



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1322

Case No. 1396

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane, Second Vice-President; Mr. Julio Barboza;

Whereas, on 31 May 1992, a staff member of the United Nations, filed an application requesting the Tribunal, *inter alia*, “to order the Respondent to submit the Applicant’s post for reclassification to the Professional level with retroactive effect to 1 January 1985 and to grant the Applicant all her rights and entitlements as incumbent”. On 9 November 1993, the Tribunal rendered Judgement No. 621, finding that the Applicant had availed herself of the appeals process with respect to classification of her post but had not submitted a timely application to the Tribunal, and thus the validity of the classification was not properly before it. The Tribunal noted that, rather than appealing the classification of her post, the Applicant had appealed the Respondent’s decision not to accept the recommendations of the Panel on Discrimination and Other Grievances, to which she had complained regarding the classification. The Tribunal found that the authority of the Panel on Discrimination and Other Grievances did not extend to making recommendations regarding substantive elements of the classification process, and that, in any event, acceptance of such recommendations is not mandatory as the Respondent may, in the reasonable exercise of his discretion, decline to do so. Accordingly, the Application was rejected.

Whereas at the request of the Applicant, the President of the Tribunal granted an extension of the time limit for filing another application with the Tribunal until 28 February 2005 and once thereafter until 31 March;

Whereas, on 8 March 2005, the Applicant filed an Application requesting the Tribunal to order that:

“(a) the Applicant be paid the difference in salary, allowances and other entitlements in accordance with the recommendations of the [Joint Appeals Board (JAB)] ...;

- (b) the Applicant be compensated for the failure to promote her to the P-3/L-3 level including the relevant pension entitlements ...;
- (c) the Applicant be paid the amount of three years' net base salary ...;
- (d) the Applicant receive six months' net base salary at the P-3/L-3 level as compensation for undue delay of almost three years at the JAB level (...), as well as the delay in the Secretary-General's decision on the unanimous recommendations of the JAB ..."

Whereas on 11 April 2005, the Applicant submitted additional documentation;

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 31 August 2005 and once thereafter until 30 September;

Whereas the Respondent filed his Answer on 30 September 2005;

Whereas the Applicant filed Written Observations on 12 January 2006 and the Respondent commented thereon on 3 March;

Whereas the Applicant submitted an additional communication on 3 April 2006;

Whereas, on 21 November 2006, the Tribunal decided to postpone consideration of this case until its next session;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

***“Employment History***

... The [Applicant] entered the service of the United Nations on 4 May 1971, as an Administrative Clerk at the G-3 level, on a three-month fixed-term appointment. [She served on a series of fixed-term appointments until, on 1 May 1974, she was granted a permanent appointment.] ... [O]n 1 October 1975, she was promoted to the G-4 level ... In February 1984, the [Applicant] was assigned to [the] United Nations Educational and Training Programme for Southern Africa (UNETPSA). She was promoted to the G-5 level with effect from 1 January 1985 and her functional title was changed to Fellowship Assistant. On 9 May 1988, the classification level of the [Applicant's] post was changed from G-5 to G-6, and [she] was promoted to the G-6 level, with retroactive effect from 1 January 1985. ...

... By memorandum dated 14 March 1996, [the] Under-Secretary-General, Department for Development Support and Management Services (DDSMS), informed [the] Assistant Secretary-General, Office of Human Resources Management (OHRM), ... that ... as the [UNETPSA] Trust Fund [was to] be transferred to [the] United Nations Development Programme (UNDP) it was requested that in order to retain the experienced staff, posts should be classified at the appropriate levels.

... By letter dated 30 May 1996, [the] Under-Secretary-General for DDSMS informed the [Applicant] that due to a 'shortfall in overhead resources' [she had been] placed on a list of 'staff members to be redeployed outside' of DDSMS. The [Applicant] was also advised 'to apply for suitable posts at [her] current grade [level (G-6)] from among the vacancies listed in the Compendium' ...

...

... By memorandum dated 17 June 1996, [the] Assistant Secretary-General, OHRM, responded to the request of 14 March made by the Under-Secretary-General, DDSMS, indicating] ... that '[t]he

Classification Officers [had] now evaluated the duties and responsibilities of the Chief and Programme Officer and ... that the functions [were] “classifiable” at the P-5 and P-3 levels’.

