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ADMINISTRATIVE TRIBUNAL

Judgement No. 857

Case No. 949: DALY & OPPERMAN

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Samar Sen, Vice-President, presiding;  
Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Beauclerc Daly and Denise Opperman, former and current staff members of the United Nations, respectively, the President of the Tribunal, with the agreement of the Respondent, successively extended until 30 September and 31 December 1995, 30 April, 31 July and 31 October 1996, the time-limit for the filing of an application with the Tribunal.

Whereas, on 22 October 1996, the Applicants filed an application requesting the Tribunal, inter alia:

"... to find:

- (a) that the Administration failed to carry out the complete reclassification procedure as mandated by the applicable Staff Regulations and Rules, ...;
- (b) that the Administration denied the Applicants due process by not implementing the findings of the Compensation and Classification Service;
- (c) that the Administration further denied the Applicants due process by disregarding the unanimous recommendation of the Joint Appeals Board.

2. ... to order:

- (a) ...
- (b) that the Administration rectify the unjust situation [in which the Applicants find themselves] by implementing the classification decision without further delay by:
  - (i) identifying a Principal (G-7) level post in the case of Applicant 2 (Opperman), ...;
  - (ii) by placing Applicant 2 against such budgetary post with immediate effect, thereby implementing the classification decision;
- (c) that in the case of both Applicants [Opperman and Daly], the Administration retroactively compensate them at the Principal (G-7) level, appropriate step, including the actuarial equivalent of loss in pension and other ancillary benefits, from the date of the decision by the Compensation and Classifications Service (i.e. 16 April 1990):
  - (i) in the case of Applicant 1 (Daly) until his retirement on 30 June 1996; and
  - (ii) in the case of Applicant 2 (Opperman) until the implementation of the classification decision (reference 2(b) above);
- (c) payment of compensation equivalent to three months' net salary for the undue delay by the Administration in implementing the classification decision."

Whereas the Respondent filed his answer on 1 May 1997;

Whereas, on 2 June 1997, the Applicants filed written observations;

Whereas the facts in the case are as follows:

The Applicant Daly entered the service of the Organization on 30 March 1966, on a three-month, fixed-term appointment as a Clerk at the G-2, step III level in the then Department of Conference Services (DCS), Dag Hammarskjöld Library (DHL). The Applicant's

appointment was extended and, on 30 June 1966, became probationary.

On 1 September 1966, the Applicant was promoted to the G-3 level. On 1 March 1968, the Applicant's appointment became permanent and, on 1 April 1974, he was promoted to the G-4 level. On 1 August 1980, the Applicant was promoted to the G-5 level, and his functional title changed to Supervisor of the UN Materials Processing Unit, Processing and Publications Section, DHL, Technical Operations and Publications Service. On 1 January 1985, his grade level was raised from G-5 to G-6, upon conversion to the new classification standards. His functional title was changed to Library Assistant. From 1 January to 30 June 1996, the Applicant was on special leave without pay. The Applicant separated from the Organization with effect from 30 June 1996.

The Applicant Opperman entered the service of the Organization on 20 May 1974, on a three-month, fixed-term appointment as a Bilingual Clerk, at the G-3, step I level in the Department of Conference Services (DCS), DHL. Her appointment was subsequently extended and on 1 April 1978, she was promoted to the G-4 level, with a change in her functional title to Senior Clerk. On 1 July 1980, the Applicant's appointment was converted to probationary and, on 1 April 1981, became permanent. With effect from 29 October 1981, the Applicant's functional title was changed to Senior Clerk-Typist X. On 1 January 1985, her grade level was changed from G-4 to G-6 upon conversion to the new classification standards. Her functional title was changed to Electronic Data Processing Assistant. With effect from 1 February 1993, DHL was transferred to the Department of Public Information (DPI). The Applicant's functional title was changed to Library Assistant.

On 11 April 1989, an Interdepartmental Task Force on the Dag Hammarskjöld Library (the Task Force) was established to conduct a comprehensive review of the problems of the Library. On 1 March 1990, the Chairman of the Task Force wrote to the Under-Secretary-

General (USG) for Conference Services and Special Assignments and to the Assistant Secretary-General for Human Resources Management (ASG/OHRM), noting the "inconsistencies of the classification exercise" and the "unsatisfactory quality of the job descriptions submitted". The result was "an uneven classification stratum."

On 16 April 1990, the Chairman of the Task Force again wrote to the USG for Conference Services and Special Assignments and to the ASG/OHRM. He suggested, inter alia, that based on the review of the Task Force, some job descriptions "should be reviewed for classification at levels higher than GS-5 and GS-6."

In a reply dated 10 July 1990, the ASG/OHRM agreed, "as an exception to the current guidelines for reclassification of posts", to a review of a "very strictly limited" number of posts for which insufficiency of job descriptions had caused problems. He stated that an implementation date of 16 April 1990 was acceptable.

