



ADMINISTRATIVE TRIBUNAL

Judgement No. 1347

Case No. 1451

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Mr. Goh Joon Seng; Sir Bob Hepple;

Whereas, on 8 September 2005, a staff member of the United Nations Environment Programme (hereinafter referred to as UNEP), filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 October 2005, the Applicant, after making the necessary corrections, again filed an Application requesting, inter alia:

**“Pleas [Appeal concerning delayed payments of entitlements]**

10. ... retroactive compensation of financial losses resulting from the late payment of entitlements. Financial losses for the staff member resulted from the exchange rate fluctuations between the due date and the date of actual payment as well as from interest paid for personal credits which had to be taken because the entitlements were not paid in time.
11. ... compensation of financial loss of 1,570 Euros resulting from late payment of assignment grant...
12. ... compensation of financial loss of 1,594 Euros resulting from late payment of non-removal grant...

...

**Pleas [Appeal concerning promotion to P-3]**

28. ... retroactive evaluation of [the Applicant's] step level upon appointment to the post of Programme Officer (Monitoring & Administration) effective 1 November 2002. ...

29. ... whether the term ‘competitive examination’ in the current Staff Rules is used only in the context of ‘... *National Competitive Examinations of the so-called NCE candidates and those candidates from the General Staff category desirous of being promoted to the professional category*’ ...
30. ... whether current Staff Rules concerning treatment of internal and external candidates are in accordance with Article 8 of the United Nations Charter ...
- ...”

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 May 2006 and once thereafter until 15 June;

Whereas the Respondent filed his Answer on 8 June 2006;

Whereas the Applicant filed Written Observations on 25 September 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] entered the service of UNEP, Division of Technology, Industry and Economics (DTIE), Paris,] as [an] Associate Programme Officer in September 1997 at the P-2 level on a fixed-term contract for six months. In the following years, he received several fixed-term contract extensions ranging from two months to two years and ... he was promoted to the P-3 level.

...

***Facts of the Case:***

... The staff member appeals from a decision not to grant him compensation in the form of interest and deterioration of the dollar exchange rate as a result of late payment by the Organization of entitlements on the one hand, and [the United Nations Office at Nairobi (UNON)’s] refusal to grant him initial appointment at the P-3, step VI level instead of the P-3, step III level on the other hand.

... [The Applicant] was initially hired in 1997 on a series of short-term contracts from the Paris Office of UNEP. In August 1998, he received his first contract at the P-2 level for the duration of one year.

... In the course of the year 2002, after re-classification of his [post] to the P-3 level, his post was advertised and on 1 November ..., [the Applicant] was appointed to the new [post] at the P-3 level. UNON, in determining the in-grade step upon promotion, determined that that step would be at the P-3 step III level in application of staff rule 103.9. [The Applicant] argues that staff rule 103.9 should not have been applied but rather staff rule 104.15 (b) (i) regarding competitive examinations which, in his view, would result in a classification of his level at step VI.

... When the staff member signed his first fixed-term contract for one year or longer in August 1998, he still kept an apartment in Berlin, Germany, his home country. This would normally have entitled him to the receipt of an assignment grant and the non-removal element. It appears that UNON originally did not share this opinion, since [the Applicant] was already living in Paris and was recruited from there having previously worked for UNEP on short-term contracts. According to the documentation made available to the panel, [the Applicant] did not pursue the matter of his entitlements since becoming eligible for it until 27 November 2002, at which time he wrote to the then Acting Chief, [Human Resources Management

Service (HRMS)], UNON, and requested payment of the assignment grant and the non-removal element. By letter dated 31 January 2003 the then Acting Chief, HRMS, UNON, decided to grant [the Applicant] the non-removal element and the assignment grant. ... [The Applicant] is pursuing his claim to be compensated for the loss of interest and the deterioration in the exchange rate of the U.S. Dollar between 1998 when he first became eligible for the assignment grant and the non-removal element, and the year 2003 when he finally was paid those emoluments.”

On 29 July 2003, the Applicant lodged an appeal with the JAB in Nairobi. The JAB adopted its report on 2 June 2005. Its considerations and recommendation read, in part, as follows:

***“Considerations:***

**1. Claim to be initially graded at the P-3, step VI level**

The Appellant’s claim that he should have been placed at the P-3, step VI level instead of the P-3, step III level ... can not be upheld as, in the Panel’s view, the Administration correctly applied staff rule 103.9 to the case of the Appellant.

