



ADMINISTRATIVE TRIBUNAL

Judgement No. 1348

Case No. 1452

Against: The Secretary-General
of the United Nations

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

Whereas at the request of a former 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 31 October
2005 and once thereafter until 15 December;

Whereas, on 15 December 2005, the Applicant filed an Application containing pleas which read,
in part, as follows:

“Section II: **PLEAS**

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

...

(c) *to decide* to hold oral proceedings ...
2. On the *merits and substance*, the Applicant respectfully requests the Tribunal:

(a) *to find and rule* that the Joint Appeals Board’s [(JAB’s)] proceedings violated
the requirements of the Staff Regulations and Rules and pertinent administrative
instructions by not addressing the Respondent’s obligation to comply with due
process and to submit the Applicant’s request for reclassification to the
appropriate ... authorities;

- (b) *to rescind* the ... decision of the Secretary-General refusing to resume the proceedings in the Applicant's request for job reclassification, including payment of the related salary adjustments and of her pension contributions, since 1997;
- ...
- (d) *to award* the Applicant 2 years' ... net base salary as compensation for the actual, consequential and moral damages suffered by [her] as a result of the Respondent's actions or lack thereof, for the harm to her career, and for the abusive delays in the handling of her case;
- (e) *to fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance by the Secretary-General within three months of the judgement, at three years' net base pay in view of the special circumstances of the case."

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 22 May 2006;

Whereas the Respondent filed his Answer on 28 April 2006;

Whereas the Applicant filed Written Observations on 4 June 2006;

Whereas, on 24 October 2007, the Tribunal decided not to hold oral proceedings in the case.

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

“Employment history

... [The Applicant] joined the United Nations (...) in March 1972 [as a bilingual secretary]. From July 1992, she served in the position of Information Network Assistant in the Financing for Development Office (FFDO) of the Department of Economic and Social Affairs (DESA). In September 1993, [the Applicant] was promoted to the GS-6 level ... Except for two periods of time (16 November 1999 to 16 April 2000 and 1 August 2001 to 26 July 2002) when she temporarily served against a GS-7 level post ... and for which she was granted appropriate special post allowances (SPA), [the Applicant] continuously worked as a GS-6 Information Network Assistant until her separation from service on 31 July 2004.

Summary of the facts

... According to [the Applicant], she consistently received performance evaluations stating that she worked at a higher level than her functions called for.

[On 15 December 1997, 18 August 1999 and 12 December 2001, the Applicant formally requested that her post be reclassified to the G-7 level, by signing Requests for Classification. Her Requests were counter-signed by her supervisor, and one by the Director, but none were signed by the Executive Officer and they were never forwarded to the Office for Human Resources Management (OHRM).]

... According also to [the Applicant], the Director of the Development Policy and Planning Office (DPPO) and [the Applicant] agreed on the following: The Director requested that [the Applicant] not challenge a colleague's promotion to GS-7. In return, upon that staff member's

retirement in October 2002, he would make that GS-7 post available for classification. [The Applicant] maintained that she was doing work at the GS-7 level for many years and in recognition of this, it seemed natural to her that the Director would commit a GS-7 post for classification when it became vacant.

... By memorandum dated 24 March 2003, [the Applicant] requested [the] Director, DPPO, that the alleged agreement to upgrade her post be implemented. She stated in the memorandum that since 1999 she had discussed with him on a number of occasions the possibility that the functions of the GS-7 post in the Office of the Director (Editorial Assistant) be changed upon the retirement of the incumbent in November 2002, to reflect the functions that [the Applicant] carried out as Web Master/Information Assistant for two Divisions (...). [The Applicant] further stated that in June ... it was still clear to her that the Director would honour the agreement. However, in August ... [the Applicant] was informed that the Director, in fact, had decided to maintain the post as 'Editorial Assistant'. A vacancy announcement ... for the recruitment of an Editorial Assistant was issued and never withdrawn. [The Applicant] ... did not receive any response to her above-mentioned memorandum of 24 March 2003."

On 27 May 2003, the Applicant requested administrative review of the decision not to reclassify her post.

On 29 August 2003, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 21 March 2005. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

...

17. ... The Panel recalled staff regulation 2.1 and administrative instruction ST/AI/1998/9 [of 6 October 1998] on 'System for the classification of posts'. In particular, the Panel noted paragraph 1.3 of the said administrative instruction which provides as follows:

‘Incumbents who consider that the duties and responsibilities of their posts have been substantially affected by a restructuring within the office ... may request the Office of Human Resources Management or the local human resources office to review the matter for appropriate action under section 1.1 (d).’

