



Administrative Tribunal

Distr. Limited
28 September 2007

Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1331

Case No. 1408

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Mr. Julio Barboza; Ms. Brigitte Stern;

Whereas at the request of, a staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 18 February 2005 and twice thereafter until 15 March;

Whereas, on 15 March 2005, the Applicant filed an Application requesting the Tribunal, inter alia, to order:

- “(a) That she receive priority consideration for promotion to a vacant P-5 post [for] which she is qualified.
- (b) That she also be given adequate financial compensation for the violation of her rights to due process and to full and fair consideration for promotion.
- (c) That she also be compensated for the harassment and damage to her reputation she suffered at the hands of her supervisors.
- (d) That she finally be compensated for her angst and distress, prolonged and compounded by the Respondent’s delay.”

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 15 September 2005 and periodically thereafter until 4 November;

Whereas the Respondent filed his Answer on 18 October 2005;

Whereas the Applicant filed Written Observations on 30 January 2006;

Whereas the Applicant filed further comments on the case on 27 October 2006;

Whereas the Respondent filed additional comments on 30 October 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 Joint Appeals Board (JAB) reads, in part, as follows:

“Employment history

... The [Applicant] is a staff member serving on a permanent appointment as an Arabic Interpreter at the P-4 level in the Interpretation Service, Interpretation and Meetings and Publishing Division in the Department for General Assembly and Conference Management (IMPD/DGACM). She joined the Organization on 19 October 1982 as an Interpreter Trainee at the P-1 level. Subsequently, on 1 August 1983, she was promoted to the P-2 level as an Associate Interpreter. On 1 August 1985, she was promoted to the P-3 level with the functional title of Interpreter. Effective 1 April 1989, the [Applicant] was promoted to the P-4 level.

Summary of the facts

Appeal 1 (a) and (b)

... On 26 May 2000, a single process was initiated in order to fill two P-5 vacancies in the Interpretation Service ... The [Applicant] submitted her application to be promoted to either of these vacant posts.

... According to the [Applicant], she was notified on 26 November 2000 that she had not been recommended by the Service. At that time her last two [Performance Appraisal System (PAS)] reports were not finalized. A joint rebuttal against them both was installed. The promotion process to fill the two P-5 vacant posts continued and the Departmental Panel met on 6 December ... to consider the applications submitted at that time.

... The Rebuttal Panel in its report dated 12 December 2000 recommended an upgrade for both ... PAS [reports] of the [Applicant].

... On 5 January 2001, the Departmental Panel met again, with a slightly different composition, as one of the four original members was still on leave. On 25 January ..., the [Applicant] wrote a memorandum to her Executive Officer in which she stated her case.

... Shortly thereafter, the Departmental Panel’s report was sent to the Appointment and Promotion Board (APB). The APB issued a recommendation in favour of another female candidate for the first post, but was divided on the question of the second post. The APB reconvened one more time to reconsider the case; it finally endorsed the Department[‘s] choice of the male candidate on 6 April 2001.

... On 15 March 2001, information circular ST/IC/2001/21, ... ‘Placement and promotion list for staff in the Professional category and above’ was issued, informing staff that [the female candidate] was promoted to the P-5 level against one of the vacant posts [...]. This is the contested decision ... of Appeal 1 (a).

... On 11 June 2001, information circular ST/IC/2001/36, ... ‘Placement and promotion list for staff in the Professional category and above’ was issued, informing staff that [the male candidate] was promoted to the P-5 level against the other vacant post ... This is the contested decision ... of Appeal 1 (b).

Appeal 2

... In 2002, the [Applicant] applied to [a] vacancy announcement ... for [the] post [of] Senior Interpreter within DGACM, at the P-5 level.

... On 12 December 2002 and on 30 January 2003 the APB met to consider and review the filling of the above-mentioned post. It endorsed the recommendation of the Department for promotion of a male candidate ... The Under-Secretary-General [for] ... Management, endorsed the APB recommendation on 6 February ... This is the contested decision ... of Appeal 2.”

On 19 November 2001 and 13 May 2003, the Applicant lodged two appeals with the JAB in New York. The JAB adopted one report on both appeals on 11 March 2004. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

Appeal 1

...

33. ... The Panel is of the view that the Appellant received full and fair consideration in the promotion exercises related to the two P-5 vacancies ...

...

35. ... [A]ccording to a memorandum included in the documentation, the change in rating in the Appellant’s PAS did not change the recommendation for the two candidates for the post.

...

37. ... The Panel was not able to find any irregularity in the consideration of the Appellant by the APB.

...

Appeal 2

...

47. The Panel found that the APB had properly considered the Appellant. The Panel also found that the selection process for the post in question had been properly handled. The Panel was not able to find any irregularity in the consideration of the Appellant by the APB.

Conclusion and recommendation

Appeal 1 (a) and (b) and Appeal 2

48. The Panel concludes that the candidature of the Appellant to the posts in question had been given full and fair consideration.

