



ADMINISTRATIVE TRIBUNAL

Judgement No. 1450

Case No. 1528

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas, on 27 April 2007, a staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

“II. PLEAS

...

8. ...[To] find:

(a) that by offering the Applicant a contractual arrangement with a different remuneration package for performing the same functions, the Respondent violated the principle of equality of treatment of staff members with identical rights and duties;

(b) that by ruling against the accelerated promotion of the Applicant, while doing so in favor of the external candidates, the Respondent further violated the principle of equality of treatment; and

(c) that by failing to properly implement the policy that purportedly was being applied the Respondent additionally violated the rights of the Applicant.

9. ...[To] order:

(a) that the Applicant be retroactively given the same contractual arrangement as the external candidates, namely a probationary appointment, so as to enjoy the benefits of a full P-2 staff member, including pension, for the two-year trial period; and

(b) that the Applicant be accorded the same rights with regards to promotion as the external candidates, and that, in light of his excellent performance, be granted a promotion to the P-3 level effective 1 January 2004, as recommended by DGACM [Department for General Assembly and Conference Management].”

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 17 October 2007; and once thereafter until 19 November;

Whereas the Respondent filed his Answer on 6 November 2007;

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] joined the Organization on 15 September 1997 as a Spanish Language Teacher at the LT-1/3 level. In 2001, he passed the Competitive Examination for Spanish-language translators/précis writers, editors and verbatim reporters.

Summary of Facts

... On 6 January 2003, [the Applicant] was selected for the post of Spanish Translator within DGACM for a trial period of two years, receiving a special post allowance (SPA) to the P-2 level.

... On 21 November 2003, DGACM recommended [the Applicant] for consideration for accelerated promotion to the P-3 level effective 1 January 2004 in light of his exceptional level of performance after [the Applicant’s] completion of one year of service as a Spanish Translator. Two other staff members – external candidates who had also passed the examination at the same time as [the Applicant] and recruited at the P-2 level – were also recommended some time thereafter.

... By a memorandum dated 30 November 2004 and copied to [the Applicant] from Common Services Activities at Headquarters Section, PAMS, OSD, OHRM [Office of Human Resources Management], the Executive Office of DGACM was informed that, in accordance with ST/IC/2001/41, [the Applicant] could only be considered for promotion after successful completion of the two-year trial period.

... By a memorandum dated 14 November 2004, the Executive Office of DGACM transmitted a request to the Operational Services Division, OHRM, to shorten (apparently with retroactive effect) [the Applicant’s] trial period to one year and grant accelerated promotion to the P-3 level effective 6 January 2004.

... In a ruling dated 23 November 2004, the Policy Support Unit, OHRM, stated that PD/9/59 provided for, in exceptional cases, promotions to the P-3 level following one year of service on probationary appointments. This provision applied only to external candidates.

... By a memorandum dated 21 December 2004, the Operational Services Division replied, *inter alia*, that, based on stipulations in ST/IC/2001/41, no accelerated promotion or reduction in the trial period of two years could be considered. According to that memorandum, OHRM had informed the Executive Office of DGACM in January 2004 by telephone and in writing that the recommendation could not be entertained.

... Effective 1 January 2005, [the Applicant] was promoted to the P-3 level.

... By a memorandum dated 17 January 2005, [the Applicant] submitted a review of the 30 November 2004 administrative decision rejecting DGACM's recommendation."

On 24 March 2005, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 5 July 2006. Its considerations and recommendation read, in part, as follows:

"Considerations

18. As an initial matter, the Panel notes that Appellant's appeal raises an issue of competence. Appellant's second plea requests the JAB to recommend that the policy regulating the conditions for recruitment or placement of successful candidates in posts requiring special language skills be interpreted in the spirit of the Rule on promotion and be revised in order to assure that internal candidates automatically enjoy the same rights as external candidates. In this regard, the Panel notes that its mandate contemplates review only of those Administrative decisions which violate an Appellant's terms of appointment; decisions taken in accordance with a staff member's terms of appointment fall outside its jurisdiction.

19. In the instant case, Appellant, a General Service staff member, after passing a special language exam, was selected to the post of Spanish Translator. Under ST/AI/2000/1 [citation omitted] and ST/IC/2001/41 [citation omitted], internal candidates must serve a trial two-year period prior to promotion to the P-3 level. General Service staff members receive an SPA to the P-2 level for the trial period. Prior to the end of the two years, Appellant received the strong recommendation of his supervisor for accelerated promotion to the P-3 level in light of his exceptional performance. Two external candidates who had also passed the examination at the same time as Appellant and who were recruited at the P-2 level were also recommended for accelerated promotion. Under section 3.3 of ST/IC/2001/41, successful external candidates receive a two-year probationary appointment, which is renewed by the Appointment and Promotion Committee thereafter.

