44. The Panel makes no further recommendation in support of the appeal."

The conclusions and recommendation concerning the "second appeal" read as follows:

"Conclusions and Recommendation

27. The Panel concludes that, while it did not have any evidence either to support or reject the alleged procedural impropriety in respect of the Executive Director's action, the subsequent actions taken by OPS clearly demonstrated that the provision of staff rule 109.1 had been observed within the context of the appellant's permanent contract with the United Nations Secretariat.
28. The Panel therefore is unable to make a recommendation in support of the appeal."

On 21 May 1986, the Secretary-General informed the Applicant that he would take no further action on the case with respect to the "second appeal".

On 20 October 1986, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant's promotion to the P-2 level should be implemented not only for the Applicant's assignment to UNITAR, but also for her assignment to the Secretariat.
2. The system for promotion from the General Service to the Professional category did not apply to UNITAR or to other subsidiary organs of the General Assembly.
3. The Applicant's assignment at UNITAR was not terminated in accordance with the Staff rules since the Executive Director singled out staff members with permanent contracts to be removed from the service of UNITAR.
4. The Applicant's employment situation in the Organization has been adversely affected since she is now assigned to a temporary post at the G-5 level.
5. The Respondent's delay in dealing with this appeal is indefensible.

Whereas the Respondent's principal contentions are:

1. The decision by the new Executive Director not to

promote the Applicant was a proper exercise of administrative discretion, since the Applicant had been promoted without the advice of the UNITAR Appointment and Promotion Board as required by staff rule 104.14(a)(i).

2. Even if the Executive Director's decision to promote the Applicant effective 1 December 1982 were valid, it would only be so for service with UNITAR since the General Assembly has mandated a competitive examination for promotion from the General Service to the Professional category.

3. Under staff regulation 1.2, staff do not have a right to any particular post, but are subject to assignment in the interests of the Organization. In case of abolition of posts, staff only have a right to be retained in service in accordance with a comparative evaluation procedure as against other staff pursuant to staff rule 109.1(c).

The Tribunal, having deliberated from 4 May 1987 to 5 June 1987, now pronounces the following judgement:

I. The Applicant entered the service of the United Nations in 1963. Except for a brief interruption of one month, in October 1968, she has remained at the United Nations up to the present, for almost 25 years. From 1968 to 1984 she was in the service of the United Nations Institute for Training and Research (UNITAR).

II. UNITAR has no legal status of its own. It was established at the request of the General Assembly (resolution 1934 (XVIII) of 11 December 1963) by the Secretary-General (Statute of November 1965, amended in 1967). Its Statute defines it as "an autonomous institution ... within the framework of the United Nations ..."

III. The Applicant, who was recruited in May 1963 as a typist (G-2 level) in the Department of Conference Services, was promoted to the G-3 level on 1 January 1964. She interrupted her service on



30 September 1968 and resumed service on 1 November. She was assigned to UNITAR on the latter date at the same level, also as a typist. On 1 April 1971, she was promoted to the G-4 level, and on 1 April 1975 she was promoted to the G-5 level, with the title of Administrative Assistant. The record of the case shows, and the Respondent expressly acknowledged, that the Applicant was actually performing duties falling within the sphere of the Professional category.

IV. In these circumstances, in 1982 the Executive Director of UNITAR concluded that the Applicant deserved to be promoted from the General Service to the Professional category. He secured the consent of the UNITAR Board of Trustees. On 24 November 1982, he requested the advice of the Institute's Appointment and Promotion Board.

V. For reasons of a general nature, on 1 December 1982 the Board decided that it should "not take up individual cases for consideration". However, on 16 December 1982 the Executive Director of UNITAR decided to promote the Applicant to the P-2 level, with effect from 1 December 1982. He referred to "the outstanding contribution" made by the Applicant to the work of the Institute. On 23 December 1982 the Applicant was notified of the personnel action taken to promote her.

VI. The Respondent disputes the validity of the Applicant's promotion, which was based on a decision taken by the Executive Director of UNITAR.

VII. He stresses that Mr. Davidson Nicol, the Executive Director, took the decision just before his term of office ended on 31 December 1982. However, he does not allege that there was any impropriety - for example, favouritism - that would vitiate the decision. The Tribunal considers that the Executive Director was entitled to exercise his authority until his term of office expired. The

Applicant's promotion had in fact been under consideration since the beginning of 1982.

VIII. The Respondent contends, as to law, that the Executive Director of UNITAR issued the promotion letter without waiting for the advice of the UNITAR Appointment and Promotion Board.

In fact, the then Executive Director did indeed present the matter before the Board and obtained its advice on the proposed promotion. Although the advice was unquestionably negative, it was not binding on the Executive Director, who reached a different conclusion.