...

... By memorandum dated 9 September 1996, [the] Executive Officer, DDSMS, informed ... OHRM that the ‘transfer of UNETPSA Trust Fund to UNDP in South Africa resulted in the transfer of the posts of all the staff members working under that programme, including the functions performed by [the Applicant]’. [She] continued that ‘the functions which [the Applicant] has been performing were classified at the P-3 level. OHRM and DDSMS supported the possibility of UNDP recruiting [her] at the P-3 level for the post of Programme Officer ...’

...

... On 18 October 1996, the [Applicant’s] supervisor ... advised ... that ‘just prior to the transfer of the Trust Fund for UNETPSA to UNDP, the functions performed by [the Applicant] were classified at the P-3 level’.

[From 1 November 1996 to 31 March 1999, the Applicant was on special leave without pay (SLWOP).]

... By memorandum dated 11 February 1997, [the Applicant was offered] a temporary assignment, on detail, with [the] UNETPSA Programme in South Africa. ...

... By memorandum dated 17 February 1997, the [Applicant replied] that she was interested in working ‘with UNETPSA on secondment to South Africa, provided that the administrative arrangements are made in accordance with the approved Job Description and at the appropriate level (P-3) ... as [she should not be forced] to continue doing a P-3 level job at the GS-6 level ...’ ...

... On 18 February 1997, [OHRM indicated] ... that ‘[while] it is true that the functions [the Applicant] performed were classified at the professional level, OHRM [would] not be in a position to promote [her] to the professional level until such time as she successfully passe[d] the competitive examination from General Service to the Professional level’.

[On 9 April 1997, whilst the Applicant was on SLWOP, her husband submitted 2 medical certificates, stating that, due to surgery, she was not in a position to resume work until 1 June. On 16 April, the Applicant was advised that ‘there [was] no basis in the staff rules or administrative issuances for approving sick leave during a period of special leave, with or without pay’.]

...

... By memorandum dated 10 April 2000, the [Applicant requested implementation of the classification] of her prior [UNETPSA] post, which she alleged had been classified at the P-3 level.

... By memorandum dated 26 July 2000, ... OHRM informed [her] that ‘the information [she had] provided [did] not satisfy [Sections 5, 6 and 7 of Administrative Instruction ST/AI/1998/9 of 6 October 1998, entitled “System for the classification of posts”]’ and that [she] had failed ‘to establish that [she] had performed the functions of a particular post for which a classification decision was taken, or that classification standards were incorrectly applied in the evaluation of these functions’.

...

... By memorandum dated 16 May 2001, [the Chief, Compensation and Classification Policy Unit,] informed the [Applicant] that her office had ‘reviewed the documentation provided and had to [inform her] that based on [their] review, [they were] unable to establish that [she] occupied a post which was classified at the P-3 level’.”

On 24 July 2001, the Applicant requested the Secretary-General to review the administrative decision “not to accept the official organization documents [she had] submitted in support of [her] case, seeking implementation of [her] reclassified functions”.

On 28 September 2001, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 16 September 2004. Its considerations, conclusions and recommendations read, in part, as follows:

***“Considerations***

...

28. The Panel considered the issue of classification. The Panel had to determine whether the Appellant had any right or legal expectation to be promoted to the P-3 level as a result of the classification exercise that deemed her functions ‘classifiable’ to the P-3 level. ...

29. In the case under consideration, the Panel took note that the Respondent made a distinction between a post being classified at the P-3 level versus a post ‘classifiable’ at the P-3 level. The Respondent explained that ‘classifiable implies that the functions and the nature of a job conform to a particular classified level’. The Respondent further explained that the classification process at issue had been undertaken only for the purpose of advising UNDP. ... The Panel was aware that pursuant to ST/AI/1998/9 ..., a classification is effective ‘once the reclassification has been approved in the budget’. (...) In view of the absence of the budget approval, with respect to the said post, the Panel was of the opinion that the classification could not be considered implemented. The Panel thus acknowledged that there was no formal classification of the Appellant’s post.

