



Administrative Tribunal

Distr. Limited
28 September 2007

Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1341

Case No.1424

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 30 June 2005;

Whereas, on 29 June 2005, the Applicant filed an Application requesting the Tribunal, inter alia:

- “(a) To find that the Applicant was denied equal opportunity to promotion at the Professional level, during part of 1999, for 2000 and for part of 2001;
- (b) To find that the Applicant was denied mobility;
- (c) To find that the Applicant receives a lower income, and will receive a lower pension, than that she would have received, had she been treated fairly; and,
- (d) To order that the Applicant be paid three years’ base salary for the delay in her career development and for denial of equal opportunity to promotion at the Professional level.”

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 29 December 2005;

Whereas the Respondent filed his Answer on 19 December 2005;

Whereas the Applicant filed Written Observations on 27 January 2006;

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] was recruited to the ... Economic Commission for Western Asia (ECWA) on 15 May 1979 on a three-month fixed-term appointment as a Research Assistant at level GS-5, duty station Beirut, Lebanon. Her [appointment] was extended a number of times for varying periods of less than one year until April 1982, when it was extended for two years. Effective 16 October 1982, she was transferred to ECWA, Baghdad. On 24 October 1983, but effective 1 April 1982, she was promoted to the GS-6 level. On 7 August 1985 her appointment was converted to probationary, and, on 1 May 1986, to permanent. Effective 1 April 1985, she was promoted to GS-7, Senior Research Assistant. Effective 1 August 1991, she was assigned with [the Economic and Social Commission for Western Asia (ESCWA)] to Amman, Jordan. Her duty station was changed to Beirut and her functional title to Social Science Assistant effective 5 January 1998.

Chronology and Summary of the facts

... 15 September 1992: Issuance of ST/AI/377 ‘Implementation of the Initial Classification of Posts in the General Service and Related Categories in the [ESCWA]’, paragraph 6 of which stated ‘[t]he results of the initial classification exercise for ESCWA will be implemented as of 1 January 1989, in accordance with the procedures for implementation set out in the present instruction’.

... 17 January 1994: Memo from [the] Acting Chief, Personnel Section, ESCWA, notifying [the Applicant] that her post had been classified at the GS-6 level.

... 25 April 1994: Memo from [the Applicant] to [the] Executive Secretary of ESCWA appealing the classification level of her post.

... 8 February 1996: Recommendation by the ESCWA Classification Appeals and Review Committee to the Executive Secretary that [the Applicant]’s post be classified at the Professional level.

... 1 April 1999: Approval by the Assistant Secretary-General, Human Resources Management, of the recommendation by [the] New York General Service Classification Appeals and Review Committee that [the Applicant]’s post be classified at the Professional level.

... 13 May 1999: Memo from [the] Chief, Compensation and Classification Policy Unit, [Office for Human Resources Management (OHRM)] ... to the Chief, Administrative Services Division, ESCWA, informing him of the [1 April 1999] decision, ... requesting, [a] job description ... and stating:

‘In addition, as explained under paragraph 12 of ST/AI/377, in the context of an initial classification exercise, the incumbent of a post which is found to be performing duties belonging to the Professional category, may be promoted to the Professional category, on an exceptional basis, provided that the staff member has performed the functions described in the job description for at least three years prior to 1 January 1989. In this connection, please be advised that in order to implement the classification decisions, posts will be required in the ESCWA staffing table, as set out in paragraph 12 of ST/AI/377.’

... 12 August 1999: [The] Job Description and other information requested sent to Headquarters

... 25 August 1999: [The Job Description was confirmed at the P-2 level].

... 11 October 1999: Personnel Action approved by [the] Chief of Personnel, ESCWA, confirming [the Applicant]’s promotion to P-2 effective 1 January 1989 and her current step in grade as 12.

...

... 4 February 2000: [The Chief of Personnel, ESCWA's] memo to the Officer-in-Charge, Budget and Finance Section, ESCWA, ... copied to [the Applicant], requesting that no action be taken on [her promotion and for budgetary reasons].

... 15 February 2000, [The Chief of Personnel, ESCWA,] e-mailed [the Applicant]:

'I have been informed by Finance that a consequent amount of money has already been paid to you on account of your promotion. Although, there is no denying it, I have to instruct Finance to recover this money until such time as we receive New York's green light on the budgetary accommodation of your promotion...'

... 28 February 2000: [The Applicant]'s salary for [the] month is withheld.

... 28 March 2000: Memo from ... OHRM, to the Chief, Administration Division, ESCWA.