20. These two external candidates received accelerated promotion, and Appellant did not. Respondent contends that, under ST/IC/2001/41, no accelerated promotion or reduction in the trial period of two years could be considered. Apparently, however, OHRM considers that, in view of past practice under PD/9/59 (abolished by AI/2000/1) whereby accelerated promotion was allowed on an exceptional basis, exceptional promotion was available for the two external candidates recruited at the P-2 level; however, accelerated promotion for Appellant, who had been granted an SPA to the P-2 level, was not available. Appellant argues in response that the current system treats internal and external candidates unequally.

21. Ultimately, the issue amounts to a policy debate, rather than an appeal. In that light, the Panel recalls the judgement of the United Nations Administrative Tribunal (UNAT) in Judgement No. 1231, ... (2005), para. IX:

'As the Tribunal has previously held in Judgement No. 722, *Knight et al.* (1995), '[t]he Tribunal's function, as defined by its Statute, is to determine whether there has been non-observance of the terms of the employment [contract]'. Moreover, the Tribunal recalls its Judgement No. 1145, *Tabari* (2003), in which it held:

'Unlike a Staff Association or a Staff Union, neither a JAB nor the Tribunal is a vehicle available to a staff member to be used to lobby management or to seek to persuade management to effect what the staff member would perceive to be improvements in his working conditions or the terms of his employment, unless that staff member seeks to establish that the matter of which he complains arises from the non-observance of the

terms of his appointment or that it arises from the infringement or denial of some employment right. Both the JAB and the Tribunal are parts of the justice system whose primary objective is to right employment wrongs and to provide remedies to staff members who establish that they have been wronged in relation to a condition of employment or been denied an employment right.’

In sum, it is not the Tribunal’s role to substitute its views for those of the Secretary-General or the General Assembly on how best to manage the Organization.’

22. In denying Appellant accelerated promotion, Respondent was acting under the rules applicable to a staff member on an SPA. The desirability of those rules and those governing ‘accelerated promotions’ lie beyond the mandate of the JAB. As such, that portion of Appellant’s plea is not receivable.

23. However, although the proper application of the rules governing the staff member on an SPA in this case lies beyond the JAB’s jurisdiction, a larger issue implicit in Appellant’s contentions lies very much within its competence: whether Respondent, by giving Appellant an SPA instead of a probationary P-2 appointment, subverted the original intent of the post allowance in a way that violated his terms of appointment. For the answer to be affirmative, Respondent’s application of the AI and IC in this case would have to violate some other underlying rule of administrative law.

24. Respondent argues that Appellant and external candidates were not in an equal position, and therefore cannot be accorded equal treatment: placement of external candidates is based on their qualifications, while placement of internal candidates is based on their previous category. Respondent submits that fairness requires that the professional and educational achievements of external candidates be considered upon recruitment – which in this case comes after passing the examination – in contrast with the case of internal candidates, whose qualifications were assessed at the time of their own entry into service.

25. Yet whatever differences in their professional and educational achievements prior to the exercise, the fact remains that, to be eligible to sit for the exam, Appellant was required to have the same language and educational background as the other two external candidates. Appellant was required to take the same examination as the two external candidates. Appellant and external candidates were required to undergo an interview before the Board of Examiners (and there appears to be no material difference between the type of interview given to internal and external candidates). Thus, irrespective of dissimilarities in pre-existing professional and educational achievements, both Appellant and the external candidates were expected to possess the same basic competencies, to demonstrate those competencies in an examination and an interview, and, ultimately, to perform the same P-2 functions. Indeed, [the Applicant] appears to have performed those functions as successfully as the two external P-2s, given the DGACM’s enthusiastic recommendation of the three for accelerated promotion. However, the two external candidates were given a probationary P-2 appointment, while Appellant was given a ‘trial’ SPA. This, in the Panel’s view, violates the basic principle of equal pay for equal work.

26. The Panel observes a number of material differences between the circumstances of this case and the nature and purpose of an SPA. Under Staff Rule 104.14 promotion constitutes the normal means of recognizing increased responsibilities and demonstrated ability. Rule 103.11 creates an exception to this, where an SPA is a discretionary allowance paid in exceptional cases where a staff member is called upon ‘to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months.’ This includes staff members in the General Service category temporarily placed against a higher level post in the Professional category.

