

**Administrative Tribunal**

Distr.: Limited
30 September 2004

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1189

Case No. 1284

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. Dayendra Sena Wijewardane;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 July 2002, and periodically thereafter until 15 February 2003;

Whereas, on 12 February 2003, the Applicant filed an Application containing pleas which read as follows:

“Section II: PLEAS

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...;

(d) *to order* the production of minutes of the meetings of the [Office for Internal Oversight Services (OIOS) Appointment and Promotion Panel (APP)] that considered the Applicant's candidacy for the post of Senior Programme Management Officer, OIOS.

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Secretary-General rejecting the findings of the Joint Appeals Board [(JAB)] in the Applicant's case that the responsibility of the organization was entailed calling for compensation;

- (b) *to find and rule* that the [JAB's] recommendation for six months' net base salary failed to provide appropriate and adequate compensation for the harm done to the Applicant for violation of her rights under the Staff [Regulations and Rules];
- (c) *to find and rule* that the [JAB] erred as a matter of law and equity in finding that the Applicant's health condition was a legitimate reason for denying her promotion and that OIOS had no duty to address the Applicant's complaints of harassment;
- (d) *to find and rule* in addition that by introducing an extraneous element into the rules governing promotion, which was not communicated to the staff, the Respondent violated the Staff [Regulations and Rules];
- (e) *to order* that the Applicant be promoted to the P-5 level with retroactive effect from January 1999 or, alternatively, that the Respondent recalculate the pension benefit of the Applicant on the basis of the salary she would have received had she been promoted to the P-5 level effective January 1999;
- (f) *to award* the Applicant compensation in the amount of five years' net base pay as an exceptional measure for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof and in light of the exceptional circumstances;
- (g) *to award* the Applicant \$500,000 in punitive damages for the failure of the Respondent to maintain a proper working environment and to take steps to prevent gender harassment;
- (h) *to award* the Applicant six months' net base pay for the unnecessary delays in adjudicating her claims;
- (i) *to fix* pursuant to Article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;
- (j) *to award* the Applicant as cost, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements.

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 June 2003 and periodically thereafter until 10 November 2003;

Whereas the Respondent filed his Answer on 10 November 2003;

Whereas the Applicant filed Written Observations on 23 March 2004;

Whereas, on 22 June 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas, on 24 June 2004, the Tribunal posed a question to the Applicant and, on 30 June 2004, the Applicant responded thereto;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 August 1974, on a two-year fixed-term appointment at the P-2 level as Associate Social Affairs Officer, Department of Economic and Social Affairs. Her fixed-term appointment was subsequently extended, and she was promoted. At the time of the events that gave rise to this Application, the Applicant had a permanent appointment, and held the P-4 level position of Programme Officer, Central Monitoring and Inspection Unit (CMIU), OIOS.

On 3 March 1997, the Applicant submitted her application for the vacant P-5 level post of Senior Programme Management Officer, CMIU. This post had been vacant since 1995 but, due to the hiring freeze, the vacancy announcement was not circulated until February 1997.

On 13 March 1997, the Applicant wrote to the Under-Secretary-General for Internal Oversight Services, advising him that she had learned her candidature for the P-5 post was not being seriously considered. She stated that she had been discharging functions closely related to the advertised post and had the required 17 years of experience in the management and control of programmes as well as thorough knowledge of the programme planning and budgeting process. On 17 June, she met with him.

Apparently, in July 1997, the Applicant met with the Under-Secretary-General for Internal Oversight Services and the Director, CMIU, at which time the Under-Secretary-General indicated his support for her candidacy, despite the reservations of the Director, conditioned upon her finalization of the Secretary-General's Report on the 1996-1997 biennium Programme Performance for the Committee on Programme Coordination in May 1998.

On 2 March 1998, the Applicant met with a doctor from the Medical Service Division. She was in great distress, and was granted certified sick leave for that day and subsequently for two more days. Thereafter, the Applicant's personal physician diagnosed her as suffering from "a major depression", and placed her on sick leave.

In response to telephone calls from OIOS to the Applicant's home, on 6 and 10 March 1998 her husband faxed the Director, CMIU, and the Under-Secretary-General for Internal Oversight Services, respectively, explaining that his wife was "resting under medical care". On 10 March, OIOS inquired as to her expected date of return.