49. The Panel also concluded that the decision not to select the Appellant for the posts in question had not violated her rights including the right to due process. The APB had before it all necessary documentation to assess the Applicant’s merits in respect of the vacancies. The selection processes had

been correctly handled and the Appellant had been properly considered. The decisions were not tainted by undue influence or improper motivation.

50. Accordingly, the Panel unanimously decided to make no recommendation in support of [the appeals].”

On 24 August 2004, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB’s findings and conclusions and had decided to accept the JAB’s unanimous recommendation and to take no further action on her appeal.

On 15 March 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The administrative decisions of February and April 2001 to fill two P-5 posts in the Arabic Interpretation Section (Appeal 1 (a) and (b)) were flawed.
2. The Administration inflicted damage on her reputation.
3. The Respondent further denied the Applicant due process as a result of an inordinate delay of over 21 months in responding to her first appeal.
4. The administrative decision of 30 January 2003 to fill a P-5 post in the Arabic Interpretation Section (Appeal 2) was vitiated.

Whereas the Respondent’s principal contentions are:

1. The decisions not to promote the Applicant conformed fully to the applicable legal procedure and did not violate any of her rights.
2. The Applicant is not entitled to be awarded compensation as a result of “administrative delays”.
3. The Applicant’s additional pleas have no merits.

The Tribunal, having deliberated from 30 October to 21 November 2006, in New York, and from 28 June to 27 July 2007, in Geneva, now pronounces the following Judgement:

- I. This case deals with a promotion - or rather non-promotion - process involving the Applicant, which took place from 2000 to 2003 and pertained to three successive P-5 posts.
- II. The Applicant entered the service of the United Nations on 19 October 1982 as an Arabic Interpreter at the P-1 level. She embarked upon an impressive career, having been successively promoted to P-2 on 1 August 1983, P-3 on 1 August 1985, and P-4 on 1 April 1989.
- III. The Applicant is contesting two promotion exercises, the first involving two P-5 posts and beginning on 26 May 2000, and the second involving one P-5 post and beginning on 22 March 2002. The Applicant takes the view

that she did not receive full and fair consideration during either promotion exercise and, therefore, states in her Application:

“On the merits, the Applicant respectfully requests the Tribunal to find the following:

I In the first case:

1. That administrative decision of February 2001 ... and administrative decision of 6 April 2001 ... to fill two P-5 posts in the Arabic Interpretation Section were flawed as a result of the following:

- (a) the Administration’s violation of the Applicant’s right to a full and fair consideration for promotion and its numerous irregularities pertaining to performance evaluation and performance management;
- (b) promotion procedures which were tainted by improper motivation, prejudice, undue influence and lack of good faith and integrity;
- (c) the Administration’s machinations to invalidate a successful rebuttal and disqualify the Applicant, in order to deprive her of the benefit of the special measures for the achievement of gender equality, set out in ST/AI/1999/9 ... and reaffirmed in ST/SGB/2000/7.

2. That the Administration inflicted damage on the Applicant’s reputation.

3. That the Respondent further denied the Applicant due process as a result of the inordinate delay of over 21 months in responding to her first Appeal.

II. In the second case:

1. That administrative decision of 30 January 2003 to fill a P-5 post in the Arabic Interpretation Section was vitiated by the following:

- (a) the Administration’s failure to carry out fair promotion procedures and its numerous irregularities pertaining to performance evaluation and performance management;
- (b) promotion procedures which were tainted by improper motivation, prejudice, undue influence and extraneous factors;
- (c) the Administration’s failure to implement the special measures for the achievement of gender equality, set out in ST/AI/1999/9 and ST/SGB/282, which give female candidates of substantially equal qualifications a preferential right to promotion, amounting sometimes to a right to promotion, according to the Tribunal jurisprudence in Judgement No. 765, *Anderson Bieler* (1996).

2. That the Administration inflicted damage on the Applicant’s reputation.

Whereafter the Applicant respectfully requests the Administrative Tribunal to order:

- (a) that she receive priority consideration for promotion to a vacant P-5 post to which she is qualified;
- (b) that she also be given adequate financial compensation for the violation of her rights to due process and to full and fair consideration for promotion;

- (c) that she also be compensated for the harassment and damage to her reputation she suffered at the hands of her supervisors;
- (d) that she finally be compensated for her angst and distress, prolonged and compounded by the Respondent's delay."

IV. Dissatisfied at not having been promoted to either of the P-5 posts advertised in 2000, on 11 May 2001 the Applicant filed with the Secretary-General a request for review of the administrative decision; subsequently, having failed to obtain a satisfactory outcome, she lodged an appeal with the JAB on 19 November. Similarly, dissatisfied at not having been promoted to the P-5 post advertised in 2002, on 3 March 2003 the Applicant filed a request for review of the administrative decision of 6 February not to promote her to the P-5 post; subsequently, having failed to obtain a satisfactory outcome, she filed an appeal with the JAB on 13 May. In that appeal, she stressed that her first appeal to the Board, submitted on 19 November 2001, was still awaiting a reply from the Administration.