Further, paragraph 2.3 of administrative instruction ST/AI/1998/9 states, *inter alia*, that: ‘The decision regarding the classification of the post will be taken by, or on behalf of, the Assistant Secretary-General for Human Resources Management.’

...

19. The Panel noted that the Appellant’s contentions were aimed largely at persuading the Panel that the content of the post she encumbered was such that it should be reclassified at least at the GS-7 level. The Panel agreed that it was not in a position to enter into an evaluation of the elements of the Appellant’s last job description.

...

21. The Panel felt that the Appellant was indeed a good staff member who performed up to the required level, but her good performance did not translate into an automatic reclassification of her post. In this connection, the Panel was of the view that the Director, DPPO, had the discretionary authority to assess the Appellant’s request and in respect of these technical issues, he had the managerial prerogative to retain what was the best for his Division.

22. The Panel considered the contention made by the Appellant that she not only performed consistently high level functions in her position of Information Network Assistant, but in fact performed well at levels above her GS-6 grade, as evidenced in her [performance evaluations]. In connection with this issue, the Panel noted that [such] reports are not designed to promote cases for reclassifying functions of a post but rather tools with which to evaluate the performance of the incumbent against pre-planned objectives and goals and specific quantitative and qualitative measurable criteria.

23. The Panel noted that the Director, DPPO, indeed gave fair consideration to the Appellant's request that her post be reclassified to a higher level. He believed that no staff member has the automatic right to have his/her post reclassified to a higher level. He asserted that job descriptions need to reflect the needs of the organizational unit and the classification should reflect the skills and experience necessary to fulfil those responsibilities. The Panel thus felt that the decision not to request reclassification of the Appellant's post was a valid exercise of the Respondent's discretionary authority.

24. The Panel reviewed the entire file, but could not find any document to substantiate the allegation made by the Appellant that 'there was an agreement between herself and the Director, DPPO to make a GS-7 post available for reclassification in order to upgrade her post'.

25. The Panel finally noted that the decision to classify the Appellant's post at a particular level was not within the authority of the Appellant's department, but was vested in the Assistant Secretary-General, OHRM, as stated in paragraph 17 above.

Conclusions and Recommendation

26. In the light of the foregoing, the Panel *unanimously concluded* that the decision not to change in grade the post that the Appellant encumbered was a valid exercise of the Respondent's discretionary authority. The Panel *also unanimously concluded* that the Appellant failed to demonstrate that the Respondent committed a breach of her terms of employment or that her rights as staff member had been violated.

27. Accordingly, the Panel *unanimously decided* to make no recommendation in support of this appeal."

On 15 July 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 findings and conclusions and had decided to accept its unanimous recommendation and to take no further action on her appeal.

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

Whereas the Applicant's principal contentions are:

1. She was unfairly denied due process by the decision denying her the right to have her post considered for reclassification by OHRM.
2. The obstruction of this reclassification process took place without any valid and legitimate reason, nor through any due process within the scope of the established procedures.

Whereas the Respondent's principal contentions are:

1. The Applicant's rights were not violated by the decision not to submit the post she encumbered for reclassification.

2. The fact that the Applicant performed functions at a level higher than those of the post she encumbered did not entitle her to be compensated at that level.

3. None of the Applicant's rights have been violated and, accordingly, she is not entitled to any compensation.

The Tribunal, having deliberated from 24 October to 21 November 2007, now pronounces the following Judgement:

I. There are two key issues in this case:

- (1) Did the failure or refusal of representatives of the Applicant's Executive Office to sign and forward to OHRM her requests in 1997, 1999 and 2001 that her post be reclassified to the G-7 level constitute a violation of her right to due process?; and,
- (2) Is the Applicant entitled to compensation for the failure to communicate to her the implied administrative decision not to proceed with the reclassification process?

II. In regard to the first issue, it is undisputed that the Applicant formally requested that her post be reclassified to the G-7 level, by signing Requests for Classification in 1997, 1999 and 2001. Her requests were countersigned by her immediate supervisor, the Programme Officer, on all occasions. The 1997 request was signed by her then Director but not by the Executive Officer. The 1999 and 2001 requests were not countersigned by the Director or the Executive Officer. None of these requests were forwarded to OHRM. The Applicant did not receive any notification from either the Director or the Executive Officer that her requests were not being forwarded to OHRM.

