



Administrative Tribunal

Distr. Limited  
6 February 2008

Original: French

---

ADMINISTRATIVE TRIBUNAL

Judgement No. 1369

Case No. 1447

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; Mr. Goh Joon Seng;

Whereas at the request of a staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 12 August 2005 and twice thereafter until 31 December;

Whereas, on 25 October 2005, the Applicant filed an Application requesting the Tribunal, inter alia:

“8. On the merits ... to find:

- (a) that following the abolition of her post, the Applicant’s candidacy for the post of Principal Officer, External and Business Relations Unit [(EBR)] of the United Nations Office for Project Services [UNOPS] (...) was not given proper consideration;
- (b) that through the arbitrary selection decision taken by the Executive Director of UNOPS the Applicant’s due process rights were violated and her career with the Organization adversely affected;
- (c) that no good faith efforts were undertaken on the part of UNOPS to find an alternative suitable vacancy for the Applicant;
- (d) that the lack of due process and good faith efforts in the consideration of the Applicant for suitable posts, and in particular [the] post ... referred to above, constitutes an infringement of staff rule 109.1;
- (e) that the said lack of due process and good faith efforts has:

(i) jeopardised the Applicant's status as a staff member holding a permanent appointment, undermined her efforts to secure another position of comparable remuneration and responsibilities and thereby damaged the Applicant's career of 20 years with the United Nations system ...;

(ii) adversely affected the Applicant's reputation for high quality work; and,

(iii) caused undue anxiety and stress;

(f) that the Secretary-General's rejection of the recommendations of the Joint Appeals Board [(JAB)] was unjustified.

9. [and] ... to order:

(a) the placement of the Applicant in another suitable post within the Organization; or,

(b) two years' net base salary in addition to the proposed separation settlement."

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 30 April 2006 and once thereafter until 30 May;

Whereas the Respondent filed his Answer on 30 May 2006;

Whereas the Applicant filed Written Observations on 10 September 2007;

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 Organization on 19 February 1980 on a four-month fixed-term contract initially as a Guide Trainee and eventually, after subsequent renewals, as an Associate Information Officer with the Department of Public Information. On 1 July 1986, she received a fixed-term appointment with UNDP for one year as an Associate Programme Officer [and, on] ... 1 July 1993, she received a 100 Series permanent appointment with UNDP. [The Applicant] was placed on assignment with UNOPS upon its creation in 1995, and she was promoted to P-5 on 1 July 1997. In July 2001 the Executive Director (...) of UNOPS ..., requested her to serve as Acting Chief of the Division for External Communications and Relations with the United Nations (ECRUN). ...

***Summary of the facts***

... As the result of a budget reduction exercise, ECRUN as well as the Division for Business and Partnership Services (BAPS) were dissolved and [the Applicant's] post abolished. A new unit, ... EBR was formed to accommodate those functions within ECRUN and BAPS that were considered essential. On 20 May 2002, the newly-established post of Principal Officer, incorporating elements from the former posts for Chief of ECRUN and BAPS, was advertised, and [the Applicant] subsequently applied.

... A set of Human Resource [(HR)] Guidelines ...was established to provide staff with a general overview of HR policies and procedures to govern the budget reduction exercise. In accordance with the Selection Guidelines drafted in connection with the exercise, a Selection Panel (SP) was established. The SP, ranking candidates to points received for established categories associated with the position, ranked [the Applicant] first on a short-list of four candidates. The SP noted that [the Applicant] did not fulfil the

minimum requirement of a working knowledge of a second official United Nations language. The SP submitted its recommendations to the [Executive Director] of UNOPS, in accordance with the Selection Guidelines.

... On 21 June 2002, the Executive Director generated a ‘Note on the SP Report’ [stating, inter alia, that the] “position to be filled here is particularly critical for UNOPS at this juncture”. ... “The selection therefore must closely respond to the requirements set out in the job description as approved by me.’

... The Executive Director [further] stated that, having reviewed the SP report and the relevant documentation on each candidate, he had selected another candidate who had been serving since August 2001 on an [appointment of limited duration (ALD)] ... with UNOPS for one year as Director of BAPS/UNOPS. The selected candidate had been ranked lower by the SP, but had fluency in French and English. He had been within the United Nations system for 11 years ...