She was warned that, unless her sick leave was certified, her absence would be recorded as annual leave, until such leave was exhausted, and then as leave without pay.

On 30 July 1998, the Applicant was invited for an interview the following day with the APP. She replied that she was on sick leave and unable to attend the interview, but was still very interested in the P-5 post and would like to be interviewed at a later date. On 1 September, the Applicant was informed that the APP had recommended another candidate for the post, but that she could provide additional information relevant to her suitability for the vacancy. The Applicant responded that she was the best-qualified person for the post, and that the sudden urgency to fill the position had deprived her of an opportunity to be interviewed.

On 18 September 1998, the Under-Secretary-General for Internal Oversight Services signed the Applicant's performance appraisal (PAS) for 1997. Her PAS reflected that she had been given "increased responsibilities" in the preparation of the Programme Performance Report, which would "normally [be] discharged by an officer at a higher level", and that she had "performed her new duties in a responsible way".

On 23 December 1998, the Applicant was again invited to be interviewed by the APP. The Applicant stated on 1 January 1999 that she was unable to undergo an interview due to her illness, but that she had provided two memoranda to the APP and had been extensively interviewed for the post by the Under-Secretary-General for Internal Oversight Services and the Director, CMIU.

On 19 January 1999, the APP resumed its meeting to review six candidates for the P-5 post. The following day, the Under-Secretary-General for Internal Oversight Services informed the Applicant that another candidate had been selected.

On 18 March 1999, the Applicant requested the Secretary-General to review the administrative decision not to select her for the P-5 post.

On 22 July 1999, the Applicant was advised that the United Nations Joint Staff Pension Committee had found her incapacitated for further service and thus entitled to a disability benefit under article 33 of the Regulations of the Fund.

On 28 July 1999, the Applicant lodged an appeal with the JAB in New York. On 18 and 19 July 2001, the Applicant wrote to the Secretary of the JAB, objecting to the composition of the JAB panel, in particular, the appointment of the Chairman whose objectivity she questioned as he was on secondment from the same national

government as the Under-Secretary-General for Internal Oversight Services. The Secretary of the JAB responded on 19 July that the Presiding Officer had decided not to replace the Chairman, and noted that

“the mere supposition that by virtue of nationality alone a member of the JAB would be incapable of dealing fairly and objectively with a case cannot be allowed as a ground for disqualifying that member. Such a serious allegation must be proven beyond any shadow of a doubt, which the Presiding Officer finds has not been done in this case.”

The Applicant asked the Secretary of the JAB to note her reservations for the record but not to make them known to the Panel.

The Applicant separated from the Organization for reasons of health effective 5 August 1999.

The JAB adopted its report on 31 January 2002. Its considerations, conclusions and recommendations read, in part, as follows:

“Summary of facts

...

6. Sometime in July 1997, the Appellant had a meeting with [the Under-Secretary-General for Internal Oversight Services and the Director, CMIU,] among others. At that meeting, [the Under-Secretary-General] indicated his support for the Appellant’s candidacy for promotion to the advertised P-5 post in spite of [the Director’s] reservations. However, his support was conditioned upon the finalization of the Secretary-General’s Report on the 1996-1997 biennium Programme Performance for the Committee on Programme Coordination (CPC) in May 1998 and its positive acceptance by the Member States. [The Under-Secretary-General], on the other hand, remembered having told the Appellant that the report would have to meet past quality standards and that he was confident of the Appellant’s ability to deliver.

...

Considerations

...

58. The Panel ... felt strongly that the OIOS treatment of the Appellant from 2 March 1998 onwards till her separation did not comply with the fulfilment of expected responsibilities of a good employer. In its view, the OIOS Administration had failed to reach out towards the Appellant as a staff member having mental or psychological problems, which, as a consequence, may have aggravated her health situation.

...

Conclusions and recommendations.

60. In light of the foregoing, the Panel *unanimously agreed* that there was adequate evidence showing that the OIOS had complied with the promotion procedure of ST/AI/413 [“Placement and Promotion” of 25 March 1996,] *mutatis mutandis*, thus procedurally guaranteeing that the Appellant had received full and fair consideration during the promotion exercise.