III. The background to her requests was that, from 1992, the Applicant, who had joined the Organization in 1972, served as Information Network Assistant in the Division for Macroeconomics, DESA, and from 1997 in the Division of Microeconomics, DESA. In 1993, she was promoted to the G-6 level and she remained in this post until she retired on 31 July 2004. For the periods from 16 November 1999 to 16 April 2000, and 1 August 2001 to 26 July 2002, however, she was placed against a G-7 level post and paid an SPA, while the G-7 incumbent of that post was on loan. During the period for which she received an SPA, she covered her own web responsibilities and the regular responsibilities of the staff member on loan.

IV. It is common ground that, on a number of occasions, the Applicant discussed the upgrading of her post with her Director. The Applicant maintains that, in June 2001, she and the Director discussed the possibility that the functions of the G-7 post of Editorial Assistant in the Office of the Director might be

changed upon the retirement of the incumbent in November 2002 in order to reflect the functions that the Applicant carried out as Web Master/Information Assistant for two Divisions. She claims that on this occasion, the Director made it clear to her that he would help her to secure an upgrading from G-6 to G-7 on the new post when it was established. She says that when she approached the Director again in June 2002, it was clear to her that he would honour this “agreement”. However, in August the Director indicated to her that he had decided to maintain the post of Editorial Assistant. The Applicant set out her version of events in a memorandum to the Director dated 24 March 2003. She never received a reply to this memorandum, nor did the Director explain to her why he had not signed her 1999 and 2001 requests for reclassification. The Applicant’s belief appears to have been shared by her immediate supervisor who, in a statement dated 15 August 2003, says: “It was my understanding from the Director of DPAD at the time a G-7 post became available, that it was the intention of the Director to promote another G-6 internal candidate and that [the Applicant] would be given priority for the next available G-7 post”.

The Director informed the Executive Officer (by memoranda dated 24 June 2003 and 13 August 2004) that he had not signed the Applicant’s requests for reclassification, countersigned by her supervisors, because he did not consider that they accurately reflected the functions she performed. The Director is unable to recall the precise content of the conversations with the Applicant. In his memorandum to the Executive Officer dated 13 August 2004, he states:

“... I informed [the Applicant] that I intended to use the G-7 post for an Editorial Assistant but I do not believe that I would have requested - or even advised - her not to challenge a colleague’s promotion because I do not consider such a request to be within the bounds of propriety. As in all such cases and as on the previous occasion when she approached me, I listened sympathetically to her request, without categorically accepting or rejecting it. I did not promise the staff member that I would either promote her or upgrade her post, not only because I had doubts about the validity of the request but also because it would not be entirely within my authority to deliver on such a promise.”

V. The JAB found that there was no document to substantiate the allegation made by the Applicant that there was an “agreement between herself and the Director ... to make a GS-7 post available for reclassification in order to upgrade her post”. The Tribunal confirms this finding, and agrees with the JAB that, in any event, the decision to classify the Applicant’s post at a particular level was not within the authority of her Department, but was vested in the Assistant Secretary-General, OHRM. However, the Tribunal makes the additional finding of fact that the Applicant had a genuine, albeit mistaken, belief, shared by her immediate supervisor, that a post would become available for reclassification on the retirement of the Editorial Assistant. This did not, and could not, however, amount to a promise that the functions would be reclassified to the G-7 level or that the Applicant would be promoted to that level. The Tribunal agrees with the Director that it would not have been within his purview to make such a commitment and notes that such a promise, had it been offered, would have violated the spirit and terms of the Staff Regulations and Rules governing classification and appointment.

VI. In the light of these facts, the Tribunal considers first whether the failure or refusal of the Executive Office to forward the Applicant's requests for reclassification to OHRM constituted a violation of her rights to due process.

Whilst the Tribunal "cannot substitute its discretion for that of the Secretary-General in job classification matters" (Judgement No. 396, *Waldegrave* (1987)), it will examine the exercise of the Respondent's discretion, in determining whether it was reasonably exercised. (Judgement No. 792, *Rivola* (1996).) Moreover, it will "consider whether there was a material error in procedure or substance, or some other significant flaw in the decision complained of". (See Judgement No. 541, *Ibarria* (1991) and, generally, Judgements No. 792, *Rivola* (1996); No. 1073, *Rodriguez* (2002); No. 1080, *Gebreanenea* (2002); No. 1136, *Sabet and Skeldon* (2003); and, No. 1325 (2007).)