V. The Tribunal takes note of the Administration's decision to submit, on 8 August 2003, a consolidated reply to the two successive appeals submitted by the Applicant. Owing to the serious delay of almost two years in submitting the Administration's reply to the Applicant's first appeal, the two appeals have been merged and were therefore both dealt with in a joint report of the Board.

VI. The JAB submitted its report on the two appeals on 11 March 2004. In that report, which was formalistic and not at all detailed, the Board rejected all the claims. With regard to the first promotion exercise, the Board took the view that, since the APB had before it all the necessary information, the Applicant had received full and fair consideration. Similarly, the JAB took the view that the second promotion exercise had been conducted properly, that the comparative evaluation worksheet prepared by the Department had made it possible to consider all the relevant criteria, and that the APB had taken account of the special measures for the achievement of gender equality set out in administrative issuances ST/SGB/282 of 1996 and ST/AI/1999/9 of 1999, since its records referred to those documents. The JAB therefore took the view that the Applicant had received full and fair consideration during the promotion exercises for the three P-5 posts, and its recommendation was accepted by the Secretary-General, who notified the Applicant of his decision in a letter dated 24 August 2004. The Applicant now appeals that decision to the Tribunal.

VII. First, the Tribunal recalls that staff members are not entitled to be promoted. The Administration has discretionary authority in the area of promotion. (See Judgements No. 275, *Vassiliou* (1981); No. 375, *Elle* (1986); and, No. 390, *Walter* (1987).) However, in accordance with consistent jurisprudence, this power is not absolute and must be exercised in such a way as to ensure that staff members are treated fairly.

VIII. The Tribunal will therefore consider the promotion processes contested by the Applicant with a view to determining whether she was treated fairly or, on the contrary, whether her right to fair treatment was violated. The promotion processes contested by the Applicant before the Tribunal are intimately linked to the various actions she

took, within the framework of the United Nations performance appraisal system, to rebut her performance evaluations, although it should be made clear that no appeal is being filed against those evaluations. The Tribunal, however, takes the view that, in order to establish whether the promotion exercise was conducted fairly and equitably, the various performance evaluation rebuttals submitted by the Applicant must be revisited and, in particular, the timing of those rebuttals in relation to the promotion exercises must be fully understood.

IX. The Tribunal will therefore review the main points of the Applicant's evaluations, which were completed first using the Performance Evaluation Report (PER) system, and then using the PAS. They provide a vital insight into the Applicant's treatment during the promotion exercises.

X. Until 1998, the Applicant had always received extremely positive evaluations: for instance, in the PER for the period 1 April 1991 to 31 March 1996, her overall evaluation was "an excellent performance"; and exactly the same evaluation, "an excellent performance", appears in her PER for the period 1 April to 31 December 1996.

XI. However, her promising career reached a turning point in 1998. Upon her return from a sensitive mission in Algeria, during which her performance had been regarded as particularly outstanding, she received a performance appraisal report (hereinafter referred to as PAS No. 1) covering the period 1 April 1997 to 31 March 1998 which, in her view, was not at all in keeping with her previous ratings and did not accurately reflect her current performance. The Applicant therefore initiated a rebuttal process.

XII. Before analysing the first report of the Rebuttal Panel, submitted on 19 April 2000, the Tribunal would like to observe the apparent contradiction between the downgrading of the Applicant's performance ratings and the expressions of thanks and praise bestowed upon her following the 1998 mission to Algeria. Those letters of thanks - that the Administration is seeking to downplay - went over and above the usual expressions of courtesy. In a note dated 11 September 1998 from the Director, Africa Division I, Department of Political Affairs, addressed to the Chef de Cabinet, the former wrote: "Our interpreters, [the Applicant] and [her colleagues], did us proud. The quality of their work was very high and, *especially [the Applicant and one of her colleagues]*, they had to work extraordinarily long hours with little breaks. *They served above and beyond the call of duty.*" (Emphasis added.)

That note is corroborated by a message dated 7 November 1998, addressed to the Director, Africa Division I, Department of Political Affairs, in which the praise lavished on the Applicant is even more extravagant:

"I found that, had it not been for [the Applicant] with her impeccable Arabic language and her knowledge of the intricacies of this language and its 'dialects' we would have found it impossible to communicate, translate and alternate between the three languages: Arabic, English and French which [the Applicant] mastered ...

I hereby would like to commend [the Applicant] for her high degree of professionalism and the excellence in which she conducted herself." (Emphasis added.)

XIII. The first Rebuttal Panel found that the Applicant's qualifications as an interpreter were not adequately reflected in her rating. While the Rebuttal Panel emphasized that her command of English was impressive and said it was convinced that the Applicant had not been properly rated, it nevertheless recommended in its report that the rating should be reconsidered only in future performance appraisal reports. Moreover, the Rebuttal Panel highlighted something rather unusual, namely that a rating of 80 was given to the Applicant under the heading "Team Leader", whereas she had never acted in that capacity during the period covered by the evaluation; it therefore recommended that the rating should be replaced by the phrase "Not applicable". Furthermore, the report reads:

"... The Panel was impressed with the staff member's command of English. ... English was considered to be a passive language for the staff member, which meant that she had only to interpret from it into Arabic. *On the basis of that criteria alone the staff member was underrated, for her English would have been noteworthy even for an interpreter who used English as an active language.*" (Emphasis added.)