It is uncontentioned that the Appellant was appointed to his post after advertisement of that post. Since the Appellant was already in the services of the United Nations, his assignment to the post following the regular ... recruitment process constitutes a promotion of a staff member. As such, staff rule 103.9 on ‘Salary policy in promotions’ is applicable and UNON acted correctly in applying that rule to the Appellant. As a result of the applicability of staff rule 103.9, and in particular 103.9 (a), UNON had to place him at the lowest step in the level to which he had been promoted, ensuring that the increase in salary would be equal to at least the amount that would have resulted from the granting of two steps at the lower level. That level in this case was P-3, step III and therefore UNON acted in accordance with the applicable rules and regulations.

The Appellant has argued extensively that staff rule 104.15 on competitive examinations should be applied, thus effectively trying to make the case that his appointment at the P-3 level should have been treated as an initial appointment and not as a promotion. This argument is based on a misunderstanding of the expression ‘competitive examinations’. The competitive examinations mentioned in staff rule 104.15 refer to the National Competitive Examinations of the so-called NCE candidates and those candidates from the General Staff category desirous of being promoted to the Professional category. It does not refer to the competitive process in the context of general recruitment procedures. In the case of staff rule 104.1, candidates are recruited under specific regulations and for those candidates the appointment is indeed an initial appointment as these candidates have either not yet been in the employment of the United Nations when they are appointed to their positions (NCE candidates) or enter a different category of staff for the first time in their careers. Because of the very specific circumstances of their cases, special rules have been promulgated for them. But since these circumstances do not apply to the Appellant, staff rule 104.15 does not apply to him either.

In any event, and irrespective of the applicability of specific Staff Rules, the Appellant does not seem to accept that the Organization treats promotion as the assignment of a staff member to a new position higher than his own, while an appointment is generally understood to be the assignment of a non-staff member, i.e. somebody from outside the United Nations to a position within the United Nations. The fact that in both cases an Advisory Body oversees the appointment/promotion does not change the fact that they are treated differently by the law of the Organization when it comes to in-grade eligibility. ... It follows that the Panel had no choice but to reject the Appellant’s plea in this regard.

**2. The claim for damages**

In respect to the claims for damages resulting from the late payment of his assignment grant and non-removal entitlements, the Panel noted with concern that UNON had not paid out the entitlements as and when the Appellant became eligible for them. UNON should have clarified the issue at the time and if it felt that the Appellant was not entitled to an assignment grant and the non-removal element, then it should have informed him accordingly in writing. Instead, the issue remained open and unsolved for a period of almost four years when the staff member, for the first time since his initial appointment in 1998, by letter of 27 November 2002, asked for payment of those emoluments. It is at this point, however, that the Appellant himself must accept that his negligence in pursuing his emoluments was a contributing factor in the delay of their payment. The Appellant can also not argue that he knew nothing of the assignment grant because he himself enquired about his eligibility in this regard in his letter to HRMS of 28 July 1998, just before taking up his assignment. The situation is thus such that the Appellant himself was aware of the possibility of receiving assignment grant but failed to follow-up on this entitlement for a period of over four years. Staff members however have the obligation to inform themselves as to their eligibility to entitlements and to follow up on them. This is also in line with the stipulations of the doctrine of laches and staff rule 103.15, whereby a statute of limitation is placed on retroactive payments of entitlements by the Organization to staff members. Given the fact that the staff member himself bears considerable responsibility regarding the late payment of his entitlements, the Panel concluded that a claim for damages for loss of interest and deterioration of the [U.S. Dollar] exchange rate was unfounded. Therefore, this plea too must be rejected.

***Recommendation:***

In the light of the foregoing considerations and conclusions, the Panel recommends to the Secretary-General to reject the present Appeal.”

On 14 September 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him 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 his appeal.

On 28 October 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The retroactive payments were miscalculated.
2. The wrong staff rule was applied to his promotion.

Whereas the Respondent’s principal contentions are:

1. The Applicant is not entitled to compensation as a result of the retroactive payment of his assignment grant and his non-removal element.
2. The Administration correctly applied staff rule 103.9 in determining the Applicant’s step level upon promotion to P-3.

The Tribunal, having deliberated from 23 October to 21 November 2007, now pronounces the following Judgement:

I. The first of these appeals raises the issue whether the Applicant is entitled to compensation for the late payment of an assignment grant and the non-removal element. The second appeal is concerned with whether the decision to grade the Applicant at the P-3, step III level, in accordance with staff rule 109.3, violated his rights.