30. However, the Panel found, on the basis of the evidence produced, ... that the Appellant had assumed functions and responsibilities of a professional nature. The Panel took note that while the Appellant’s outstanding performance at the professional level was recognized, there was no attempt on the part of the Administration to adequately compensate her. The Panel thus regretted that the Administration had allowed such an abnormal situation to go on, without any correction, placing the Appellant in an inequitable situation. The Panel, therefore, on the basis of the principle of equal pay for equal work, felt that the Appellant ought to be adequately compensated as it was clearly recognized that she had performed higher-level functions while working with UNETPSA. In that respect, the Panel recalled that on the strength of this principle, the Tribunal has compensated applicants for the violation of that principle by the Administration (...).

31. The Panel then examined the Appellant’s pleas. The Appellant in her pleas had requested promotion and compensation retroactive to the date of the classification of her functions, i.e. 17 June 1996. The Panel considered that the Appellant had no right to promotion *per se* and there was no evidence that she had been placed against a P-3 post from 1996 onwards nor had performed the functions beyond 1996. Besides, the Panel was cognizant that being a General Service staff member, the Appellant could not be promoted to the professional category but through the competitive examination as established by General Assembly (...) resolution 33/143 and reaffirmed by [General Assembly] resolution 35/210.

32. The Panel rejected the Appellant’s plea with respect to compensation for her alleged loss in pension rights on the basis that there was no evidence that she had encumbered a P-3 post. The Appellant’s request for compensation for the moral injury allegedly sustained was rejected for lack of evidence. The Panel also rejected the Appellant’s request for compensation for the ‘damage resulting from denial of sick leave in April 1997, for which a medical certificate was submitted’. The Panel referred the Appellant to staff rule 105.2 (d) that provides that during the period of special leave, ‘staff members shall not accrue service credits towards sick, annual and home leave’.

***Conclusions and Recommendations***

33. In light of the foregoing, the Panel *unanimously agreed* that there was no formal reclassification of the Appellant's post. The Panel *unanimously agreed* that there was merit to this appeal as there was enough evidence tending to show that the Appellant had performed duties of a professional nature without being adequately compensated.

34. The Panel *unanimously agreed* that such a failure was in violation of the principle of equal pay for equal work.

35. As a consequence, the Panel *unanimously recommends* that the Appellant be compensated by being paid retroactively the difference in salary, allowances and other entitlements, between the G-6 level and the P-3 level from May 1990 to October 1996.

36. The Panel *unanimously agreed* to make no other recommendations in respect of the present appeal.”

On 31 January 2005, the Applicant retired from service.

On 8 March 2005, the Applicant, having not received any decision from the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 31 March 2005, the Officer-in-Charge, Department of Management, informed the Applicant as follows:

“The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case and regrets not being able to agree with the JAB's conclusions. He notes that your functions were classified during the initial classification exercise and confirmed, at the G-6 level, in 1987. ... [T]he advice given to UNDP in June 1996 concerning the functions of a proposed 'Programme Officer' post for UNDP at the P-3 level was for advisory purposes only; it pertained to a suggested future structure and was given without reference to you or to any other staff member. Concerning the JAB's finding that you performed professional functions during your service with UNETPSA, the Secretary-General further notes that your supervisor's comments about the nature of your functions are not equivalent to a formal finding by Classification Officers, and no Classification Officer ascertained the nature of your functions following the initial classification exercise, nor did the JAB make a finding that you had a right to the reclassification of your post. Your case is therefore distinguishable from the Tribunal Judgements ... where staff members were found to be entitled, on the basis of the principle of equal pay for equal work, to compensation for their performance of higher-level functions *after* official classification exercises had concluded that those staff were performing higher-level functions. In your case, there was no such official classification exercise in, or after, 1996. Accordingly, the Secretary-General regrets that he finds no basis for accepting the JAB's recommendation to pay you retroactively the difference in salary and entitlements between the G-6 and P-3 levels. Moreover, even if a special post allowance had been requested and approved for you for the performance of higher level functions (and no such allowance was requested or approved), it would have been payable, at the most, to the P-2 level.”

Whereas the Applicant's principal contentions are:

1. Her post was classified in accordance with staff regulation 2.1. The Respondent erred in failing to implement this classification.
2. She was entitled to be promoted to the P-3 level in accordance with the classification.
3. She is entitled to the difference in salary, allowances and other entitlements, between the G-6 level and the P-3 level from May 1990 to October 1996, as recommended by the JAB.
4. She is entitled to compensation for the Respondent's decision to deny her certified sick leave.