61. The Panel *also unanimously agreed* that, while there was no adequate evidence indicating that the OIOS Administration had become aware of the Appellant’s complaints about harassment and prejudicial treatment and thus had had no duty to address them, the OIOS Administration had statutory responsibilities to reach out to the Appellant when she was undergoing a major depression with understanding, support and encouragement, and that it had failed to fulfil its expected responsibilities as a good employer towards the Appellant, for which she should be compensated.

62. The Panel thus *unanimously recommends* that the Appellant be paid six-month net base salary in effect at the time of her separation as symbolic compensation for the unnecessary aggravation and deterioration of her mental conditions as a result of the indifferent and distrustful attitude of the OIOS Administration.

...”

On 11 October 2002, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

“... The Secretary-General has noted and agrees with the Board’s conclusion that there was adequate evidence showing that you were afforded full and fair consideration during the promotion exercise in accordance with the requirements of administrative instruction ST/AI/413 as applied to OIOS *mutatis mutandis*. The Secretary-General also agrees with the Board’s finding that there was no evidence that the OIOS had used your medical condition to reject your candidacy. ...

The second aspect of your appeal, namely, that OIOS had failed to prevent the harassment and prejudicial treatment that you allegedly suffered by your supervisors, is irreceivable and not properly before the Board as it is not against a specific administrative decision made within the time-limits prescribed in the relevant Staff Rule. Unlike what the Board said in this regard, this is not a mere technicality, as the Administration must be given the opportunity to consider and take a decision on a claim. In any event, the Secretary-General takes note of the Board’s finding that there was no evidence indicating that the OIOS had become aware of your feelings and complaints of harassment, and of its conclusion that, in the absence of such actual or imputed knowledge, OIOS had no duty to address those harassment problems.

... The Secretary-General considers that the tone of the OIOS communications to you after you went on sick leave was not an issue that was properly before the Board, as this matter was not against an administrative decision within the meaning of the applicable staff rule and did not form part of the issues on which you had requested administrative review. Furthermore,

the Board was not the competent body to review and advise on medical issues, nor was it qualified to reach the conclusions it reached concerning what caused the alleged aggravation and deterioration of your medical condition. In any event, the Secretary-General considers that the manner in which the OIOS Administration communicated with you during your medical leave complied with the normal standards of courtesy and civility. There was nothing in those communications that was impolite or overbearing, and the letters expressed concern about your condition and wishes for your speedy recovery. The Secretary-General sympathizes with your medical condition and understands that you might have felt particularly vulnerable during your medical leave. However, the Organization must continue conducting its business and, to that end, the OIOS was responsible to ascertain your status and your likely return and did so in a responsible and polite way.

In light of the foregoing, the Secretary-General cannot accept the recommendation of the Board for compensation.”

On 12 February 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s candidacy for the P-5 post was subjected to exceptional treatment that placed her at a disadvantage vis-à-vis other candidates.
2. The Applicant was discriminated against on the basis of her medical condition and leave status.
3. The APP functioned in an irregular manner and failed to give the Applicant full and fair consideration for the post.
4. The JAB erred in finding that OIOS had no duty to act on the Applicant’s complaints of harassment.
5. The JAB erred in failing to adequately compensate the Applicant for the damage she suffered as a result of the “insensitive” behaviour of OIOS once she was on medical leave.
6. The Applicant’s procedural rights before the JAB were violated when her objection to the Chairman of the Panel was not kept confidential but was disclosed and included, with factual errors, in the report.

Whereas the Respondent’s principal contentions are:

1. The Applicant was given full and fair consideration for promotion in accordance with established procedures; good performance creates no expectancy of

promotion; and, the assessment of candidates is a discretionary responsibility reserved to the Secretary-General.

2. The APP was constituted fully in accordance with the applicable rules and regulations.

3. The JAB was correct in concluding that OIOS had no duty to act on the Applicant's complaints of harassment.

4. The tone of the OIOS communications to the Applicant after she went on sick leave was not properly before the Board.

5. The Applicant has adduced no evidence of bias, improper motivation or other extraneous factors on behalf of the Chairman of the JAB or any other member, and has thus failed to carry her burden of proof.