'Upon receipt of the post numbers, we will be in a position... to approve the promotion of the [Applicant] retroactively to 1 January 1996, or to the earliest date that a post became available after 1 January 1996.'

... 22 May 2000: Personnel Action authorized by [the Chief of Personnel, ESCWA], approving [the Applicant]'s promotion to P-2, effective 1 January 1996.

...

... 29 September 2000: Memo from [the Applicant] to the Secretary-General requesting an administrative review of [the] decision [concerning the] date of implementation [of her promotion].

... 9 January 2001: The Applicant lodged an appeal with the JAB in New York.

... 7 March 2001: [The Applicant's promotion was approved, effective] 1 January 1989.

...

... 31 January 2002: Memo from Counsel for [the Applicant], to the Secretary of the JAB, requesting that the appeal be submitted to a JAB Panel to review the request for compensation for excessive delay. ..."

The JAB adopted its report on 1 June 2003. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

9. ... [T]he Panel decided that it could not accept the Respondent's conclusion that 'no rights [of the Appellant] have been violated and [that] there is no cause to seek relief'. While it would be unreasonable to expect that the processes of bureaucratic review would be rapid, the Panel decided ... that the delay in this case entitles the Appellant to compensation.

10. In determining what it considered to be adequate compensation, the Panel first noted that the extent of the undue delay suffered by [the] Appellant was the seven years from April 1994, when she filed her appeal against the original classification of her post until March 2001, when she was confirmed at P-2 with full retroactivity. (While she had also to suffer the two years from the inception of the classification

exercise in 1992, the Panel was aware that that suffering was shared by the generality of the ESCWA General Service staff) ...

...

12. In considering the fact that at least one month of salary (February 2000) had been withheld from Appellant, the Panel felt that it need not decide whether that was a result of administrative malfeasance or incompetence. ... [T]he fact of withholding the entire salary without prior notice or discussion was unjust and, in the Panel's view entitles her to compensation. The Panel puts that at \$5,000.00.

13. Finally, the Panel felt obliged to consider the Administration's decision to contest this appeal. The Panel, in so doing, would no more deny the right of the Administration to respond in the way it deems appropriate to any appeal than it would deny the right of a staff member to appeal. The Panel, in addressing *this particular appeal*, deemed three points relevant: (a) the decision to contest was, in its view, inconsistent with the policy of negotiation, mediation and conciliation which the staff has often been assured is the policy now adopted by the Administration; a settlement could and should have been negotiated or mediated; (b) the decision to contest was inconsistent with a number of ... decisions [of the Administrative Tribunal] ...; and (c) the decision to contest resulted in a *further* delay - 2001 to the present - in a final resolution of this case. For each of those three years, the Panel considers \$1,000.00 appropriate compensation for the material inconvenience and psychological stress suffered by Appellant.

Recommendations

14. The Panel recommends to the Secretary-General:

(a) that Appellant be paid compensation in the amount of \$20,000.00 for the undue delay (1994-2001) in effecting the classification of her post and her promotion to P-2, with full retroactivity;

(b) that Appellant be paid compensation in the amount of 9 months' net salary at her current rate for the deprivation of the possibility of consideration for promotion and of career development for the same seven year period;

(c) that Appellant be paid compensation in the amount of \$5,000.00 for the unjust withholding of her salary;

(d) that Appellant be paid compensation in the amount of \$3,000.00 for the further three-year delay in resolving her case caused by Respondent's decision to contest the appeal; and,

(e) that Appellant be accorded due consideration for early promotion to P-3.

15. The Panel makes no other recommendation with respect to this appeal."

On 28 January 2005, 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 recommendations that she be granted US\$ 5,000 compensation for the withholding of one month's salary and US\$ 20,000 for the seven years' delay in properly classifying her post. However, the Secretary-General did not accept any of the other JAB's recommendations.

On 29 June 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. She was denied equal opportunity to promotion at the Professional level during part of 1999, for 2000 and for part of 2001.
2. She was denied mobility.
3. She receives a lower income, and will receive a lower pension, than that she would have received, had she been treated fairly.

Whereas the Respondent's principal contention is:

The Applicant has been adequately compensated for all damages and inconveniences flowing from the delays in her promotion to the P-2 level and in the determination of the effective date for such promotion.