Whereas the Respondent's principal contentions are:

1. The post encumbered by the Applicant at UNETPSA was never reclassified within DDSMS. The Applicant's rights were not violated by the decision not to reclassify this post.
2. The fact that the Applicant performed functions at a level higher than that of the post she encumbered did not entitle her to be compensated at a higher level.
3. The Applicant was not entitled to be promoted to the P-3 level. The Applicant was required to pass the competitive examination in order to be considered for promotion to the Professional level.
4. The Applicant was not entitled to sick leave whilst on SLWOP.

The Tribunal, having deliberated from 25 October to 21 November 2006, in New York, and from 27 June to 27 July 2007, in Geneva, now pronounces the following Judgement:

I. The Applicant in this case advances a spectrum of claims which raise both issues of substance and of receivability. The single most important issue which she raises is essentially one of fact on the basis of which her various claims radiate. This issue is whether she is correct when she asserts that, on 17 June 1996, the post she occupied as Fellowship Assistant at the G-6 level in UNETPSA was classified as a P-3 post.

II. The background facts relating to this Application are briefly as follows. Since June 1994, DDSMS had overall responsibility for the UNETPSA Trust Fund which had been transferred to DDSMS from the Centre Against Apartheid. In 1996, the General Assembly decided that the Trust Fund should be transferred to UNDP and, as a result, the existing posts were evaluated in order to determine future staffing requirements.

It is apparent from the record that this was done with a view to negotiating, if at all possible, the transfer of the staff to UNDP along with the Trust Fund, and efforts were made to suggest a restructuring of UNETPSA - which would include the creation of a post of Programme Officer at the P-3 level - to ensure the smooth functioning of UNETPSA in the future. The hope, no doubt, was that UNDP would be able to adopt this structure and, perhaps, employ such an Officer at the suggested level. The Under-Secretary-General, DDSMS, invited the Assistant Secretary-General, OHRM, to look into this suggestion and it is the latter's response to this initiative on 17 June 1996 that forms the centrepiece of this litigation. In a carefully worded memorandum, which nonetheless gave rise to controversy, the Assistant Secretary-General responded, in relevant part, as follows:

"The classification officers have now evaluated the duties and responsibilities of the Chief and the Programme Officer and I am pleased to advise you that the functions are *classifiable* at P-5 and P-3 levels respectively. Please note that these functions have been classified within the [United Nations] structure and that some of the factors rated in the evaluation such as levels of contacts and number of staff supervised, may be different within the UNDP context." (Emphasis added.)

The Applicant has claimed, with the support of some of her erstwhile colleagues, that this constituted a formal classification of her G-6 post to that of P-3. There are a number of memoranda which referred to this response as a "classification" of the Applicant's post. The Respondent has denied this and maintained that this was not a formal

classification of a post according to the established procedures under ST/AI/301 of 10 March 1983, but was a purely advisory memorandum to enable a smooth transition to UNDP; to provide guidelines for UNDP in setting up the Programme in South Africa; and, to support the possibility of UNDP recruiting the Applicant at the P-3 level as Programme Officer. The JAB accepted this position and concluded that the Applicant's post did not stand reclassified to the P-3 level within DDSMS.

III. The Tribunal has carefully examined the documentation and sees no reason to disagree with the finding of the JAB that the Applicant's post was not, in fact, reclassified in June 1996. The Tribunal notes that in an initial classification exercise carried out in 1985, the Applicant's post had been classified at the G-5 level but that later, in 1988, it was reclassified to the G-6 level and the Applicant was promoted to that level with retroactive effect to 1 January 1985. Indeed, the Applicant claimed then that the post should have been classified at the Professional level and lodged an unsuccessful appeal to achieve that result, which led to Judgement No. 621, (*ibid*).

It is clear that the Applicant believed that she was performing at a higher level than her General Service post demanded and, indeed, she may well have. The Applicant's performance level was acknowledged to have been of a significantly high standard. However, the Tribunal must reiterate the fundamental distinction to which it has repeatedly drawn attention in its jurisprudence and which is also embedded in the applicable procedures: "classification of [a] post depends on the nature of the duties and responsibilities assigned to it and not on the personal qualifications, experience or performance of the incumbent". (See Judgement No. 388, *Moser* (1987).) Similarly, paragraph 2 of ST/AI/301 is quite clear: "[t]he basic principle of the post classification system is that it is job oriented. The classification of each post depends on the nature of the duties and responsibilities assigned to it and not on the personal qualifications and experiences of the incumbent." Failure to keep this distinction clearly in mind can lead both to errors of judgement and to frustration, as this case illustrates.