The Tribunal, having deliberated from 22 June to 23 July 2004, now pronounces the following Judgement:

I. As of August 1986, the Applicant, who occupied a P-4 level post as Programme Officer, commenced working for the Central Monitoring Unit which, in 1994, became the Central Monitoring and Inspection Unit (CMIU) within the newly established OIOS. In February 1997, a vacancy announcement for the P-5 level post of Senior Programme Management Officer was circulated. This post had been frozen since 1995. On 3 March 1997, the Applicant submitted her application for the said post.

II. According to the Applicant, on 17 June 1997, she reported to the Under-Secretary-General for Internal Oversight Services to inform him of the difficult situation in CMIU and to complain of mistreatment which she alleged she had received from her supervisor, the Director, CMIU. The Under-Secretary-General subsequently denied that such a grievance had been lodged with him.

In July 1997, the Under-Secretary-General for Internal Oversight Services informed the Applicant that he would support her candidacy for the P-5 post, despite what were said to be her Director's misgivings, but indicated that his support was conditional upon her finalization of the Secretary-General's Report on the 1996/1997 biennium Programme Performance for the Committee on Programme Coordination in May 1998. The Applicant contends that the Under-Secretary-General indicated that his

support was further conditioned upon the acceptance of the said Report by the Member States. In contrast, the Under-Secretary-General maintains that he had informed the Applicant that the Report would have to “meet past quality standards and ... that [he] was confident [she] could deliver” rather than that he had imposed a pre-condition that it should receive “positive acceptance”. In the opinion of the Tribunal, nothing substantial turns on the resolution of this particular issue. The Tribunal cannot believe that the Under-Secretary-General would impose upon the Applicant a condition which required her to achieve something wholly beyond her control, or believe that the Applicant would have accepted such a condition. Whatever the wording used, the Tribunal is satisfied that it was intended to mean, and was understood by the Applicant to mean, that the Report should be up to previous standards or some other phrase to like effect. In any event, as the Applicant never completed the said Report due to illness, and no issue was raised as to the standard or quality of her work on the Report before she ceased its preparation, this issue became moot.

On 2 March 1998, the Applicant visited the Medical Service, extremely upset and crying. She related the difficulties in her office, and complained of lack of support from the Director and a shortage of assistance to enable her to complete the Programme Performance Report, as well as the linking of her promotion to its completion. She complained that she had been recently working seven days a week, sleeping badly and was both exhausted and embarrassed at crying in the office. She stated that she felt trapped. Shortly thereafter, her condition was diagnosed by her personal doctor as “a major depression”. She was never to return to work but remained on certified sick leave until 5 August 1999, when she was separated from the Organization on health reasons. She is in receipt of a disability benefit under article 33 of the Regulations of the United Nations Joint Staff Pension Fund.

By letter of 10 March 1998, the Administrative Officer, OIOS, wrote to the Applicant (having failed to reach her by phone) indicating that the Under-Secretary-General for Internal Oversight Services wished to know the Applicant’s expected date of return to work in view of the impending deadline for the Programme Performance Report. The letter further indicated that, unless her leave was certified as due to illness, her absence from work would initially be recorded as annual leave and thereafter as leave without pay.

By letter of 30 July 1998, the Applicant was invited to attend for interview by the OIOS APP in connection with the application she had submitted for the P-5 level

post. The Applicant replied indicating her inability to attend on the date due to her illness and sought that the interview be put back until she felt stronger. She did not indicate when this was likely to be. By letter dated 1 September 1998, the Applicant was informed that another candidate had been recommended for the post and was advised of her right to provide additional information to that already before the APP. The Applicant responded by letter of 11 September addressed to the Chairman of the APP, indicating why she should be considered to be the best qualified candidate and complaining that she had been deprived of the possibility of interview.

On 7 October 1998, the Applicant was sent her performance appraisal (PAS) for the period January to December 1997 for her signature. She replied on 20 November, stating that she was in no condition to address such matters whilst on sick leave, but expressed her view that certain of the PAS items had not been completed correctly. She ultimately signed her PAS on 9 December, claiming that she felt compelled to do so.