The Tribunal, having deliberated from 25 June to 27 July 2007, now pronounces the following Judgement:

I. The Applicant entered into the service of the Organization in 1979 as a member of ECWA at the GS-5 level. From 1982 to 1998, the Applicant was transferred to a number of different duty stations and was promoted several times, which brought her to the GS-7 level. In 1992, following the issuance of administrative instruction ST/AI/377 concerning the classification of posts in ESCWA, the Applicant's post was downgraded to the GS-6 level. The Applicant contested this reclassification in April 1994. On 8 February 1996, the ESCWA Classification Appeals and Review Committee recommended that the Applicant's post should be classified at the Professional level, following which the Chief of Personnel approved her promotion to the P-2 level retroactive to 1 January 1989. On 4 February 2000, the ESCWA Budget and Finance Section declared that it was not in a position to implement the promotion and informed the Applicant of the decrease in salary corresponding to her post as well as her obligation to return the amounts that had already been paid. On 28 March 2000, ESCWA was advised by OHRM that posts had been made available to effectuate retroactive promotion, but only as far back as 1996. Accordingly, the Applicant was granted her promotion retroactive to that date.

II. On 29 September 2000, the Applicant requested an administrative review of the aforementioned decision, and filed an appeal with the JAB on 9 January 2001. On 7 March, the Administration reverted to its original decision to make the Applicant's promotion retroactive until 1 January 1989. Nevertheless, the Applicant maintained her complaint before the JAB, claiming US\$ 5,000 in compensation for material inconvenience and psychological stress and further compensation in an unspecified amount for the excessive delays and the harm caused to her career. On 1 June 2003, the JAB recommended that the Applicant be awarded compensation under four different headings, as follows: (1) US\$ 20,000 for the Administration's undue delay in classifying her post; (2) nine months' net base salary for deprivation of the possibility of being considered for promotion; (3) US\$ 5,000 for the unjust withholding of her salary; (4) US\$ 3,000 for the further three-year delay owing to the Administration's decision to contest the Applicant's appeal to the JAB. The JAB also recommended that she receive priority consideration for promotion. On 28 January 2005, the Secretary-General accepted the JAB's recommendations that she be granted US\$ 5,000 for the withholding of one month's salary and US\$ 20,000 for the seven-year delay in

properly classifying her post. However, the Secretary-General did not accept the JAB's recommendation that she be paid an additional nine months' net base salary for the delay in her career development, as he considered it would amount to double compensation for the same findings. On 29 June 2005, the Applicant filed an appeal with the Tribunal in order to contest this decision.

III. In the instant case, the Applicant's principal complaint is that she was deprived of her right to obtain full and fair consideration for a possible promotion to the P-3 level owing to the Administration's contradictory decisions concerning her promotion to the P-2 level, having first granted her the promotion and later withdrawn it, after which the promotion was made retroactive to different dates. These confusing acts on the part of the Administration prevented the Applicant from applying for a P-3 post.

IV. The Tribunal wishes, first of all, to point out that applicants have no right to promotion. Questions of promotion and appointment fall within the competence of the relevant body, and the Tribunal has always refused to interfere with this exclusive right. (See Judgements No. 828, *Shamapande* (1997) and No. 834, *Kumar* (1997).) However, the Tribunal has a duty to ensure that the Administration has made proper use of its powers and has respected the right of applicants to have full and fair consideration for promotion. The question is, therefore, to determine whether, the Administration failed to respect the Applicant's rights when it delayed for a seven-year period the date on which the Applicant's promotion to P-2 would take effect, thus depriving the Applicant of the opportunity to apply for a P-3 post and receive full and fair consideration for promotion during that period.

V. The Tribunal must first determine whether there was any undue delay and mismanagement in the classification procedure. In the present case, it emerges from the file that the Applicant was deprived of her right to be fully and fairly considered for promotion to P-3 owing to the accumulation of numerous administrative delays and errors. The Tribunal notes that the Respondent has in no way sought to contest or justify its excessive delays. Thus, the Tribunal is in agreement with the JAB when it states: "While it would be unreasonable to expect that the processes of bureaucratic review would be rapid, the Panel decided (...) that the delay in this case entitles the Appellant to compensation". The facts of this case are similar to those presented in Judgement No. 1171, *Mungai* (2004), in which the Applicant's promotion was delayed for six years, consequently depriving him of career opportunities during that time. The Tribunal held in that Judgement in para. V: "Whilst the Tribunal acknowledges that a staff member has no right to a promotion, it is nonetheless of the view that when a person worthy of a promotion is in fact promoted, it is manifestly unreasonable that he should be asked to bear the consequences of inordinate delay for which he was in no way responsible". Notwithstanding a number of factual differences between the two cases, the Tribunal is of the view that both Applicants suffered the consequences of undue administrative delays.