II. The Applicant entered the services of UNEP, Paris, as a P-2, Associate Programme Officer, in September 1997 and worked under a series of short-term contracts. When he signed his first fixed-term contract in August 1998, he still kept an apartment in Berlin, Germany, his home country. This would normally have entitled him, as from that time, to the receipt of an assignment grant and the non-removal element. In his memorandum of acceptance of the post dated 28 July 1998, he wrote:

“The ... appointment offers for the first time a longer-term perspective in Paris, which would allow me to settle down in my own apartment. Up to now, my principal residence is in Berlin. In Paris I am living on a month-to-month basis in a furnished room. The process of finding and furnishing an appropriate apartment would surely be supported by the inclusion of an assignment grant in the contract ... I would be grateful if you could consider my above suggestions. However, I confirm that I am willing to accept your offer without conditionalities.”

III. The Applicant received no response on the issue of his assignment grant. However, he did not pursue this question until 27 November 2002, at which time he requested UNEP to pay the grant and non-removal element. His explanation for the delay - given that he was working in an out-posted office (DTIE, Paris,) with its headquarters and its financial and human resources management in Nairobi (UNON) - was that at the time there was no Personnel Officer deployed in DTIE, Paris, to respond to his questions related to entitlements; there was a high degree of staff fluctuation; he was poorly informed; and, he had no access to administrative instructions. It was only when the UNON bulletin and web-based Human Resources Handbook became available and designated Personnel Officers in Nairobi provided assistance to DTIE, Paris, that he realized that he should raise the matter again. In response to his request, on 31 January 2003, UNON decided to pay him retroactively, in U.S. Dollars, both the non-removal element and the assignment grant. The Applicant claims compensation for the loss of interest and the deterioration in the exchange rate of the Dollar between 1998, when he first became eligible for the entitlement, and 2003 when he was finally paid.

IV. Staff rule 103.15 provides:

*“Retroactivity of payments*

A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made written claim:

- (i) In the case of the cancellation or modification of the staff rule governing eligibility, within three months following the date of such cancellation or modification;
- (ii) In every other case, within one year following the date on which the staff member would have been entitled to the initial payment.”

V. The Applicant contends that he complied with this rule by his memorandum of 28 July 1998, while the Respondent claims that the first request was contained in the memorandum of 27 November 2002 and that retroactive payments were made “on humanitarian grounds as a gesture of goodwill rather than under any obligation to do so”. The JAB noted with concern that UNON had not paid the entitlements as and when the Applicant became eligible for them, but that his negligence in pursuing his entitlements was a contributory factor in the delay in payment, because he was aware of the possibility of receiving an assignment grant but failed to follow-up on his entitlement for a period of over four years. In the Tribunal’s view, the JAB erred in construing the Applicant’s memorandum of 28 July 1998 as simply an inquiry about eligibility. The word used by the Applicant was “suggestion”, which is a polite way of framing a request. The JAB’s finding that the first request was on 27 November 2002 is plainly wrong. Accordingly, the claim was not time-barred under staff rule 103.15. Moreover, the JAB’s finding that he was negligent in pursuing his entitlement is not supported by the evidence. The explanation he gives for the delay in taking further steps, after he received no response to his initial request, is not contradicted by any other evidence. Although staff members have the obligation to inform themselves as to eligibility requirements, it is also the obligation of the Office to respond to requests of the kind made in the memorandum of 28 July 1998. The Applicant was, instead, left in limbo without any attempt being made to explain the position to him. In those circumstances the Tribunal rejects the finding of negligence and holds that it would be inequitable to invoke the doctrine of laches (as the JAB has done). Moreover, there is no evidence to support the argument by the Respondent that the payments were made “on humanitarian grounds as a gesture of goodwill”. The UNON response of 31 January 2003 states:

“The attached Personnel Action Form ... shows this [non-removal] entitlement effective 1 August 1998. We will check if the non-removal element has been paid since this date and if not it will be paid retroactively. ... Taking into account your specific situation at the time of your appointment, we are willing to pay for your travel to the duty station and assignment grant, as per 1 August 1998.”

VI. This is a clear acknowledgment of “entitlement” to the non-removal element from 1 August 1998. In relation to the assignment grant there is no mention that this is being paid *ex gratia*, and the words used must be construed as an acknowledgment that he was entitled to this grant from 1 August 1998.