By letter of 23 December 1998, the Applicant was informed that, at the request of the APP, she was being afforded a further opportunity of submitting herself for interview and was offered a choice of five different dates between then and 15 January 1999. By letter dated 1 January 1999, the Applicant replied stating that she would be unable to undergo an interview due to illness. Again she offered no prognosis as to when she might become fit.

On 19 January 1999, the APP took stock of the events to date and concluded that the Applicant had been given a fair chance to compete for the post. It agreed that the filling of the post could not be postponed indefinitely and, therefore, made its decision as to which of the competing candidates should be recommended. It duly recommended a candidate other than the Applicant for the P-5 post. The Applicant was informed of this decision by letter of 20 January 1999.

III. In these proceedings, the Applicant complains that she was never afforded fair or reasonable consideration for promotion to the post in question and that this violated her rights to fair procedure and due process. The Tribunal, like the JAB, must reject this submission as it is not supported by the evidence. She complains that her candidacy had been burdened by the imposition of unfair conditions, citing the pre-condition placed by the Under-Secretary-General for Internal Oversight Services on her for his support and the requirement to attend for interview when she was on sick

leave. In the view of the Tribunal, these matters ought not to be viewed as pre-conditions.

In the opinion of the Tribunal, it was proper and reasonable for the Under-Secretary-General for Internal Oversight Services to have set for the Applicant a test wherein she could effectively demonstrate her capacity or potential to perform tasks of the higher level so that her performance might be better evaluated. The Tribunal - like the JAB - finds no evidence to support her assertion that she had been promised assistance over and above that which was available to her. Further, it was an integral part of the evaluation process that each candidate should be interviewed. In the opinion of the Tribunal, it cannot be said that there was any failure on the part of the APP to treat the Applicant reasonably in this regard. She was given a number of opportunities which she declined due to her illness. She can make no case that the filling of the vacancy ought to have been postponed indefinitely or that she had a right to postponement until her condition improved to such an extent that she felt fit. She never gave a prognosis as to when, if ever, this event might come to pass. In the view of the Tribunal, she was given reasonable consideration. Likewise, in view of the nature of her illness and the uncertainty of her prognosis, the APP was entitled to take her health into consideration as a factor to be considered in all of the circumstances of the case. The Tribunal is satisfied that the APP had given such consideration to the Applicant's candidacy as was reasonable in the circumstances. She was undoubtedly disadvantaged by reason of her inability to be interviewed, but the Tribunal is satisfied that the latitude afforded to her by offering her additional dates was a reasonable response and that the decision of the APP to press ahead was appropriate when there was no prognosis given as to when, if ever, the Applicant's condition might have sufficiently improved.

In all of the circumstances, the Tribunal must reject the Applicant's submission that she was treated unfairly or denied reasonable consideration of her application for promotion to the P-5 post. The Tribunal finds there was ample evidence to support the JAB's finding that she was given fair and reasonable consideration. So, this submission is hereby rejected.

IV. Under the heading "Irregularities in the JAB Procedures" set out in the Application, it is stated that the JAB report recounts the Applicant's objections to the composition of the JAB Panel and, in particular, to the Chairman. The Application

contends that the objections were made on the following grounds: (i) the Chairman was of the same nationality as the Under-Secretary-General for Internal Oversight Services; (ii) each was on secondment from the same Government; and, (iii) “one of the issues in the case involved an allegation that [the Under-Secretary-General] had tried to intimidate the Applicant into hiring another national from his country and resented her refusal to comply with his wishes”. The JAB report recorded the objection as if it had been made on grounds (i) and (ii) alone and omitted to mention any matter resembling what is stated in ground (iii) above. Since the Applicant complains that the JAB was intentionally misleading as to the grounds upon which the objections had been made, the Tribunal next looked for the material setting out the Applicant’s objections, so as to ascertain their precise nature. Further inquiry revealed that her objections had been set out in letters from the Applicant to the Secretary of the JAB dated 18 and 19 July 2001. An examination of these letters reveals that, whilst indeed exception had been taken to the proposed Chairman, the objections were made upon grounds (i) and (ii) as indicated above, and that a somewhat similar objection to that set out in ground (iii) had been taken, although ground (iii) is an embellishment of the actual objection lodged. Greater care ought to have been taken in setting out the actual grounds upon which the objection had been made, particularly when these matters were relied upon to support a submission attacking the credibility of the JAB and accusing it of having been “intentionally misleading”.