VI. With regard to the Administration's argument that the Applicant has not proved that she suffered damages, the Tribunal recalls its consistent position in its case law. In its Judgement No. 880, *MacMillan-Nihlén* (1998), the

Tribunal held that:

“The Applicant does not have to show any specific damage resulting from the undue delay. As the Tribunal has held, an inordinate delay ‘not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering to an applicant.’ (Cf. Judgements No. 353, *El Bolkany* (1985) and No. 414, *Apete* (1988)).”

The Applicant in the instant case is therefore correct in her assessment when she asserts: “The Respondent states ‘the Applicant has provided no evidence that she actually missed any career opportunities ... However, the basis of the Applicant’s submission to the Administrative Tribunal is that she was not treated equal to other staff and was not afforded the same opportunities [as] other staff.’” Thus, and as the Tribunal has previously held, the Applicant has no obligation to show any specific damage in connection with the material consequences of the formal violation of her rights, since the violation in itself already constitutes sufficient damage to entail the Administration’s responsibility and to constitute a basis for compensating her as a victim of excessive delays.

VII. Notwithstanding the foregoing considerations, it is difficult to imagine that, over a period of seven years, there was, in the United Nations system, no P-3 post for which the Applicant could have applied. In so far as it is necessary to proceed from the premise that there must necessarily have been opportunities for promotion, it is clear that the Applicant, as she indicates in her comments, was unable to apply for a P-3 post as long as her status had not been clearly confirmed by the Administration as belonging to the Professional category. The Tribunal, therefore, considers that her right to be fully and fairly considered was violated, in other words, that she suffered damage as a result of the excessive delay.

VIII. As to the extent of compensation that should be granted to the Applicant, the Tribunal, in its Judgement No. 1136, *Sabet & Skeldon* (2003), considered:

“In addition, the Tribunal states that in the present case, the Applicants suffered considerably from all these delays. Merely to restore retroactively the situation that should have been that of the two Applicants when they worked at the United Nations cannot enable the two Applicants to relive all those years during which they were deprived of their proper status.”

In that case, the Tribunal had been of the view that it was necessary not only to restore, in financial terms, the situation that would have existed if the Administration’s unlawful act had not been committed, but also that the Applicants should receive additional compensation for the loss of career opportunities.

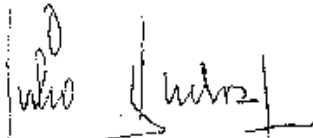
IX. In the present case, the JAB had recommended compensation for various damages incurred by the Applicant; however, only the US\$ 20,000 in compensation for the inordinate delay by the Administration in confirming the Applicant’s promotion, and the US\$ 5,000 to compensate for the unjust withholding of her salary for a month, were accepted by the Secretary-General. However, such compensation can only cover the psychological stress caused by the Administration’s completely chaotic and excessively long handling of the classification

procedure, as well as the particularly sudden decision to withhold all salary for one month. The Tribunal is therefore of the opinion, contrary to that of the Administration, that the Applicant has not been fully compensated for the loss of the opportunity to participate in promotion exercises over a period of seven years, and must, therefore, be compensated for the violation of her right to be fairly and equitably considered in promotion exercises.

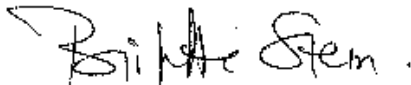
X. For the above reasons, the Tribunal:

1. Orders the Respondent to pay the Applicant US\$ 15,000, 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)



Julio **Barboza**
Member



Brigitte **Stern**
Member

Geneva, 27 July 2007

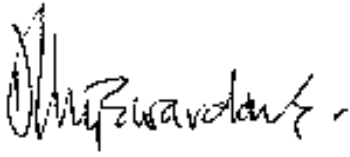


Maritza **Struyvenberg**
Executive Secretary

DISSENTING OPINION BY MR. DAYENDRA SENA WIJewardane

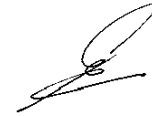
I regret I must respectfully dissent from the majority opinion. I am of the view that the Applicant has received sufficient satisfaction for the harm she has suffered. In all the circumstances of this case I do not believe further compensation is justified and would not have awarded additional amounts. I am supported by the assessment of compensation in a recent Judgement of the Tribunal, namely Judgement No. 1171, *Mungai* (2004). (In this connection, see also Judgement No. 621, *Berezoug* (1993), paragraph VI.)

(Signatures)



Dayendra Sena **Wijewardane**
Vice-President

Geneva, 27 July 2007



Maritza **Struyvenberg**
Executive Secretary