With respect to her first reclassification request in 1997, the following provisions of ST/AI/301 of 10 March 1983, entitled "Initial Classification of General Service Posts in New York" were applicable:

"3. A description of the duties and responsibilities is required for each General Service post or group of identical posts. The post description will be provided by the departmental executive office after being signed by the supervisor and by the incumbent of the post, if any, on the standard form P.270 attached. In case of disagreement among the parties concerned (including the executive officer, supervisor and incumbent), the Classification Section will be requested to review the functions of the post and determine the appropriate description. (The term 'supervisor' refers to the individual who signs the performance evaluation form as first reporting officer.)"

With respect to the Applicant's requests submitted in 1999 and 2001, ST/AI/1998/9 provides so far as relevant:

"Request for the classification or reclassification of a post

1.1 Requests for the classification or reclassification of a post shall be made by the Executive Officer, the head of Administration at offices away from Headquarters, or other appropriate official in the following cases:

- (a) When a post is newly established or has not previously been classified;
- (b) When the duties and responsibilities of the post have changed substantially as a result of a restructuring within an office and/or a General Assembly resolution;
- (c) Prior to the issuance of a vacancy announcement, when a substantive change in the functions of a post has occurred since the previous classification; and
- (d) When required by a classification review or audit of a post or related posts, as determined by the classification or human resources officer concerned.

...

1.3 Incumbents who consider that the duties and responsibilities of their posts have been substantially affected by a restructuring within the office and/or a General Assembly resolution may request OHRM or the local human resources office to review the matter for appropriate action under section 1.1 (d)."

The administrative instruction in force in 1997 does not state who is to forward the matter to the Classification Section in the event of disagreement, but the wording which envisages that the Classification Section “will be requested” appears to place an obligation on the executive officer to take the matter to OHRM in the event of disagreement. Although there was a breach of this obligation, the Applicant did not at the time seek an administrative review, and indicated her knowledge that the request had not been forwarded by submitting fresh requests in 1999 and 2001.

The 1998 administrative instruction clearly expanded the rights of incumbents by giving them the right to submit a request directly to OHRM for consideration. The Applicant chose not to do so and failed to utilize the remedy which was available to her. It is well settled in the jurisprudence of the Tribunal that staff members must exercise due diligence in pursuing their claims. As the Tribunal held in Judgement No. 1325 (*ibid.*), “whilst staff members enjoy rights of due process, and the Respondent has the duty to protect same, a staff member may not neglect to take reasonable steps to protect his or her own interests in a timely fashion”. (See also Judgements No. 232, *Dias* (1978) and No. 953, *Ya’coub* (2000).) Under these circumstances, we find that there has been no violation of the Applicant’s right to due process in this respect.

VII. This brings us to the second issue. The Applicant believed that the Director had received her request “sympathetically” and was unaware of his doubts or his rejection. Had she been aware of this, she asserts that she would have submitted her claim directly to OHRM. The Tribunal is persuaded that she was also under the genuine belief, mistaken as it turns out, that a post would become available for reclassification in due course. It was only when she realized that the functions of the vacant post were not being changed to accommodate her that she recognized that she should have taken her request directly to OHRM.

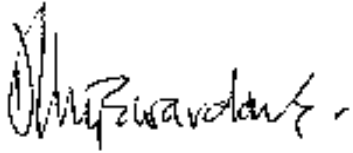
Although it was the Applicant’s responsibility to exercise due diligence in her case, it is obvious to the Tribunal that the failure of the Director to communicate his implied decision not to forward her request, or to disabuse her of the above-mentioned belief, of which he was aware, played a significant contributory part in her decision not to exercise her right to make her request to OHRM. The Applicant was either induced to operate under misguided or mistaken beliefs or, at the very least, permitted to continue to operate thereunder despite the knowledge of the Director that she was so doing. This failure of communication constituted a violation of her right to due process.

VIII. In view of this conclusion, based on the narrow ground of lack of transparency which contributed to the Applicant’s failure to exercise her rights, it would not be appropriate for the Tribunal to grant the Applicant any of the remedies which she seeks. Instead, the Tribunal has decided to fix an amount of compensation for the Applicant, without further action being taken in her case, having regard to the loss of opportunity of being considered for reclassification of her post and her own contributory fault in not exercising due diligence.

IX. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant, by way of reparation, compensation of US\$ 10,000, 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.

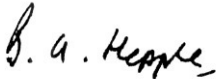
(Signatures)



Dayendra Sena **Wijewardane**
Vice-President

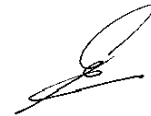


Brigitte **Stern**
Member



Bob **Hepple**
Member

New York, 21 November 2007



Maritza **Struyvenberg**
Executive Secretary