Nonetheless, the Tribunal has considered these objections both as appearing in the letters of 18 and 19 July 2001 and as supplemented by the Application. Either way, it is satisfied that the objection taken to the inclusion of the Chairman was an objection made solely on the grounds of his nationality. Nothing was submitted which might have supported the Applicant’s contention that he might lack objectivity or that he might not act impartially. The Tribunal is satisfied that the Presiding Officer of the JAB was correct to reject her objections, which were nonsensical and spurious, and provided no grounds whereby he might have nominated another Chairman. That said, the Tribunal was surprised to learn that the Applicant’s objections were disclosed to the JAB panel members and published in the JAB report. It considers such disclosure to have been unnecessary and inappropriate, since the Applicant had specifically requested that her objections remain confidential. The appropriate response from the secretariat of the JAB would have been to advise the Applicant that her objections would not be kept confidential and to have offered her an opportunity of withdrawing them. However, there are no grounds on which the Tribunal could find that the

fairness of the JAB deliberations had been influenced by the disclosure and so, in the circumstances, only nominal compensation is deemed warranted.

V. Next in importance, the Tribunal will deal with two issues which can be conveniently joined and may be summarized as follows:

(i) The Applicant alleges that, prior to going on medical leave, she had been treated by the Director, CMIU, in an abusive and bullying way which amounted to harassment and ill-treatment. The abuse and harassment was said to be of a non-sexual sort and is described as “managerial harassment”.

(ii) The Applicant further alleges that, after she went on medical leave, she was treated with callous indifference and in an icy and threatening manner which likewise amounted to harassment and ill-treatment and which was a denial of her rights.

It should be noted that, in the course of the JAB proceedings, the Respondent did not raise any objection as to the receivability or admissibility of any claims arising from these matters, notwithstanding that receivability was central to the Respondent’s reasoning in declining to act upon the recommendation of the JAB thereon, which was favourable to the Applicant. It is still not clear from the Respondent’s Answer in these proceedings before the Tribunal if such an objection is now being raised. Since it was raised by the Respondent in his letter of 11 October 2002 as a central issue, if not the central issue, in relation to these matters, the Tribunal assumes the objection is still maintained and will proceed accordingly. The Tribunal wishes to take this opportunity to stress that where receivability or admissibility are at issue, this should be clearly indicated at the earliest appropriate time.

The JAB, on its own initiative, raised the issue as to the admissibility of the pre-March 1998 treatment and queried its jurisdiction to entertain or to adjudicate upon same. It noted that the allegations regarding neither the pre-March 1998 nor the post-March 1998 treatment of the Applicant were said to have arisen from an administrative decision affecting the Applicant’s rights as a staff member or the breach of any rule or regulation. In its report, the JAB made specific reference to staff regulation 11.1, whereby it, the JAB, was established to advise the Secretary-General on “any appeal by a staff member against an administrative decision alleging non-observance of their terms of appointment, including all pertinent regulations and rules”. It further adverted to staff rule 111.2 (a) which states that a staff member wishing to appeal an

administrative decision must first write to the Secretary-General requesting that the administrative decision be reviewed. It added “[t]hus, an appeal must be filed against ‘an administrative decision’”.

Having addressed the issues set out above, the JAB continued as follows:

“Nevertheless, the Panel observed that it was not only a forum of law but also one of equity. When strict and formalistic interpretation of legal principles may prevent an otherwise meritorious claim from being heard and thus lead to inequitable and unsatisfactory results, the Panel may resort to considerations of equity and fairness in order to render the administration of justice more complete by affording relief where it was incompetent to give it as a forum of law.”