That led the Rebuttal Panel to conclude as follows:

"While the Panel notes that in one area - the use of English as an active as well as a passive language - the staff member did frequently exceed performance expectations, it does not feel that this area alone warrants a change in the overall rating, particularly as the present rating is the first under the PAS ... However, the Panel strongly feels that subsequent evaluations should specifically acknowledge that by using English as a working language the staff member consistently exceeds performance expectations for an Arabic interpreter. The Panel sincerely hopes that future evaluations will take this factor into consideration."

The Tribunal is somewhat puzzled by this conclusion, which seems to it to contain inherent contradictions. On the one hand, it is difficult to believe that undervaluing one aspect of the Applicant's performance would not have influenced her overall rating, and, on the other hand, it does not make sense to decide simultaneously that this undervaluation had no impact on past ratings but should be addressed in future evaluations. Despite this conclusion, which seems more like a compromise between various appraisals than a genuine decision which takes all of the aspects of the case into account, the first Rebuttal Panel suggested to the Administration what its future actions should be.

XIV. These recommendations were scarcely taken into consideration at all by the Administration, however, because the Applicant's ratings were not upgraded in the following performance appraisal report covering the subsequent period, i.e. from 1 April 1998 to 31 March 1999 (hereinafter referred to as PAS No. 2), on the rather formalistic ground that the performance appraisal report could not be affected by the Rebuttal Panel's recommendation, as it had been prepared before the adoption of the Panel's report, even though in fact it was finalized afterwards. In the performance appraisal report, the Applicant was given a rating of 84 and the overall performance rating "Fully meets performance expectations". The Administration told the Applicant that it believed that PAS No. 2 could not be changed, for it could not be considered as a "subsequent report", as it did not involve a report adopted after the Rebuttal Panel's decision. The Applicant, for her part, put forward a different interpretation, which seems more justified in the Tribunal's view, according to which "a subsequent report is normally understood

to mean subsequent to the previous report and not subsequent to a rebuttal decision”. In fact, even according to the Administration’s interpretation, PAS No. 2 could be considered subsequent to the Panel’s report: it had not been finalized at the time when that report was adopted because the Applicant indicated that she had postponed signing the report drafted in December 1999 pending precisely the decision of the Rebuttal Panel. The Administration’s refusal to take consideration of the Rebuttal Panel’s recommendations - dated 19 April 2000 - led the Applicant to continue to refuse to sign her PAS No. 2, which nevertheless was submitted to the Executive Officer, within the framework of the first promotion exercise.

XV. A new performance appraisal report dated 14 June 2000 was established for the period from 1 April 1999 to 31 March 2000 (hereinafter referred to as PAS No. 3): in this new PAS, the Applicant obtained a rating of 88 and the overall performance rating “Frequently exceeds performance expectations”.

XVI. It is worth mentioning the date on which the first promotion exercise concerning the first two P-5 posts was launched: 26 May 2000. It is clear that the appraisal reports for periods prior to this promotion exercise were crucial for the proper conduct of the process.

XVII. The Applicant, believing that she had been unjustly evaluated and hence put at a disadvantage in the promotion exercise, initiated a rebuttal process against the previous two appraisal reports, or PAS No. 2 and PAS No. 3, on 2 November 2000. No-one would deny that it is crucial for a candidate to be able to put forward, within the framework of a promotion exercise, a fair rating and that, consequently, wherever possible, the Administration should await the outcome of a Rebuttal Panel before the selection of persons for promotion begins. However, it seems to the Tribunal that the chronology of the various procedures shows disregard for the Applicant’s right to be taken into consideration in a fair and equitable way.

XVIII. The applications were supposed to be submitted before 26 June 2000. Nevertheless, it should be recalled that the report of the first Rebuttal Panel was submitted on 19 April 2000; that its conclusions were not taken into consideration in PAS No. 2; that PAS No. 2 was transmitted within the framework of the promotion exercise unrevised and without the Applicant’s signature; and, that PAS No. 3 is dated 14 June 2000, i.e. a few days before the deadline for submission of applications for promotion to the two P-5 posts. The Tribunal should also note here that consideration of this document, submitted as an annex to the Application, shows calculations and numerous corrections made before working out a rating for the Applicant - figures under the heading “Comments” probably written in pencil but apparently not retained - giving the Applicant a rating of 93.2, which implies at least that the rating could have been made against the background of the promotion exercise and the respective place of the various candidates.

XIX. The Departmental Panel, which puts forward an initial recommendation on promotions, was convened on 6 December 2000. Although the Applicant had requested that the meeting should be postponed pending the outcome

of her rebuttal exercise, it was held nevertheless, which does not show much concern for the need to consider all aspects of the Applicant's evaluation. In addition, while the second rebuttal was filed on 2 November 2000 and the texts require the Administration to respond in a timely fashion, it was not until 5 December, after working hours, that the response of the Administration to the rebuttal was submitted, which means that the second Rebuttal Panel could not take a decision on the Applicant's performance appraisal reports, PAS No. 2 and PAS No. 3, before the Departmental Panel met.