VII. Accordingly, the Tribunal finds that the Applicant is entitled to compensation for the injury sustained as a result of late payment of his entitlement to the assignment grant. He was entitled to the payment from 1 August 1998. He received the sum of US\$ 12,443.63 on or about 27 March 2003, that is, more than 4.5 years overdue, and, subsequently, the balance of the non-removal grant, US\$ 6,617.14. The Applicant claims compensation on the basis of the annual inflation rate, annual interest rates which he had to pay to various banks, and fluctuations in the exchange rate. In the Tribunal’s opinion, this approach is misconceived. The proper basis on which to compensate for late payment is by the award of interest on overdue payments. The Applicant could have spent the amounts due in various ways, and it is not appropriate to examine whether or not he was justified in taking out certain loans or incurring overdrafts. Moreover, exchange rates can fluctuate in both directions over a period and this is a risk (or

benefit) which the payee is normally expected to bear. In the circumstances of this case, the Tribunal considers that it would be appropriate to award the Applicant compensation of US\$ 7,000 which is equivalent to a notional rate of interest of eight per cent over a period of 4.5 years on the total amount of US\$ 19,060.77.

VIII. The facts relevant to the second appeal are that in 2002, after reclassification of his post to the P-3 level, the post was advertised and on 1 November, the Applicant was appointed at the P-3 level. UNON in determining the grade-in-step upon promotion, determined that it would be at the step III level in application of staff rule 103.9 (a), which reads: “(a) On promotion, a staff member shall be placed at the lowest step in the level to which he or she has been promoted that provides an increase in net base salary equal to at least the amount that would have resulted from the granting of two steps at the lower level”.

IX. The Applicant contends that the Administration should have relied upon staff rule 104.15 which applies to candidates who have passed “competitive examinations”, rather than staff rule 103.9 (a) which governs the promotion of staff members already serving in the Organization. This contention is based on the fact that the post was internationally advertised in June 2002, and that short-listed candidates were interviewed in July, resulting in a recommendation by the recruitment panel that the Applicant be appointed, which was approved by the Appointment and Promotion Board and by the Executive Director. A UNON memorandum dated 31 March 2003 stated that the post had been filled “based on an international and competitive selection”. Staff rule 104.15 provides:

*“Competitive examinations*

(a) Boards of Examiners established by the Secretary-General shall ensure the regularity of the competitive examinations administered in accordance with conditions established by the Secretary-General.

(b) Boards of Examiners shall make recommendations to the Secretary-General in respect of the following:

(i) *Appointment*

Appointment to P-1 and P-2 posts and to posts requiring special language competence shall be made exclusively through competitive examination. Appointment to posts at the P-3 level shall be made normally through competitive examination;

(ii) *Recruitment to the Professional category of staff from the General Service and related categories*

Recruitment to the Professional category of staff from the General Service and related categories having successfully passed the appropriate competitive examinations shall be made within the limits established by the General Assembly. Such recruitment shall be made exclusively through competitive examination.

(c) Staff members appointed to the Professional level after a competitive examination shall be subject to mandatory reassignment, under conditions established by the Secretary-General.”

X. The Tribunal agrees with the JAB that the Applicant's argument is based on an erroneous interpretation of the term "competitive examination". The process under which he was selected was a competitive one which had been advertised internationally. This does not, however, make it a "competitive examination". The text of rule 104.15 and the practice of the United Nations makes it clear that the term "competitive examination" applies to three processes: (a) appointments to junior professional posts, which in the case of P-1 and P-2 posts are made exclusively through examinations, and in the case of P-3 posts are made "normally" through such examinations; (b) appointments to posts requiring special language competence; and, (c) recruitment to the Professional category of General Service Staff. The OHRM website makes it clear that "P-3 posts are normally filled through competitive examinations, but can be filled through internal promotions and other means". The Tribunal agrees with the JAB that there is a well-recognized practice of distinguishing between a "promotion" of an internal candidate after a selection process and an "appointment" of a non-staff member. The inapplicability of staff rule 104.15 becomes apparent when one notes that a "competitive examination" is held under the supervision of a Board of Examiners and that the appointment is pursuant to recommendations of the Board of Examiners. No part was played by a Board of Examiners in the process by which the Applicant was selected for the P-3 post. For all these reasons, the Tribunal finds that the process by which the Applicant was selected was an internal promotion and not a "competitive examination" and that staff rule 103.9 was correctly applied.

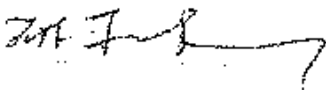
XI. In view of the foregoing the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of US\$ 7,000, 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)*

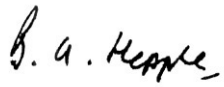


Jacqueline R. **Scott**  
Vice-President



**Goh Joon Seng**  
Member



Handwritten signature of Bob Hepple in black ink.

**Bob Hepple**  
Member

New York, 21 November 2007

Handwritten signature of Maritza Struyvenberg in black ink.

**Maritza Struyvenberg**  
Executive Secretary