... [The Applicant] was notified ... on 25 June 2002 of the outcome of the selection process.

... By a memorandum dated 26 June 2002, [the Applicant] requested the Secretary-General for a review of the decision.

... On 17 July 2002, [the] Administrator, UNDP, requested information regarding the impugned decision from] ... the Executive Director ...

... On 23 July 2002, the Executive Director sent a response to the above memorandum, along with a number of materials requested by [the] Administrator, UNDP.

... On 14 August 2002, the Executive Director wrote to [the Applicant] ... stating[, inter alia, that although the SP ‘noted that of all the interviewed candidates you scored the highest, the Panel also noted that you did not fulfil the minimum requirement of a working knowledge of a second official [United Nations] language’ and that, therefore, the SP ‘highlighted the strengths and weaknesses of the respective candidates to me and suggested that I make the final decision based on my understanding of the requirements of the post’. ... [He added that in] ‘exercising my authority to appoint UNOPS staff members and acting in the best interests of the organization, I was compelled to select another candidate as Principal Officer, EBR ...’.”

On 1 November 2002, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 21 September 2004. Its considerations, conclusions and recommendations read, in part, as follows:

**“Considerations**

...

35. The Panel does not refute the [Executive Director]’s prerogative to disagree with the SP, to freely evaluate the candidates, and to come to his own decision; it does take issue with relying on criteria in making that decision that was not properly part of the process at the crucial stage of evaluation. Indeed, even if the criteria upon which the [Executive Director] relied in making the decision were part and parcel of the requirements for the post, the fact remained that the [vacancy announcement (VA)] that guided the SP led it to recommend her as the suitable candidate. In that instance, the Panel considered that the [Executive Director] had full discretion to disagree provided that he followed the proper procedure. He either could have referred the recommendation back to the SP, or readvertise the post, as related in the SP’s recommendation.

36. Every procedure established in this case to ensure [the] Appellant’s due process and specific rights under staff rule 109 led the Panel to find that the only source of discerning, in the context of transparency and fairness of process, which was the most suitable candidate to the post was the SP. The Panel was

mindful of the fact that this, by itself, could not be determinative, insofar as the SP serves as an advisory body. However, what was determinative was that the foregoing analysis regarding the SP's work puts in bold relief the disregard by the highest official at UNOPS towards due process. The fact that the [Executive Director] not only ignored its recommendation on [a] murky basis ..., but instead chose the candidate who ranked last overall, and who did not have a permanent appointment, in contravention of staff rule 109, led the Panel to conclude that the [Executive Director] failed to give her full and fair consideration for the post, failed to pay due regard to United Nations gender policy, and failed to observe her rights under staff rule 109.

***Conclusions and recommendation***

37. The Panel *unanimously recommended* to the Secretary-General:

1. that [the] Appellant be paid three months' net base salary at the rate effective at the time of the decision for the violation of her due process rights, as described above;
2. that [the] Appellant be paid three months' net base salary at the rate effective at the time of the decision for moral injury and stress caused by UNOPS breach of its obligations to her.

38. The Panel accordingly decided to make no other recommendation with regard to the present appeal.”

On 17 February 2005, the Officer-in-Charge, Department of Management, transmitted a copy of the JAB report to the Applicant and informed her as follows:

“The Secretary-General ... is unable to accept the JAB's findings or its recommendations for the following reasons. The JAB was not correct in finding that the [Executive Director] could disagree with the SP *provided he referred the matter back to it or readvertised the post*. (...) The [Executive Director's] discretion is not so limited. Indeed, it may only be challenged on the grounds of lack of due process, prejudice or other extraneous factors. In this case, in his response to your request for review, the [Executive Director] correctly pointed out, as had the SP, that you did not meet the essential requirement set out in the VA of working knowledge of another [United Nations] language. The candidate who was selected did meet all the essential requirements of the post and had been the Chief of the other unit (BAPS) that had been dissolved along with your unit to form the new EBR unit. Your application appears to have been duly considered and you have been continuously employed within the [United Nations] system, thus satisfying the requirement in staff rule 109.1.”

On 25 October 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Her candidacy for the post was not given full and fair consideration.
2. Her due process rights were violated and her career adversely affected by the arbitrary decision concerning this promotion exercise.
3. The Respondent did not make good faith efforts to find her a suitable alternative.