XX. The Tribunal will therefore begin by considering the conduct of this opening stage of the first promotion exercise. The Applicant was informed on 29 November 2000 that she was not among the two candidates recommended by her Department, the two candidates being, respectively, a younger woman and a man with the same level of seniority. This proposal was made while three weeks earlier the Applicant had initiated a rebuttal process with respect to her two previous PAS reports on the basis of the two performance appraisals she was contesting. In other words, the Applicant wasn't short-listed as one of the proposed candidates at a time when her two previous PAS reports had not been assessed and reviewed by the Rebuttal Panel. During this meeting, it was recommended that the first post should be given to the female candidate who was younger than the Applicant, but no agreement could be reached on the appointment of the candidate to the second post. In the Tribunal's view, it seems clear that at this first meeting during which a recommendation was made for one of the posts, which was subsequently approved by the APB, the Applicant was not considered in a fair and equitable way. To summarize, one sees here the link between the rebuttal procedure and the promotion procedure, since during the first promotion exercise the Applicant had PAS No. 1, which had been criticized but not revised by the first Rebuttal Panel; PAS No. 2, which had not been corrected by the Administration even though the first Rebuttal Panel had recommended modification of the PAS reports subsequent to PAS No. 1 and also because the second Rebuttal Panel had not yet rendered its decision; and, PAS No. 3, likewise unrevised by the Administration because the second Rebuttal Panel had not yet been able to render its decision owing to the refusal to postpone the Departmental Panel meeting by one week.

XXI. The way in which this procedure was carried out can be easily faulted. Indeed, soon afterwards, on 12 December 2000, the second Rebuttal Panel submitted an extremely critical report on the way in which the Administration had conducted the evaluation of the Applicant. The Tribunal cites a few - exceptionally critical - excerpts from the report:

“Some astonishing and irresponsible remarks were made by ... the first appraising officer about certain aspects of the staff member's performance and her suitability as Arabic interpreter. Upon checking with the peers of the staff member (i.e. her fellow interpreters), and the users of her interpretation, (e.g. delegates and verbatim reporters), after the hearing, the Panel found that such remarks were not based on facts or reality. Why the first appraising officer chose to be so derogatory and vindictive towards the staff member is beyond the comprehension and purview of this Panel.

Judging from this very biased assessment by the first appraising officer, the staff member has been obviously short-changed and was being appraised unfairly. As a high quality language professional, the staff member should not be subjected to the humiliation and unwarranted treatments of the first appraising

officer. Based on the evidence presented the Panel is convinced that the staff member's numerical score in each and every PAS report that she rebutted should be raised by at least 5 (five) points."

As if a judgement so severe and a conclusion so clearly in favour of the Applicant were not enough, the Rebuttal Panel concluded its report by adding the following: "The Panel would also like to put on record that: NO staff members, supervisors included, should be allowed to act unscrupulously with impunity. Such acts must not be met with silence or acquiescence, and the perpetrators must be reprimanded or disciplined."

XXII. The Tribunal therefore concludes that the Departmental Panel's first recommendation regarding the first P-5 post, which was subsequently endorsed by the APB, was made on the basis of incomplete information about the Applicant and that, as a result, she was not given fair and equitable treatment during this initial - and often decisive - stage of the promotion process. It should also be noted that the Departmental Panel did not make a recommendation at this stage regarding the second post.

XXIII. While it is true that the Departmental Panel simply issues recommendations, it has often been found that even procedural irregularities before an advisory body could constitute a violation of a staff member's right to due process: "The fact that the [Subsidiary Promotion Review Panel] was an advisory body and not the authority taking the final decision on promotions is also immaterial. Insofar as it gave advice, its advice was tainted by the procedural irregularity." (Judgement No. 870, *Choudhury/Ramchandani* (1998), para. VII.)

XXIV. The Tribunal would, however, like to consider the sequence of events. Since the Departmental Panel was unable to reach a decision concerning one of the P-5 posts, a second meeting was convened. In the Tribunal's view, this meeting likewise did not allow the Applicant's right to due process to be respected.

XXV. First, the date chosen for the meeting clearly once again failed to take account of the Applicant's interests, as the meeting was convened on 5 January, meaning that one of the Departmental Panel members who had attended the December meeting - and who happened to be the focal point for women - would not be able to attend, as she would not be returning from leave until 6 January. This is in contravention of administrative instruction ST/AI/1999/9, paragraph 4.4 (b), which states that "(h)eads of departments and offices shall ensure that departmental focal points participate in an *ex officio* capacity in the panel advising on ... promotions".