On 28 July 1992, the Officer-in-Charge, Compensation and Classification Service (CCS), informed the Deputy Executive Officer, Office of Conference Services (OCS), inter alia, that while the new job descriptions submitted for the Applicants met the criteria for classification at the G-7 level, CCS could not issue the classification notices unless the Department provided CCS with identified post numbers at the principal level.

On 7 August 1992, the Assistant Administrative Officer, OCS, provided OHRM with the list of staff members whose posts had been classified at a higher level. He requested implementation of these promotions with effect from April 1990. The Applicants' names were not included in this list due to the non-availability of posts at the principal level.

In a memorandum dated 14 September 1992, the Assistant Administrative Officer transmitted to the Applicants the results of CCS's classification findings, stating that the Department was unable to identify higher-level posts to accommodate the Applicants.

However, the Assistant Administrative Officer indicated that as soon as OCS was in a position to make available a principal-level post,

the post identification number would be communicated to CCS so that a classification notice could be issued.

With effect from 1 February 1993, the Dag Hammarskjöld Library was transferred from the OCS to DPI pursuant to ST/SGB/257 of 26 January 1993.

In July 1993, DPI submitted its proposed programme budget for the Biennium 1994-1995 to the then Office for Programme Planning, Budget and Finance (OPPBF), requesting, inter alia, additional resources and funding for the Applicants' posts. OPPBF did not support this request. On 17 September 1993, the Secretary-General submitted to the General Assembly the proposed Programme Budget for the Biennium 1994-1995, which did not reflect DPI's request for two G-7 posts.

On 19 October 1993, the Applicants requested the Executive Office, DPI, for the implementation of the reclassification decision. In a reply dated 20 October 1993, the Director, Library and Publications Division, informed the Applicants that the OPPBF had not supported DPI's proposals for two G-7 level posts. The only solution he could offer was to request these posts in the next budget submission.

On 6 April 1994, the Applicant Daly and the Applicant Opperman lodged appeals with the Joint Appeals Board (JAB) against the decision not to implement the reclassification of their posts from the G-6 to the G-7 level. The JAB adopted its report on 2 February 1995. Its considerations, conclusions and recommendations read, as follows:

"22. The Panel decided, as the two cases were identical in substance, to consolidate them and deal with them in a single report.

23. The Panel observed that unlike all the other recommendations of the CCS regarding the reclassification of the General Service posts in the DHL, which had been implemented for the 28 staff members affected, the CCS'

recommendations with respect to the reclassification of the two posts occupied by the Appellants to the Principal (G-7) level were not implemented.

24. The Panel took note of the explanation offered by the Respondent that the implementation of a reclassification decision at the Principal level to the General Service category was contingent upon availability of a GS-7 post or of budgetary appropriations for that post.

25. The Panel was of the view that the budgetary implication of reclassification from [the] GS-6 to [the] GS-7 level was not significantly greater than the reclassification of other categories of the General Service posts. The Panel was further of the view that requirement of availability of posts or budget for them as [a] condition for implementation of recommendations for reclassification of professional posts was not justified for the General Service category.

26. Although relevant, these considerations were not the basis of the Panel's conclusion.

27. Instead, the Panel considered the delay by the Respondent in making the arrangements which were thought to be necessary before the post[s] could be absorbed. The Panel felt that once the special mechanism to remove the anomalies was put in place, the Secretary-General had an obligation to implement [it] without undue delay. Failure to do so by the Administration in the Appellants' case, especially in view of the fact that their 28 colleagues benefitted from the remedial action resulting from the recommendations of the CCS constituted legitimate ground[s] for the complaint that their right to equal treatment had been violated.

28. In light of the above, the Panel unanimously recommends that the posts that the Appellants presently occupy should be reclassified upward, with effect as of 16 April 1990."

By a letter dated 3 April 1995, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicants and informed them as follows:

"The Secretary-General has examined your case in the light of the Board's report and has taken note of its conclusion and recommendation. The Secretary-General wishes to reiterate that the advice of the Classification and

Compensation Service (CCS) to [the] then Department of Conference Services that your functions were at the G-7 level did not create a right to have your posts upgraded to the G-7 level. The Secretary-General wishes to point out that the agreement by OHRM, exceptionally, 'to review a very strictly limited number of cases ...' further stated also that, '... Any reclassification to the G-7 level ... will necessitate the normal budgetary provisions being made available.' There was, therefore, no 'reclassification' of your posts, as CCS only advised the Department of the results of its review of your posts. CCS needed to request a post number against which your post could be reclassified before it could issue a classification notice. Indeed, the Board, while acknowledging the relevance of these considerations, chose not to base its conclusions on these fundamental points.

The Panel, in basing its conclusion on the alleged delay by the Administration to make the arrangements necessary to implement the outcome of the review, confuses two distinct phases in the process, namely: (i) the determination by CCS that the functions of a post meet the standard for upward classification to the GS-7 level; and (ii) the budgetary implementation of the reclassification. In any event, once the results of the review were known, requests for additional resources were submitted by the responsible offices: Procedures to obtain budgetary provision can commence only after the results of the review are known and warranting additional financial resources. The Secretary-General's subsequent decision not to seek approval in his proposed biennial programme budgets for 1994-1995 and 1996-1997, for the reclassification of your posts was proper and within his discretion. The Secretary-General, therefore, is unable to agree with the Board's conclusion that your right to equal treatment had been violated, and rejects the Board's recommendation.