Whereas the Respondent's principal contentions are:

1. The Applicant's candidacy for the disputed post was given full and fair consideration. Staff rule 109.1 (c), on preferential retention in service, does not apply in a case of temporary assignment. The SP report was flawed and the Executive Director's decision was properly taken.

2. The Applicant had no right to, and no expectancy of, promotion to the newly-established D-1 level post at UNOPS. The selection of another candidate, who was a D-1 level staff member at the time his post was abolished, did not violate her rights.

3. The contested decision was not tainted by prejudice, improper motive or other extraneous factors.

The Tribunal, having deliberated from 26 October to 21 November 2007, now pronounces the following Judgement:

I. This case challenges the decision not to select a UNDP staff member for a newly created post following the abolition of her own post. The Applicant joined the United Nations on 19 February 1980 for an initial period of four months. After several successive extensions, on 1 July 1993 she received a permanent contract with UNDP, where she had been working since 1 July 1986. She was assigned to UNOPS in 1995 when it became a separate entity and then, in July 2001, when she was a P-5, was appointed Acting Chief of ECRUN, against a D-1 post.

II. Following a budget reduction exercise, the Applicant's post was abolished in June 2002. A new post of Principal Officer (D-1) of the new EBR was created, combining the functions of ECRUN, the Division headed by the Applicant, and those of BAPS. Wishing to occupy that post, the Applicant put herself forward for the selection process, which provided for the evaluation of candidates by an SP. Even though the SP recommended the Applicant, giving her a higher score than the other candidates and ranking her first on a shortlist of four candidates chosen from the five that had applied, the Executive Director, UNOPS, decided to recruit another person, namely, the Director of BAPS. In contrast to the Applicant, who had been working at UNDP for 16 years, nine of them on a permanent contract, the chosen candidate, who had ranked fourth and last on the SP's list, had been with UNOPS for less than a year, serving on an ALD.

III. As soon as the Executive Director's decision was announced, the Applicant applied to the Secretary-General on 26 June 2002 for a review of the decision. On 1 November, the Applicant lodged an appeal with the JAB. The Board, in its 21 September 2004 report adopted unanimously by its members, recommended to the Secretary-General that the Applicant be paid an amount equivalent to three months' net base salary for the violation of her due process rights and three months' net base salary for moral injury. On 17 February 2005, the Secretary-General informed the Applicant that he rejected the JAB's recommendations. It is this decision that the Applicant is contesting before the Tribunal.

IV. In the interests of clarity, the Tribunal will first determine the applicable law, and then consider whether or not that law was respected.

V. The Tribunal recalls, firstly, that the Applicant does not, in principle, have a right to appointment or promotion. This position was stated clearly with regard to promotions - but the *same* principle applies to appointments - in, for instance, Judgement No. 275, *Vassiliou* (1981), para. IV: “As regards promotion, the subject is within the discretion of the Secretary-General and, in the absence of a legal obligation binding on him, the Tribunal cannot enter into the merits of the Applicant’s claim. (Judgement No. 134, *Fürst*, para. III).”

VI. Nevertheless, it is established jurisprudence that, even where there is no right to appointment or promotion, the Tribunal monitors the way in which the Administration exercises its discretion not to promote or not to appoint a candidate to a post for which he or she has applied in order to prevent the discretionary measure from becoming arbitrary. In this connection, the Tribunal wishes to emphasize the importance of its comments on the subject in Judgement No. 1052, *Bonder* (2002), para. IV:

“It is especially important for the Tribunal to ensure the right of staff members to an equitable procedure when discretionary decisions are taken by the Administration, in order not to leave them entirely to the mercy of caprice. The Tribunal has many times affirmed the imperative need for oversight of the discretionary decisions of the Administration, in which it seeks a delicate balance between the need to allow the Secretary-General of the Organization room to exercise judgement and the need to provide an essential protection to the staff members working in the service of the Organization.”

VII. The Tribunal identified the limits of the discretionary power of the Secretary-General in Judgement No. 1122, *Lopes Braga* (2003), para. III: “This discretionary power of the Secretary-General to evaluate and promote candidates, however, is not without boundaries - the Administration’s discretion shall be reviewed when there are allegations of abuse of discretion, procedural irregularities, bias, prejudice or discrimination. (See Judgement 1056, *Katz* (2002)).”