XXVI. Second, the information available to those members who were present, though slightly more complete than the information available at the December meeting, was still not enough to ensure justice for the Applicant. For example, even though the Departmental Panel that met in January was informed that the Rebuttal Panel had recommended upgrading the Applicant's two most recent performance appraisals by five points, it was not provided with the Rebuttal Panel's very critical report, several excerpts of which are quoted above. In the view of the Tribunal, that report was very important as it would have ensured that those who took the promotion decision were aware of all the circumstances surrounding the decision not to recommend the Applicant for promotion. This

situation - a procedural curiosity, to say the least - was also denounced by the APB in a report on the appointment process: “the Board expressed concern about the procedure followed by the Department in the review of the case, including the unavailability to the Departmental Panel of the PAS rebuttal report on [the Applicant]”.

XXVII. It should also be noted that the Administration did not take the trouble to re-examine, in the light of the Rebuttal Panel’s report, the list of proposed candidates or, more importantly, the comparative table of the various candidates initially submitted to the Departmental Panel. It would seem that the only action that the Administration took with regard to the Rebuttal Panel’s very critical report occurred in February 2001 - i.e., following the two meetings of the Departmental Panel which issued the recommendations endorsed by the APB - as it informed the Applicant in a letter, “the panel report has been placed in your Official Status file. It has also been shared with the management of the Interpretation Service.”

XXVIII. While it notes that the APB had more complete information than the Departmental Panel - and, in particular, had access to the Rebuttal Panel’s report - the Tribunal is not convinced that its decision could have been made on the basis of entirely objective criteria, owing to the extremely late, probably too late, consideration of the Applicant’s new performance appraisal and because the final decision attached such importance to the initial incomplete information submitted to the Departmental Panel and to the recommendations made on the basis of that information, which were later endorsed by the APB. According to the Applicant,

“[as] for the APB, it followed the path of least resistance and of mere acquiescence to the wishes of the Department, rather than exercising independent judgment. Despite ‘noting with concern’ and ‘deploring the irregularity’ of not making Applicant’s rebuttal report available to the DP, the APB nonetheless based itself on the DP flawed recommendations and paraphrased them in its own report”.

The Tribunal will limit itself here to quoting an excerpt from its Judgement No. 677, *Daure* (1994): “In addition, the APB, in carrying out its advisory functions, should ensure that its recommendations are based on its own independent evaluation rather than on mere acquiescence in the wishes of a department, as may have been the case here”. It is therefore clear to the Tribunal that the Applicant was not considered in a fair and equitable way at the first meeting or at the second meeting, during which a recommendation was made for one of the posts, a recommendation subsequently endorsed by the APB.

XXIX. The Tribunal concludes that the entire procedure was vitiated, as the competent bodies did not receive complete and accurate information about the Applicant’s performance appraisal on time and her right to due process with regard to promotion was therefore violated. Here, the Tribunal is following its long-standing jurisprudence, according to which it condemns the violation of an Applicant’s right to have his or her file examined impartially, as it did in Judgement No. 539, *Bentaleb* (1991), para. XI:

“In a tight competition between several candidates for a limited number of vacant posts, all evaluations, especially recent ones in favour of the staff member, ensure a fair and objective appraisal of his or her

performance and provide a basis for advancement. The Applicant was unfairly deprived of this opportunity in violation of his right to fair treatment.”

The same approach was taken, for example, in Judgement No. 814, *Monteleone-Gilfillian* (1997), where the Tribunal decided the following:

“IV. ... The JAB found, and the Tribunal concurs, *that the absence of a current [performance evaluation report (PER)] ‘was of critical importance’ in the context of a promotion review* and that the ‘long delay in providing the staff member with her PER was a violation of the rules’. The Tribunal also agrees with the JAB’s conclusion that the absence of an updated PER was a violation of due process. The Tribunal has previously concluded that *when a denial of promotion is based on incomplete and inaccurate information, ‘the Applicant’s right to full and fair consideration for promotion [is] not adequately respected’.*” (Cf. Judgements No. 592, *Sue-Ting-Len* (1993), and No. 586, *Atefat* (1992).)

V. The Tribunal need not determine whether the Applicant would actually have received a promotion had her performance record been complete. It is sufficient for the Tribunal to find that the appropriate procedures were not followed in the Applicant’s promotion review. This itself constitutes a violation of the Applicant’s due process rights.” (Emphasis added.)

These principles were reiterated, and *Bentaleb* cited, in its Judgement No. 899, *Randall* (1998):

“III. ... The Tribunal has found procedural irregularities to result in unfair treatment in cases where PERs are improperly missing from or improperly considered in the promotion process (cf. Judgements No. 312, *Roberts* (1983), No. 314, *Tomiak* (1983)). A procedural irregularity can also arise from the failure to have such reports prepared in time, when such failure precludes their consideration in the promotion process (cf. Judgements No. 198, *Lane* (1975), No. 412, *Gross* (1988) and ... *Bentaleb* [*ibid.*]). *Thus, the Tribunal has previously held that the lack of sufficient information about a candidate may affect the entire promotion process, as there is no way of knowing how such lack of information may have influenced the APB’s recommendation* (cf. Judgement No. 412, *Gross*, (para. XVI)).