27. The expectations for a probationary appointment differ fundamentally from the expectations for an SPA. An SPA, which statutorily must be discontinued eventually, is therefore

temporary in nature, such that a staff member granted an SPA has no legitimate expectations of retaining either the SPA or the post, irrespective of excellent performance. Appointment to the post is possible only if the post is advertised and he or she successfully demonstrates competencies superior to those of unsuccessful candidates in a competitive selection process. A probationary appointment *follows* a competitive examination or a selection process, and is performance driven, such that a staff member can expect such an appointment to become permanent or definite upon a satisfactory work evaluation. Here, Appellant and the two external candidates successfully demonstrated their qualifications in a competitive examination process prior to (and as a condition of) receiving the SPA. Moreover, Appellant's appointment was limited not by time but by performance.

28. In addition, a discretionary SPA is an exception to the basic condition of service outlined in Rule 103.11(a) which requires staff members 'to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts.' As such, it supplies a vehicle to satisfy the needs of the Organization. However, here Appellant was not expected to temporarily 'assume ... the duties and responsibilities of higher level post,' based on the needs of the service. He was competitively selected for a translator post.

29. However, here Respondent created a situation whereby Appellant, having been selected for a professional post, carried out the same functions as the two external professionals, but was not given the remuneration package of a professional. Although under section 9 of ST/AI/1999/17 an SPA is computed in the same manner as a promotion (and thus, in this case, would be computed as a P-2), certain elements – namely, contributions to the United Nations Joint Staff Pension Fund, termination indemnity, commutation of annual leave, payment of compensation under appendix D to the Staff Rules, life insurance premium, repatriation grant, and surviving dependants' benefits under staff rule 109.10 are nevertheless not affected by an SPA. The non-pensionable aspect of an SPA in particular is significant over the course of two years. This differential between Appellant's pay and that of others amounts to different remuneration packages. In this regard, the Panel notes that UNAT has recognized that the principle of equal pay for equal work constitutes a basic rule underlying a staff member's conditions of service. *See* Judgements No. 1113, *Janssen* (2003), para. XII and No. 1136, *Sabet and Skeldon* (2004).

30. The Panel finds that by offering Appellant a different remuneration package for performing the same functions, Respondent violated the principle of equality of treatment of staff members with identical rights and duties. Thus, although Respondent correctly posits that Appellant chose to enter the United Nations system in the General Service category, and knew that certain conditions would apply prior to promotion to the Professional category, the Panel observes that, in line with this principle, nothing in the Staff Regulations and Rules gives Appellant a reason to expect that those conditions diverge from certain basic principles of fairness implicit in his terms of appointment.

Conclusions and recommendation

31. In light of the foregoing, the Panel *unanimously concluded* that a) Appellant's pleas regarding his accelerated promotion fell outside the jurisdiction of the JAB, but b) that, by offering Appellant a different remuneration package for performing the same functions, Respondent violated the principle of equality of treatment of staff members with identical rights and duties. It therefore *unanimously recommended* that he be retroactively given the benefits of a full P-2 staff member, including pension, for the two-year trial period."

On 12 December 2006, the Acting Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that:

“[t]he Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case. The Secretary-General agrees with the JAB’s conclusion that the Respondent acted in accordance with the rules applicable to a staff member on a special post allowance when it decided not to grant your request for an accelerated promotion to the P-3 level. However, the Secretary-General does not accept the JAB’s conclusion that the Respondent, ‘by offering [you] a different remuneration package for performing the same functions’ violated ‘the principle of equality of treatment of staff members with identical rights and duties’. When you commenced your functions in the post of Spanish Translator, you were correctly given a SPA in accordance with paragraph 13 of ST/IC/2001/41 and Section 4 of ST/AI/2000/1. The payment of the SPA resulted from the fact that you were an internal candidate when you were assigned for a trial period of two years as a Spanish Translator and reflected the fact that you had a different status to those external candidates who were successful in the competitive language examination and who are governed by Section 3 of ST/AI/2000/1. The Secretary-General also notes that at the time of completing the application to take the competitive examination, you would have been fully aware of the condition governing your situation. By lodging the application, you expressed your acceptance of the conditions and therefore were not in a position to contest them subsequently. Accordingly, in light of the above, the Secretary-General regrets to inform you that he is not able to accept the JAB’s recommendation that you be retroactively given the benefits of a full P-2 staff member, including pension, for the two-year trial period.”

On 27 April 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent violated his rights in offering him a different remuneration package for performing the same functions as other staff members who were external candidates.
2. The Respondent violated the principle of equality of treatment in favoring the accelerated promotions of external candidates to the detriment of internal candidates such as the Applicant.
3. His due process rights have been further violated by the Respondent’s refusal to adhere to the principle of equality of treatment and by not promoting him to the P-3 level.