VIII. The Tribunal’s review, which does not therefore apply to the merits of the decision not to appoint or not to promote, focuses on procedural guarantees in their broadest sense, which are of course important for ensuring respect for the law. In addition to the general obligation to accord each candidate fair and equitable treatment, these guarantees are based, in particular, on staff rule 109.1 (c) (i), which provides that:

“Except as otherwise expressly provided ..., if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service.”

IX. The Respondent advances two main arguments against the applicability of staff rule 109.1 (c) (i) to the present case. The first is that staff rule 109.1 (c) (i) applies only in the case of termination and that since the

Applicant had a permanent contract that was not affected by the abolition of her post, the Executive Director was not required, in selecting a candidate for the newly created post, to abide by the provisions of staff rule 109.1:

“The Respondent submits first that this rule does not provide for ‘priority consideration’ for any particular post, but refers only to the retention of permanent contract holders subject to termination ‘in preference to those on all other types of appointment’ after abolition of post. Essentially, this rule establishes a hierarchy for termination of staff on abolished posts”.

The second argument attempts to isolate UNOPS from UNDP and to maintain that staff rule 109.1 applies only to the latter. Here, the Respondent’s main contention is that, since the Applicant’s contract was concluded with UNDP, not UNOPS, the UNOPS Executive Director was not bound by staff rule 109.1 (c) (i) vis-à-vis the Applicant. However, in case that rule is deemed applicable to UNOPS, the Administration contends subsidiarily that, far from having to apply it to the letter, it is bound to apply only its spirit.

X. After carefully considering the Administration’s first argument, the Tribunal concludes that staff rule 109.1 (c) (i) is indeed applicable to the Applicant’s case. To the Administration’s argument that this rule applies only in the case of termination, the Tribunal responds that such a limitation on the scope *ratione materiae* of that rule cannot be justified and that the rule must be applied in the case of abolition of a post *or* reduction of the staff. The fact that the Applicant’s permanent contract was not affected by the abolition of her post is thus irrelevant, since she was clearly affected by a reduction in staff. What is more, the Applicant has indicated - and the Respondent has not denied - that “[d]uring UNOPS’ budget cutting exercise, the Applicant was included in the list of former UNDP staff whose employment was to be terminated if no suitable post could be identified”.

XI. Turning to the Respondent’s second argument, the Tribunal notes that an exception cannot be made for UNOPS, since the protection afforded by staff rule 109.1 (c) (i) extends, in principle, to any staff member appointed by the Secretary-General, regardless of the agency for which he or she is working. The Tribunal deems it appropriate to recall here the stipulations of staff rule 100.1, which provides: “Staff rules 100.1 to 112.8 are applicable to *all* staff members appointed by the Secretary-General except technical assistance project personnel and staff specifically engaged for conferences and other short-term services”. (Emphasis added.)

XII. Any exception would be particularly disturbing given that UNOPS and UNDP are closely linked, with the former enjoying delegation of authority from the latter. Furthermore, the UNOPS HR Guidelines, which were adopted on 1 May and 12 June 2002 jointly with UNDP for the express purpose of dealing with the post reduction exercise the applicability of which to the present case is not disputed by the Respondent, stipulate in section 5 that

“[i]n applying staff rule 109.1 (c), due regard shall be had for a staff member’s period of service with UNOPS and any obligations UNOPS has under the Staff Rules for long-serving staff members of the organization. Subject to the availability of suitable posts in which their services can be effectively utilized, staff holding UNDP permanent appointments and staff serving on fixed-term appointment, whether on assignment or limited to UNOPS, for a period of 5 years or more in UNOPS/UNDP, will receive priority placement over equally qualified staff with fewer years of service in UNOPS/UNDP.”

XIII. It is clear from this text that its scope *ratione personae*, far from being restricted to persons who were recruited directly by UNOPS, also covers persons holding appointments with UNDP. Article 7.3 of the Guidelines stipulates that “[d]ue regard shall be had for a staff member’s period of service with UNOPS and any obligations UNOPS has under the Staff Rules for long-serving staff members of the organization. The relevant provisions of staff rule 109.1 (c) shall be adhered to (...).”