IV. In this case, the Applicant’s right to fair consideration and fair treatment in the promotion process for the position for which she applied in April 1994, was prejudiced by the Respondent’s failure to prepare in time ... a proper appraisal report ... The failure to keep the Applicant’s personnel records up-to-date is inexcusable. For this procedural irregularity the Applicant must be compensated, even though there is no certainty that, had the records been available, she would have been selected for promotion. The treatment she was given was unfair and resulted in the violation of her rights. The Tribunal assesses the compensation at six months of her net base salary at the rate in effect on the date of this judgement.” (Emphasis added.)

The Tribunal thus concludes its examination of the first promotion exercise by reiterating that, in its view, the Applicant was denied her right to due process.

XXX. On 11 May 2001, the Applicant, dissatisfied with the denial of her promotion, wrote to the Secretary-General asking, unsuccessfully, for a review of the administrative decision. On 19 November 2001, she filed an appeal with the JAB. The Respondent’s answer was not received until 8 August 2003, some two years later, thus delaying the JAB procedure by the same length of time. The Tribunal has a record of special vigilance in seeing that justice is done within a reasonable period, and it criticizes the Administration for causing an unacceptable

procedural delay, even in the absence of any other specific negative consequence. In its Judgement No. 1118, *Khuzam* (2003), para. IX:

“The Tribunal also notes that the Applicant filed his appeal on or about 26 June 1996, but that the JAB did not issue its report until 2 December 1999, more than two years after the filing of the appeal. The Tribunal has previously held that ‘an inordinate delay not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering [on] an applicant’. (See Judgment No. 880, *MacMillan-Nihlén* (1998).) ... The Respondent’s excessive delay is not consistent with the ‘maximum of dispatch’ necessary to ‘a fair review’ as provided for in Staff Rule 111.2 (m). (See Judgement No. 871, *Brimicombe and Ablett* (1998).) Thus, the Tribunal finds that the Applicant should receive compensation.”

XXXI. In the present case, however, the situation is different, and the delay caused by the Administration in the JAB procedure is especially serious, because the result was that a report from the JAB, which had been asked to censure the first promotion exercise, was not produced before a second promotion exercise began. It is especially important to note that one of the requests made to the JAB was that it recommend that the Applicant should be given priority consideration in any future promotion to a P-5 post. If it had done so, the Applicant would certainly have been in a better position during the second P-5 promotion exercise. In any event, it is hardly to a candidate’s advantage to have an outstanding appeal against a previous promotion exercise at the time when he or she is engaged in a new one.

XXXII. The Tribunal will therefore continue its consideration of this case by examining the second P-5 promotion exercise, which took place in 2002-2003.

XXXIII. On 12 December 2002, the APB held an initial meeting to consider the recommendation from the Department to promote Mr. X., but reported that it needed more information about the candidates for the post concerned. The Tribunal takes note of an internal memorandum written by the Administration on 7 August 2003 for the purposes of this appeal:

“After reviewing the documentation presented to it, the Board was not able to make a recommendation on the case, as it was not evident to the Board that the staff member recommended by the Department, Mr. [X.], was the best qualified candidate for the post ... the Board was of the opinion that several other candidates, whom the Department considered to meet all requirements of the post, including [the Applicant], appeared to be better qualified than Mr. [X.] on the basis of superior academic qualifications, knowledge of more languages, and/or higher seniority. The Board requested from the Department a detailed comparative evaluation against the requirements of the post”.

XXXIV. On 12 December 2002, when the APB held its first meeting, it expressed serious doubts as to whether the recommendation to promote Mr. X. was justified. The Department, however, maintained its recommendation of Mr. X., pointing out that he had had more assignments as “team leader”, omitting to state that it was Mr. X. himself, as “Organizational Officer”, who distributed the “team leader” assignments. Moreover, although it presented a comparative table of the academic qualifications of the various candidates - and the Applicant had better qualifications than the candidate favoured by the Department - the Department made the following comment, which

would probably come as a surprise to many academics: “The relative prestige *or level of the degrees* is not relevant”. (Emphasis added.)

XXXV. Moreover, it does not appear to the Tribunal that the APB was at all critical of the negative information about the Applicant given by Ms. Y., the Officer-in-Charge of the Interpretation Service, when she was questioned by the APB at one of its meetings. Ms. Y stated that the Applicant “has not been assigned as a team leader” because she “did not demonstrate interest in supervisory functions”, which is an outright contradiction of what she said two sentences further on, namely that “she was not assigned as a team leader, although she had requested to be assigned as one”. The Tribunal must point out that the APB singled out the fact that the Applicant “has not demonstrated an interest in supervisory responsibilities” as one of the factors making it possible to draw a distinction between the candidates. However, this factor is among the criteria mentioned by the Respondent in order to justify the appointment of Mr. X. in preference to the Applicant. According to the Respondent, the fact that the Applicant “ha[d] not demonstrated an interest in supervisory responsibilities” was “certainly a key criterion for a P-5 post with managerial responsibilities”. In a similar vein, the Respondent points to Mr. X.’s greater number of “special assignments”, but omits to mention that it was Mr. X. himself who distributed such assignments. The Applicant has also stated that in the year preceding the promotion exercise, the number of her assignments fell from 30 to 5, that is, to one-sixth, whereas the number which Mr. X. had assigned to himself fell by only half, from 57 to 24, as shown in the comparative table sent by the Department to the APB. On this same point, Ms. Y. stated that “[the Applicant] had not met the requirement of the vacancy announcement to be routinely assigned to sensitive meetings”, which, once more, flatly contradicts her remark two sentences further on, that “[the Applicant] had been routinely assigned to sensitive meetings”.