The JAB then considered the two matters. As to (i) it found that whilst the Applicant had given considerable evidence that she made some complaints concerning the Director’s behaviour, his style of management, and harassment, she had not brought her complaints or concerns adequately to the attention of either the Director himself or to the appropriate persons within the Administration. Nor did it consider that she had sufficiently brought her complaints forward so as to have imposed upon the Administration a positive duty to take steps or measures to deal with them or to have taken other steps to protect her. It should be noted that insofar as the JAB sought to consider the pre-March 1998 conduct, it recorded the Applicant’s complaints as her assertions or allegations and did not embark upon an investigation as to their truthfulness or otherwise. Nor did the JAB make any findings of fact, or otherwise determine what had actually occurred. This is understandable as the JAB had ultimately concluded that the Applicant’s complaints, be they *real* or *perceived*, had not been adequately presented by her. The Applicant accepted that most of her complaints had either been made anonymously or had failed to identify the person against whom the allegations were being made. She indicated that she had not wished to implicate the Director “knowing that her career depended upon him” and also acknowledged that, when she was advised that she should pursue legal recourse, she declined to do so for fear of incriminating him. She has also explained her reluctance as fear of incriminating her supervisor directly because of the repercussions she felt this would have on her career and prospects of promotion, and her desire not to alienate the Under-Secretary-General for Internal Oversight Services who had been delegated all authority over personnel matters, including her promotion.

As to issue (ii), being the Applicant's complaints of uncaring and callous treatment and communications after she went on medical leave on 2 March 1998, the JAB found that she had been treated with callous disregard for her situation and illness; that she had been treated in an icy and threatening way at a time when any reasonable employer would have been reaching out to her and offering her support and encouragement; and, that the Administration failed to offer her the assistance or support it ought to have shown to her during the acute phase of her major depressive illness. According to the JAB, this uncaring treatment and the cold and inhumane attitude displayed by the Administration "contributed to the aggravation and deterioration of an already vulnerable mind, leading to the eventual award to the Appellant of disability benefit". For these matters, the JAB recommended "symbolic compensation" equivalent to six months' net base salary.

On receipt of the said report from the JAB, the Respondent decided to accept the finding that the Applicant had not been denied fair or reasonable consideration in the promotion process. Concerning the findings of the JAB regarding the allegations of pre-March 1998 harassment, the Respondent determined that such a claim was irreceivable and not properly before the JAB as it was not against a specific administrative decision made within the time limits prescribed in the relevant staff rule. He stated:

"Unlike what the Board said in this regard, this is not a mere technicality, as the Administration must be given the opportunity to consider and take a decision on a claim. In any event, the Secretary-General takes note of the Board's finding that there was no evidence indicating that the OIOS had become aware of your feelings and complaints of harassment, and of its conclusion that, in the absence of such actual or imputed knowledge, OIOS had no duty to address those harassment problems."

In the instant case, in relation to both the allegations made concerning the pre-March 1998 treatment of the Applicant and the way in which the Applicant was treated after she went on medical leave on 2 March 1998, it appears to the Tribunal that the receivability issue is properly before it, and has been addressed by the Applicant.

It is contended on behalf of the Applicant that these matters are receivable "as the ill treatment afforded to the Applicant preceded and was cited in the request for administrative review". The JAB had decided that despite the fact that the Applicant had not identified an administrative decision linked to this harassment, and it was not

therefore, legally speaking, competent to entertain the allegations, it was additionally a forum of equity as well as of law which could resort to considerations of equity and fairness in order to render the administration of justice more complete “by affording relief where it was incompetent to give it as a forum of law”.

The JAB accordingly declined to take what it described as a strict and formalistic interpretation which would have resulted in it declining to consider this part of the Applicant’s appeal. Now that jurisdiction is in issue, the Applicant has further contended that in her case, as in all cases where a course of unacceptable conduct is alleged to have occurred over a period of time, the “time limits generally run from the date of the last act complained of”. She submits that if the position of the Respondent were correct, staff would have “no recourse for mistreatment or managerial harassment since there is not technically an administrative decision”. On these issues, the Tribunal agrees with the JAB that the said staff rule should not be construed in a legalistic or strict manner, but nonetheless cannot go so far as to accept the interpretation contended by the Applicant. An administrative decision said to have adversely affected the rights of the staff member must always be identified. In cases where the administrative decision is said to be the culmination of a course of conduct on the part of the Administration, the course of conduct must be considered as a relevant surrounding circumstance or as an aggravating or mitigating circumstance as the case may be. In cases of harassment, when complaints are adequately brought either to the attention of management or to the Grievance Panel, and investigation or other action would appear warranted, then a decision on the complaint, be it to ignore it or to fail to properly investigate it or to improperly reject it or to fail to take appropriate action where harassment is established, can each amount to an administrative decision of the type giving rise to a right to appeal to a JAB. In this regard, the Tribunal recalls its recent decision in Judgement No. 1134, *Gomes* (2003), wherein it noted that