In the Tribunal's view, with her experience and knowledge of the system, the Applicant was hardly unaware of these distinctions and of the formal procedures applicable to reclassification. Indeed, the Tribunal questions whether it was within the authority of the Assistant Secretary-General to reclassify the post through a simple memorandum of the type produced and is of the view that the required procedures for reclassification never took place. The relevant administrative instructions provide for an elaborate system of classification of posts and no evidence of any formal reclassification in 1996 is available in the record before the Tribunal. Thus, the Tribunal considers the JAB fully justified in reaching its conclusion. Accordingly, the claim of the Applicant that the "reclassification" should have been implemented and that she should have been promoted to that level or compensated for the failure to implement the classification must necessarily fail.

IV. In this connection, the Tribunal considers it appropriate to make some comment on certain aspects of the Applicant's claim which were not addressed by the Respondent. On the assumption that the Applicant's assertion was correct that the post had been reclassified, there was, in the Tribunal's view, a clear obligation on her part to assert a claim thereon within a reasonable period of time and not four years later. The Tribunal finds that such a belated claim for compensation would, in any case, not be sustainable albeit that she was on SLWOP for a

considerable period of time. At the very least, such belated efforts cast considerable doubt on the factual aspects of her claim.

Moreover, the Tribunal finds that the Applicant's pleas concerning the denial of certified sick leave status and retroactive compensation are not receivable, *ratione materiae*, as they did not form part of her request for administrative review, as required by the provisions of staff rule 111.2 (a), which reads as follows: "A staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing".

In this regard, the Tribunal recalls its finding in Judgement No. 571, *Noble* (1992), that "the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision ... renders any further consideration of that decision by the Tribunal beyond its competence" as well as its Judgement No. 1106, *Iqbal* (2003), in which it "reiterate[d] the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well functioning of the Organization".

V. The Applicant also claims compensation on the basis of equal pay for equal work for a period of time prior to the alleged reclassification and cites a number of cases of this Tribunal in support. Suffice it to say that had the Applicant wanted the Organization to take seriously the discrepancies between her assigned tasks under her General Service post and those functions she was being called upon to perform, it was open to her and, indeed, incumbent upon her to have requested - in a timely manner - reclassification of the post. (See, generally, Judgement No. 1325, rendered by the Tribunal at this session.) The cases upon which the Applicant relies, where the Tribunal awarded compensation on the basis of the above-referenced principle, involved cases in which the post had been properly and formally classified at a higher level but where the Administration had failed to implement the reclassification within a reasonable time-frame on grounds which the Tribunal did not acknowledge as justified. (See *Moser (ibid.)* and Judgements No. 857, *Daly and Opperman* (1997); No. 1113, *Janssen* (2003); No. 1115, *Ruser* (2003); and, No. 1136, *Sabet & Skeldon* (2003).) Indeed, to apply such a principle simply on the grounds that a staff member was performing at a higher level than her post demanded would be prejudicial to the responsible management of an organization of the type for which the Respondent is accountable, and would be likely to result in serious budgetary difficulties. The Tribunal does not consider that the principle for which the Applicant argues is applicable in the circumstances of this case and, for this reason, is unable to support her claim that the recommendation of the JAB to this effect should be adopted.

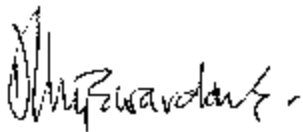
VI. In view of the foregoing, the Application is rejected in its entirety.



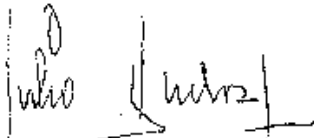
(Signatures)



Jacqueline R. **Scott**  
First Vice-President

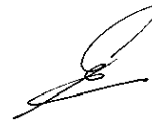


Dayendra Sena **Wijewardane**  
Second Vice-President



Julio **Barboza**  
Member

Geneva, 27 July 2007



Maritza **Struyvenberg**  
Executive Secretary