IX. The new Executive Director was under no misapprehension as to the fact that his predecessor had taken a decision and that the decision was final. He simply decided to suspend the decision. There is no legal justification for the suspension. The new Executive Director did not have the authority to suspend his predecessor's decision without a proper suspension procedure. No procedure was carried out for that purpose. The Tribunal therefore holds that the Applicant's promotion is valid and must take legal effect.

X. The Respondent contends in that case that the legal effects of the promotion decision, which the Tribunal considers valid, can only be during the period in which the Applicant was in the service of UNITAR. He bases his contention on the fact that the Applicant was promoted from the General Service to the Professional category without having to sit a competitive examination - as was required of other staff members at the United Nations Secretariat.

XI. The Tribunal believes that, before considering this claim, it is necessary to refer to the comments made by the Joint Appeals Board on the subject. The Joint Appeals Board recognized the validity of the decision to promote the Applicant. It added that:

- "36. Thirdly, the Panel turned its attention to the ramifications of the specific commitment made by the previous Executive Director. Could the Executive Director in deciding the promotion also commit the United Nations Secretariat. The Panel recognized the complication caused by the fact that the appellant had a United Nations permanent contract although she had specifically and exclusively been on assignment to UNITAR.
37. The Panel noted that the Official Status File of the appellant contained contracts and personnel action forms (P5's) which indicated her assignment to UNITAR. There was no evidence of any formal arrangements pertaining to 'secondment', 'transfer' or 'loan'. This omission, the Panel believed, resulted in a rather loose arrangement contributing to confusion and the OPS had evidently failed to advise the appellant of the consequences of her assignment in terms of promotion in the context of the Organization as a whole. Moreover the previous two promotions received by the appellant had been included in the promotion register of the United Nations thus further adding to the confusion.
38. In the Panel's view the question as to whether the appellant's promotion within UNITAR would need to be honoured by the United Nations Secretariat when she was absorbed in it is a complex one for reasons referred to above. The Panel did not draw any conclusion on this point."

However, in its conclusions the Joint Appeals Board limits implementation of the promotion to the period from 1 December 1982 to the end of the Applicant's assignment to UNITAR. No justification is put forward for that conclusion.

XII. The Tribunal must therefore investigate whether the Applicant's promotion to the P-2 level applies only in respect of UNITAR, an autonomous United Nations body to which the Applicant was assigned.

XIII. The Respondent contends, in support of his pleas, that United Nations Secretariat staff members must sit a competitive examination

in order to be promoted from the General Service to the Professional category.

XIV. The Applicant contends that she was duly promoted from the General Service to the Professional category, without sitting a competitive examination. The Tribunal notes that, in the context of the United Nations, there has been a variety of methods of promotion over the years and that there are still various methods, depending on the United Nations body concerned.

XV. The Tribunal will confine itself to the Applicant's specific case and will not prejudge solutions that should prevail in different situations.

XVI. In response to the questions posed by the Tribunal, the Respondent submitted a memorandum dated 25 February 1980 from the Director of the Personnel Office at Headquarters addressed to the Executive Director of UNITAR. He referred to the memorandum as a "directive". This memorandum indicated that the existing rules made it impossible to give legal effect in the Secretariat to the promotion of a staff member of UNITAR, or any other autonomous United Nations institution, from the General Service to the Professional category. In fact, this memorandum was not a "directive", as the Respondent contends. It merely refers to a "long established administrative practice". It indicates that a General Service staff member seconded by the Secretariat to UNITAR "normally" returns to the General Service category at the Secretariat, despite his or her promotion to the Professional category.

XVII. The Tribunal notes that the Applicant's previous promotions were included in the United Nations promotion register. Moreover, as noted by the Joint Appeals Board, the administration placed the Applicant in a situation that led to "confusion". She was never

advised of the consequences of her assignment in terms of promotion in the context of the Organization as a whole.

XVIII. The Tribunal further notes that the Respondent does not call into question the professional qualities, competence and devotion of the Applicant, who was entirely responsible for UNITAR personnel management. The Respondent openly acknowledges that the Applicant was performing duties that fall within the sphere of the Professional category. Lastly, the Applicant has been in the service of the United Nations for almost 25 years and on a permanent contract for 17 years.

There is not anything unjust or abnormal or, with greater reason, anything shocking about her promotion to the Professional category.

XIX. The Tribunal considers that, in the circumstances of the case, the Applicant's promotion is effective in respect of the Secretariat.

XX. The Tribunal therefore finds that the Applicant is entitled to the salary attaching to the P-2 level, until such time as the Administration regularizes her status.

XXI. The Applicant also requested the Tribunal to find that the abolition of the UNITAR post to which she was assigned was improper. The Tribunal considers it unnecessary to pronounce on this request, in view of its finding.

XXII. All the Applicant's other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO  
Vice-President, presiding

Endre USTOR  
Member

Roger PINTO  
Member

Geneva, 5 June 1987

R. Maria VICIEN-MILBURN  
Executive Secretary