Whereas the Respondent’s principal contentions are:

1. The Respondent acted in accordance with the rules and policy applicable to internal candidates.
2. The Applicant was fully aware that as an internal candidate he was not entitled to the same remuneration package as external candidates.
3. The Applicant is not entitled to an accelerated promotion to the P-3 level.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

- I. The first issue is whether the Respondent has violated the principle of equal treatment. The Applicant’s case is that this is a “story of three staff members recruited through a competitive examination to perform the same duties. All three did exceedingly well, but only two were rewarded for their

performance; the third was not.” The Respondent’s Answer is that the Applicant was an internal candidate and, as such, was treated in accordance with paragraph 13 of ST/IC/2001/41 and section 4 of ST/AI/2000/1, which reflect the long-standing practice of the Organisation concerning the placement of internal candidates successful in competitive language examinations. The other two members of staff were external candidates, also successful in a competitive examination, who are normally recruited on a probationary appointment at the P-2 level in accordance with section 3 of ST/AI/2000/1.

II. The principle of equality of treatment is fundamental to the Organisation, and the Tribunal has recognized that the principle of equal pay for equal work constitutes a basic rule underlying a staff member’s conditions of service. (See Judgement No. 1113, *Janssen* (2003); Judgement No. 1136, *Sabet and Sheldon* (2003)). However, the Tribunal has frequently stated that “the principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike”. (See Judgement No. 268, *Mendez* (1981); Judgement No. 1221, *Sharma* (2004); and Judgement No. 1375 (2008)).

III. The Tribunal notes the JAB’s finding that giving the successful internal candidate a “trial” SPA, while giving the two successful external candidates a probationary P-2 appointment “violates the basic principle of equal pay for equal work.” Although under section 9 of ST/AI/1999/17 an SPA is computed in the same manner as a promotion (which, in this case would be computed as a P-2) certain elements – namely contributions to the United Nations Joint Staff Pension Fund, termination indemnity, commutation of annual leave, payment of compensation under Appendix D to the Staff Rules, life insurance premium, repatriation grant and surviving dependent’s benefits - are not affected by an SPA.

IV. However, there can be no doubt that the Respondent correctly applied the rules established in the various administrative instructions to the Applicant, who was an internal candidate. Nor has it been contested that the internal and external candidates were given “like work”. The question, however is whether the situation of the internal and external candidates was comparable. The Tribunal is satisfied that there were material differences in their circumstances. The rule and practice of granting an SPA to the P-2 level to staff members below P-2 level who are successful in competitive language examinations, and to block their previous posts during the “trial period”, was established in order to guarantee continuity of their employment with the Organisation, should they not successfully complete the trial period. In contrast, no such right exists for an external candidate who is successful in the competitive examination, but fails his or her probationary period. The latter “shall be separated from service” (section 3.4 of ST/AI/2000/1). This is a material circumstance which distinguishes internal and external candidates. Accordingly, the Tribunal cannot uphold the JAB’s finding that there was a violation of the principle of equal treatment and finds that the Respondent did not err in rejecting the JAB’s recommendation in this respect.

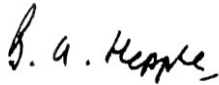
V. The second issue is whether the Applicant should have been granted an accelerated promotion to the P-3 level after completing one year of the trial period. To the extent that the Applicant claims that it was a violation of the principle of equal treatment in that the external candidates were granted accelerated promotion to the P-3 level after completing one year, and the Applicant was denied accelerated promotion, the Tribunal has already determined that the “equal pay” principle was not applicable because the external and internal candidates were not similarly situated. The Respondent correctly applied the rules. As the JAB stated: “the desirability of those rules and those governing ‘accelerated promotions’ lie beyond the mandate of the JAB.” The Tribunal has consistently held that its function is to ensure that there has been observance of the terms of the employment contract (Judgement No. 1231 (2005)), and not to substitute its views for those of the Secretary-General and the General Assembly as to the content of those rules or the policy of the Organisation (Judgement No. 1145 (2005)). Accordingly, the Respondent’s decision not to grant accelerated promotion to the Applicant to the P-3 level after completion of one year of the two-year trial period did not violate the Applicant’s rights.

VI. Accordingly, the Tribunal rejects the Application in its entirety.

(Signatures)



Spyridon **Flogaitis**
President



Bob **Hepple**
Member



Agustín **Gordillo**
Member

Geneva, 31 July 2009



Tamara **Shockley**
Executive Secretary