“the Respondent’s failure to complete his investigation of the Applicant’s claim [of prejudice], to reach a decision on the merits of the claim and to communicate that decision to the parties, as required by its regulations, violated the due process rights of the Applicant to have his claim adjudicated”.

In the instant case, however, the administrative decision central to the process was the decision to appoint someone other than the Applicant to the P-5 level post with the consequential claims that her application was not properly considered. Other complaints adequately connected to the promotion process and to the decision not to

appoint the Applicant to the said post would likewise be receivable. In the circumstances of this case, the Tribunal is satisfied that the complaints of alleged ill treatment are so far removed from those admissible issues that there was no jurisdiction on the part of the JAB to entertain them, even in the ancillary manner in which they were considered. The Tribunal makes no criticism of the JAB for proceeding as it did in the circumstances of this case, seeing that no issue had been raised before it by the Respondent.

No causative connection can be made between the alleged misconduct of the Director and the non-selection of the Applicant for the P-5 post which could justify those allegations of misconduct as being admissible before the JAB. Insofar as the Director had any part in the matters considered by the APP, it was minimal. He had, in fact, written a very complimentary assessment of the Applicant in her 1997 PAS which had been included in the papers placed before the APP for its consideration. In the circumstances, it can hardly be said that he sought to influence the APP in a way which might have been harmful to the Applicant.

The Tribunal now moves to deal with the way in which the Applicant was treated post 2 March 1998 and the Administration's communications with her from that date onwards. It must first be noted that whilst complaint had been made of these matters in the Applicant's appeal to the JAB, they had not formed part of the issues upon which she had sought administrative review in accordance with staff rule 111.2 (a) so that they were not properly before the JAB as issues which might be considered in their own right. The Tribunal is satisfied that these matters cannot be said to have such connection with, or be so closely allied to, the administrative decision central to those proceedings (i.e. the decision not to promote the Applicant to the P-5 post) that they could be considered as admissible as collateral issues or as linked to that decision as to be considered as aggravating or as mitigating circumstances. It should again be noted that no issue as to admissibility or receivability was raised before the JAB in the Respondent's reply in those proceedings; these matters were raised for the first time in the Respondent's letter of 11 October 2002, wherein he declined to accept the JAB's recommendation made in relation thereto. Finally, it should be noted that, insofar as it purported to make what were essentially medical findings, the JAB is not the proper body to review and advise on medical issues.

The Tribunal once again makes clear that no criticism of the JAB is intended arising from its decision to deal with these particular issues, as the Respondent had

taken no stance as to receivability or admissibility. It is unfair to staff members to tacitly allow such issues to be considered without protest by a JAB and then to decline to implement its recommendation on such jurisdictional grounds. Whilst the Tribunal must find that these matters were inadmissible for consideration by the JAB for the reasons above, and it is accordingly unnecessary for the Tribunal to make any finding on the merits of these issues, it should be stated that to write in a businesslike and unsympathetic fashion, asking when a staff member is likely to be back at work or advising as to the need for medical certificates, cannot be said to be a matter which might merit an award of compensation. Whilst the Tribunal does not wish to characterize the correspondence in this case, the matter not being properly before it, it need hardly add that good manners, and good management, require that one should always seek to respect the sensitivities of sick persons and decorum requires that letters should, wherever possible, be couched in a manner that should not cause offence.

VI. In view of the foregoing, the Tribunal:

1. Orders that the Applicant receive compensation of US\$ 750 for the denial of her procedural rights; and,
2. Rejects all other pleas.

(Signatures)

Kevin Haugh
First Vice-President

Omer Yousif Bireedo
Member

Dayendra Sena Wijewardane
Member

Geneva, 23 July 2004

Maritza Struyvenberg
Executive Secretary