XIV. Following staff rule 109.1 (c) (i), the Tribunal likewise fails to see how UNOPS could be bound only by its spirit. The Tribunal shares the view of the JAB, which held that: “Nothing here sustains [the] Respondent’s argument that UNOPS has the responsibility to apply only ‘the spirit of staff rule 109.1 (c)’”. By stipulating that “staff members with permanent appointments *shall* be retained in preference to those on all other types of appointments” (emphasis added), staff rule 109.1 (c) (i) signifies in spirit that it must be applied to the letter.

XV. Accordingly, the applicability in the present case of both staff rule 109.1 (c) (i) and the UNOPS HR Guidelines is beyond question. The Tribunal reaches the same conclusion as the JAB: “[t]he Panel found therefore that the Rule giving preferential treatment to permanent appointees in the context of post abolition applied to UNOPS”.

XVI. While staff rule 109.1 (c) (i) and the UNOPS HR Guidelines are vital to an assessment of the legitimacy of the decision not to promote the Applicant, the Tribunal maintains that these two texts are not the only sources of applicable law in this case. In fact, in selecting a candidate for the new post, the Executive Director was also required to take into consideration the goal of gender parity within the Organization. This has been reaffirmed on numerous occasions, including in paragraph 2 of General Assembly resolution 54/139 of 10 February 2000, in which the Assembly

“[r]eaffirms the urgent goal of achieving 50/50 gender distribution in all categories of posts within the United Nations system, *especially at the D-1 level and above*, with full respect for the principle of equitable geographical distribution, in conformity with Article 101, paragraph 3, of the Charter of the United Nations, and also taking into account the continuing lack of representation or underrepresentation of women from certain countries, in particular the developing countries and countries with economies in transition”. (Emphasis added.)

XVII. The goal of gender parity is also established in Guideline 3.3 of the UNOPS Selection Guidelines, which are applicable to the present case: “[t]o the extent possible, the UNOPS Gender Equality Policy shall be applied, in particular with regard to the selection of qualified female staff members for senior positions”.

XVIII. The Tribunal notes that the legality of the decision not to promote the Applicant must be assessed on three separate bases, namely, the general obligation to give full and fair treatment to each candidate; observance of staff rule 109.1 (c) (i); and, the need to work towards the goal of gender parity within the Organization. Having



determined the applicable law, the Tribunal will now consider whether or not that law has been breached by the Administration.

XIX. Before considering the way in which the process to fill the newly created post was conducted, the Tribunal wishes to note that the UNDP Administrator himself seems to have been somewhat surprised by the choice of the Executive Director of UNOPS, from whom he sought explanations in a letter dated 17 July 2002 - a letter of which the JAB also took note, describing it as a “surprisingly terse memorandum” - going so far as to write that if he was not satisfied with the explanations provided, he “may decide to review the existing delegation of authority”.

XX. The Tribunal wishes first of all to stress that the preference conferred by staff rule 109.1 (c) (i) on “staff members with permanent appointments” in no case means that absolute priority shall be given to the latter, i.e. that in a case involving a staff member holding a fixed-term appointment and one holding a permanent appointment it is the latter who should automatically get the post. Such an interpretation would leave no room for the Administration to exercise its discretion, by which it can strike a balance between the elements of “relative competence ... integrity and ... length of service” (staff rule 109.1 (c) (i)). Moreover, the Tribunal has consistently held that “it cannot substitute its judgement for that of the Administration on promotion questions (see Judgement No. 470, *Kumar* (1989)) except where there is evidence of prejudice or improper motivation” (Judgement No. 862, *Szekielda* (1997), para. IV). Thus, the Tribunal can only reject the Applicant’s argument that the selection procedure, which was designed to compare her profile with those of the other candidates, would in itself constitute a violation of staff rule 109.1 (c) (i). In the Tribunal’s view, this erroneous interpretation would actually confer a *right* on persons holding permanent appointments, which the Applicant herself is not claiming. What is more, among the four candidates who were rated, only the candidate selected did not hold a permanent appointment, and, in any event, the selection process involved a comparison of several candidates holding fixed-term appointments.