XXXVI. The Tribunal concludes that the information on which the APB based its decision was contradictory, and in parts inaccurate and, indeed, biased. Following the new recommendation by the Department, which paralleled the first one despite the doubts expressed by the APB, the latter eventually approved the promotion of Mr. X. at a further meeting held on 30 January 2003.

XXXVII. The Tribunal also notes the comments of a Panel of Inquiry which was established to ascertain certain facts surrounding the appointment of the staff representative to the Departmental Panel which recommended Mr. X. in this second promotion exercise:

“In its meetings of Oct. 31, 2002, the United Nations Staff Council decided to establish a Panel of Inquiry to ascertain the facts surrounding the ad-hoc appointment of a staff representative on the Departmental Promotion Panel (...) of DGAACS. The Panel of Inquiry was also given the mandate to assess the charge of improper and unethical behaviour levelled against the then Presiding Officer, [Mr. X.]. He would have used his authority as Presiding Officer to ensure that a friend was elected to the panel in the hope that this friend would favour him over the other candidates for promotion to the P-5 post for which [Mr. X.] was a candidate”.

XXXVIII. The Panel of Inquiry reached a delicately balanced conclusion. Without condemning Mr. X., it let it be understood that it would have been better for him to refrain from taking part in a meeting to select a staff representative to a body which was to decide on his promotion:

“In conclusion, the Panel is of the view that [Mr. X.] did nothing improper or unethical by availing himself of his right as staff representative to express his views on the appointment of the ad-hoc staff representative on the [Departmental Panel], but is also convinced that [Mr. X.] would have shown better judgement if he had not participated at all in the discussions on this issue and if he had refrained from using injurious words towards a colleague”.

XXXIX. The Tribunal concludes from the foregoing that the Applicant’s candidature was not given full and fair consideration in the 2002-2003 promotion exercise. In summary, chief among the impugned elements are: the two-year delay caused by the Administration in the procedure initiated by the Applicant before the JAB, which prevented that procedure from being completed before the beginning of the second promotion exercise; the appointment itself, which was dubious enough to prompt the establishment of a panel of inquiry into the inclusion of a person hostile to the Applicant in the body which had to make a recommendation on the promotion; the systematic under-valuation of the factors which would have placed the Applicant in a better position, for example her university degrees and her command of a second language; *a contrario*, the systematic over-valuation of the factors which placed Mr. X. in a better position than her, for example the number of special missions in the recent past; and, the considerable weight given to inaccurate information, such as the Applicant’s supposed lack of interest in posts of responsibility. In the view of the Tribunal, these elements in combination are sufficiently convergent to show, without any doubt whatever, that the Applicant’s right to a fair promotion process was violated.

XXXX. Moreover, whilst the Applicant has clearly proven her case, the Tribunal is mindful of its Judgement No. 828, *Shamapande* (1997), in which it held:

“The Tribunal has held repeatedly that, in order to effect the foregoing purpose, it is indispensable that ‘full and fair consideration’ should be given to all applicants for a post. The Respondent bears the burden of proof with respect to this issue. In Judgement No. 362, *Williamson* (1986), the Tribunal held that

‘since the staff member has a statutory right to have “the fullest regard” given to his candidature, the burden of establishing the Administration’s failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member’s statutory right was honoured in good faith in that the Administration gave its “fullest regard” to it.’”

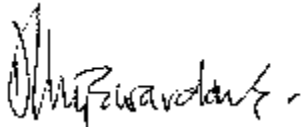
In the instant case, the Tribunal finds that the Respondent has not carried his burden in this regard.

XXXXI. The Tribunal therefore concludes that there was a pattern of violations of the Applicant’s right to be given equitable consideration for promotion which extended over a period of several years, and finds that the Applicant should be compensated.

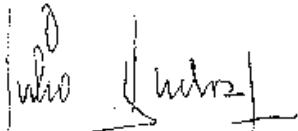
XXXXII. For all these reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant, by way of reparation, compensation of 6 months' net base salary at the rate applicable on the date of this Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2. Rejects all other pleas.

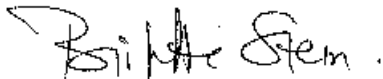
(Signatures)



Dayendra Sena Wijewardane
Vice-President



Julio Barboza
Member



Brigitte Stern
Member

Geneva, 27 July 2007



Maritza Struyvenberg
Executive Secretary