..."

On 22 October 1996, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. Having failed to challenge the classification decision, the Secretary-General no longer had discretion with respect to its



implementation.

2. If, alternatively, the implementation of the reclassification remained within the Secretary-General's discretion, he exercised his discretion not to seek approval of financing for the two G-7 posts arbitrarily or discriminatorily and, therefore, illegally.

Whereas the Respondent's principal contentions are:

1. A decision of the Classification Service that a post is at a higher level is a necessary, but not sufficient, condition for its reclassification.

2. The Secretary-General's decision not to seek approval in his proposed biennial programme budget for 1994-1995, for the reclassification of the Applicants' posts was proper and within his discretion.

The Tribunal, having deliberated from 5 to 25 November 1997, now pronounces the following judgement:

I. The Applicants are appealing a decision of the Secretary-General who failed to accept the unanimous recommendation of the Joint Appeals Board (JAB) that the Applicants' posts be reclassified to the G-7 level, with effect from 16 April 1990. The Applicants argue that the Administration denied them due process by not implementing the findings of the Compensation and Classification Service (CCS) to reclassify their posts. Consequently, the Applicants ask the Tribunal to implement the classification of their posts to that level. Further, the Applicants request retroactive compensation to the G-7 level as of 16 April 1990 and additional compensation for undue delay by the Administration in implementing the classification decision.

II. Upon the recommendations of the Interdepartmental Task Force and of the Assistant Secretary-General, Office of Human Resources Management, the CCS reviewed the job descriptions of 30 posts in the Dag Hammarskjold Library (DHL). It recommended the classification of the two posts occupied by the Applicants to the Principal (G-7) level, as well as the upgrading of 28 other posts. The reclassification of all the posts was to be effective as of 16 April 1990. The Tribunal notes that the posts of all the other 28 staff members were upgraded accordingly, but no action was taken with respect to the Applicants' posts.

III. The Respondent argues that a recommendation by the CCS that a post be upgraded is not a sufficient condition for its reclassification even when a post at a higher level is available. The appropriate resources must be available before the post is reclassified, pursuant to a classification notice by the CCS. The Tribunal cannot accept this contention. The lack of budgetary funds as a justification for non-implementation of the classification of the Applicants' posts is not acceptable in the light of the special circumstances of this case. The budgetary provisions for upgrading these posts from the G-6 to the G-7 level involved an insignificant sum of money when viewed against the total Biennial Programme Budget of the United Nations Secretariat.

IV. The Tribunal considers that the Administration failed to make the necessary arrangements for absorbing the two G-7 posts. The Tribunal agrees with the Applicants' submission that once the special mechanism to remove the anomalies found in the DHL was put into place, as mandated by the General Assembly, the Secretary-General was under a legal obligation to implement the CCS' decision without undue delay.

V. The Tribunal must decide whether the Applicants were accorded due process in the determination of their case and whether it is within the Secretary-General's discretion to refuse the Applicants equal pay for equal work and responsibilities at the G-7 level, which the Administration recognized as their appropriate level. The Tribunal believes that while the Secretary-General's discretion is not limited, it must be exercised on a non-discriminatory and non-arbitrary basis. In invoking the budgetary argument as a reason for failing to implement the classification of the Applicants' posts, while implementing the upgrading of 28 other posts, the Administration behaved in an arbitrary manner.

VI. For the foregoing reasons, the Tribunal considers that the Applicants were entitled to the reclassification of their posts to the G-7 level, with effect from 16 April 1990. Failure by the Respondent to implement the reclassification entitles the Applicants to compensation. Consequently, the Tribunal orders the Respondent as follows:

1. With respect to the Applicant Daly, that the Administration pay him retroactively the difference in salary, allowances and other entitlements between his actual level and grade at the time and the appropriate grade at the G-7 level to which he was entitled from 16 April 1990 until his retirement on 30 June 1996.

2. That the Administration pay him the actuarial equivalent of the loss in pension rights resulting from the failure to promote him to the G-7 level as of 16 April 1990.

3. With respect to the Applicant Opperman, that the Administration pay her in compensation the difference in salary, allowances and other entitlements at the Principal (G-7) level, at the appropriate step, and the lower grade post she occupied, from 16 April 1990 until her promotion to the G-7 level and or until her

retirement, whichever is earlier.

4. To consider the Applicant Opperman fully and fairly for promotion to the G-7 level as soon as possible.

5. If she is not promoted to the G-7 level, that the Administration pay her the actuarial equivalent of the loss in pension rights resulting from the failure to promote her to the G-7 level as of 16 April 1990.

VII. All other pleas are rejected.

(Signatures)

Samar SEN  
Vice-President, presiding

Mayer GABAY  
Member

Deborah Taylor ASHFORD  
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN  
Executive Secretary