XXI. Nevertheless, the Tribunal firmly recalls that the Administration has an obligation to give full and fair consideration to all staff members of the Organization during a selection process. The Tribunal must determine here whether there were any procedural irregularities, prejudice or improper motivation. After having carefully considered the selection procedure, the Tribunal considers that the Applicant was not given proper procedural guarantees at all phases of the process. Indeed, the Tribunal is concerned at the way in which the Executive Director justified the Applicant’s non-selection to her. While the Tribunal cannot substitute its judgement for the Respondent’s discretionary power, it must be convinced that the Respondent abided by his own rules. Yet, it appears from the case file that this was not done in the present case, as the two grounds given to the Applicant for her non-promotion had no basis in the VA. In his Note on the SP Report of 21 June 2002, the Executive Director stresses the importance of a good knowledge of external relations and fluency in two official languages of the United Nations, two criteria that did not appear in the VA. Later, on 14 August 2002, in a letter addressed to the Applicant, the sole criterion cited to explain why the Applicant had not been selected was her lack of in-depth knowledge of a second official language. Yet, it has been established that the VA merely required that candidates

should have a working knowledge of a second official language of the United Nations; thus, by not selecting the Applicant on the grounds that she did not speak French fluently, the Executive Director failed in his obligation to show her full and fair consideration. In the view of the Tribunal, the simple fact that the Executive Director justified his decision not to select her on the basis of a criterion that was not indicated as such in the VA is enough to constitute a failure to fulfil his obligation to show each candidate full and fair treatment. The Tribunal shares the analysis of the JAB, which stated that “[t]he Panel considered that, to the degree these requirements actually constituted priorities, they were not presented consistently as such in his letter to the Appellant, and were entirely inconsistent with the VA”.

XXII. The Tribunal notes in this connection that, in an e-mail sent on 30 April 2002 to the Assistant Director and Chief, Division for Human Resources Management, UNOPS, the Executive Director makes no mention either of fluency in two United Nations languages or good knowledge of external relations. The e-mail, the purpose of which was to clarify the VA, indicates that, at the time the VA was issued, the Executive Director did not consider those two factors to be essential. The Tribunal therefore agrees with the following analysis of the JAB:

“The Panel considered that the absence of any reference to language or national-level experience from the above review points to the fact that, if the [Executive Director] considered those qualifications to be essential in June of that year, he had no reservations about omitting them the previous April in the VA that was ultimately advertised to staff members in May”.

Although the Executive Director indicated, in the post description issued on 5 June 2002 and therefore subsequent to the VA, that he attached particular importance to those two criteria, if he had considered them to be *sine qua non* conditions which all candidates had to meet, he should have readvertised the post. The decision not to select the Applicant on the grounds that she did not meet those two criteria is therefore a gross violation of the Administration’s obligation to give all candidates full and fair consideration. By raising the level of French required for selection, the Executive Director deviated from the VA, despite having personally participated in drafting it. As the JAB rightly notes “[t]he Panel does not refute the [Executive Director’s] prerogative to disagree with the SP, to freely evaluate the candidates, and to come to his own decision; it does take issue with relying on criteria in making that decision that was not properly part of the process at the crucial stage of evaluation”.

The Executive Director has given no reasonable justification to explain why he chose the candidate ranked last, who had not joined UNOPS until August 2001, i.e. only nine months before the abolition of his post, and who, according to the Applicant, had been “the only known staff member to join UNOPS without competitive recruitment with an ALD contract for a duration of [a] full two years”. The Tribunal wishes to add that it is somewhat ironic for the Administration to refer in its submissions to “the Applicant[’s] temporary and rather tenuous status in UNOPS as Acting Chief against a higher level post”, in explaining why another candidate was selected, whereas, although it is true that she had held this particular position for only 10 months, she had been working in UNOPS since 1995, i.e. for seven years, but especially as the candidate chosen had, beyond the shadow of a doubt, an even more “temporary and rather tenuous” link to the Organization! Moreover, the Respondent states that the recommendation and ranking made by the SP was “based on incorrect information” and this categorical statement is not supported by any

indication whatsoever of just what such incorrect information might have been. It therefore follows that, given explanations of his decision which cannot justify his total disregard for the recommendations of the SP, the Executive Director acted arbitrarily in basing his decision on criteria that were not required in the VA for the post in question.

XXIII. Second, by selecting the candidate ranked fourth and last by the SP, when that candidate's contract with UNOPS was a ALD, the Executive Director committed a serious violation of staff rule 109.1 (c) (i). The Tribunal notes that, unlike the candidate ultimately selected, the Applicant had been working in UNOPS for several years and held a permanent contract.

XXIV. Third, the Tribunal notes that the selection of the Applicant would have contributed fully to achieving the objective of gender parity within the Organization, as the Applicant also emphasizes when she states that respect for the parity objective, in the case at hand, "would have been even more imperative in light of the fact that - at the time of the selection decision - all 19 posts at the D-1 level within UNOPS were encumbered by men". The JAB was first to emphasize this point: "The Panel also noted that the selection of [the Applicant] will satisfy the provisions of the UNOPS Gender Equality Policy".

XXV. As he knew that selecting the Applicant would improve the proportion of women in UNOPS, the Executive Director cannot hide behind the argument that, since female candidates are given preference only in cases where the candidates are equally competent, there was no reason to select the Applicant for the post. In recommending the Applicant, the SP said that it considered her to be, if not more qualified for the new post, then at least as qualified as the candidate ultimately selected. The Tribunal notes with interest that the Applicant's weakness in French did not prevent her from being ranked first by the SP. As the JAB emphasizes: "On all aspects of the grid, with the exceptions of communication skills and language skills, [the] Appellant ranked either equally or, for the most part, higher than the selected candidate".

Although the Tribunal is not substituting its judgement for that of the Administration in this regard, the Administration has not provided proof that the Applicant did not have the required skills, as the decision not to select the Applicant was justified by a criterion that had not been included as such in the VA. The Tribunal infers that the Administration did not take into account the objective of gender parity within the Organization.

XXVI. The Tribunal is certainly aware that post reductions are complex exercises, which often involve difficult choices. But it also agrees on this point with the Applicant, who states, "it is precisely in times where circumstances are difficult that the need to adhere to the rules is essential". Considering that the Applicant's rights have been violated, the Tribunal concludes that the Executive Director exceeded his discretionary powers, to the extent that he did not comply with either the general obligation to provide the full and fair consideration that all candidates have a right to expect throughout their career, or staff rule 109.1 (c) (i), or the objective of gender parity within the Organization. The Tribunal fully shares the following conclusions of the JAB:

“The fact that the [Executive Director] not only ignored its recommendation on [a] murky basis ... but instead chose the candidate who ranked last overall, and who did not have a permanent appointment, in contravention of staff rule 109, led the Panel to conclude that the [Executive Director] failed to give her full and fair consideration for the post, failed to pay due regard to United Nations gender policy, and failed to observe her rights under staff rule 109”.

The Applicant considers herself to have been seriously harmed by the behaviour of the Organization. According to her,

“the lack of due process and good faith efforts has:

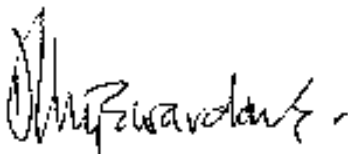
1. jeopardised her status as a permanent staff member and her career, and undermined her efforts to ‘secure another position of comparable remuneration and responsibilities’;
2. adversely affected the Applicant’s professional reputation; and,
3. caused undue anxiety and stress.”

The Applicant asks the Tribunal to order her “placement on a suitable post”, or to award her “two years’ net base pay, in addition to a proposed separation settlement”. The Tribunal will take these elements into account in determining the compensation it finds adequate. The Tribunal finds no reason to deviate from the amount of compensation awarded by the JAB.

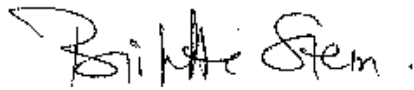
XXVII. For the foregoing reasons, the Tribunal:

1. Declares that the decision not to appoint the Applicant to the newly created post was taken under conditions that seriously violated the Applicant’s rights to a fair procedure;
2. Orders the Respondent to pay the Applicant compensation in the amount of six months’ net base salary at the rate in effect of the date of the 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,
3. Rejects all other pleas.

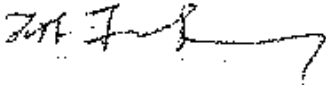
*(Signatures)*



Dayendra Sena **Wijewardane**  
Vice-President

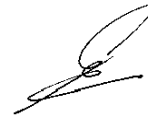


**Brigitte Stern**  
Member



**Goh Joon Seng**  
Member

New York, 21 November 2007



**Maritza Struyvenberg**  
Executive Secretary