



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1460

Case No. 1543

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 16 July 2007, a staff member of the United Nations, filed an Application in which he requested the Tribunal, inter alia:

“PLEAS

...

11. ... [To] find:

(a) that the Administration failed to carry out proper procedures, in that the [A]pplicant was misled, the findings were not transparent and did not give full consideration of promotion considering the exceptional circumstances; [that the] [l]ack of due consideration in awarding promotion violated the Applicant’s rights ... concerning his eligibility for the post and subsequent promotion at the post level;

(b) that the [A]pplicant was appointed through competitive recruitment and honored his commitment in performing to the level of the post without formal recognition by the [A]dministration;

(c) that the [A]pplicant was recognized by mission senior management as the right person for the job and proved his technical and management skills by performance;

(d) that the [A]pplicant’s rights were violated;

(e) that the [A]pplicant suffered trauma, mental and physical stress by being held to the belief that he would be promoted but instead his career was halted;

(f) that the [A]pplicant is entitled to the P4 level by way of acceptance for the post, performance and subsequent career advancement.”

[The Applicant further requests the Tribunal to find that a couple of statements in the JAB [Joint Appeals Board] Report No. 1867, Case No. 2005-052 (Annex 55) are incorrect: In particular, the Applicant challenges the JAB’s statement that “the [Applicant] received the SPA [Special Post Allowance] to [the] FS-6 level through 2 September 2005, when he was moved to UNIFIL” (JAB Report, footnote 3); as well as that PMSS advised him to file an appeal (JAB Report, para. 64).]

The Applicant requests the Administrative Tribunal to order:

“12. [...]

(a) that the [A]pplicant be promoted to the P4 level retroactive to EOD date in MONUC of 20 April 2003, by exceptional circumstances;

(b) that the applicant be awarded compensation equivalent to appropriate salary and allowance of the P4 level retroactive to EOD date in MONUC of 20 April 2003 in accordance with applicable salary and allowance scales; and

(c) that the applicant be awarded compensation for mental anguish, stress, anxiety and suffering.”

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 24 January 2008;

Whereas the Respondent filed his Answer on 15 January 2008;

Whereas the Applicant filed Written Observations on 5 May 2008;

Whereas the Respondent filed Comments on the Applicant’s Written Observations on 23 July 2008;

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 in January 1993 as Flight Operations Officer with the UNTAC [United Nations Transitional Authority in Cambodia] on a 12-month special service agreement. His initial contract was then followed by a series of fixed-term appointments with various UN peace-keeping missions, such as UNOMIL [United Nations Observer Mission in Liberia], UNAMIR [United Nations Assistance Mission for Rwanda], and UNMIBH [United Nations Observer Mission in Liberia].

... In the material time, the [Applicant] was serving as Air Operations Officer at the FS-5/III level with the UNOMIG [United Nations Observer Mission in Georgia] and was receiving a special post allowance to the FS-6 level.

Summary of the relevant facts

... Sometime in October-early November 2002, the Department of Peacekeeping Operations (DPKO) advertised the post of Chief, Movement Control (P-4), MONUC [*Mission de l'Organisation des Nations Unies en RD Congo*], with 22 November 2002 as the deadline for applications. The Applicant applied for this vacancy announcement on 22 November 2002 emphasizing inter alia that he was at that time 'a mission appointee 100 series, FS 5 level, on SPA to FS 6 since January 2002 as Air Operations Officer with the [UNOMIG]'.

... On 30 January 2003, DPKO informed UNOMIG that the [Applicant], subject to medical clearance, was 'being reassigned to MONUC as Chief of Movement Control'. The fax made no reference to the above mentioned vacancy announcement and the [Applicant]'s application for it. In the fax UNOMIG was requested to advise whether there was any reason to believe that DPKO's choice of the [Applicant] was inappropriate because of misconduct or unsatisfactory performance. DPKO informed UNOMIG further that [the] 'offer of appointment for MONUC [was to] follow under separate cover' and that they should arrange the [Applicant]'s completion of appointment with UNOMIG and one-way travel to Kinshasa. On 3 February 2003, UNOMIG replied that they did not have any objections to the reassignment of the [Applicant] to MONUC and would communicate the [Applicant]'s release date as soon as a replacement had been identified.

... On 16 April 2003, DPKO advised MONUC that the [Applicant] was undergoing briefing at Headquarters, was scheduled to depart for MONUC on 19 April 2003 but was reluctant to do so 'until he [was] assured that he has a contract at the appropriate level – P-4'. DPKO further advised that 'the holdup [was] with OHRM [Office of Human Resources Management]'.

... On 20 April 2003, the [Applicant] traveled to MONUC but prior to his departure he had a meeting with the then Chief, Human Resources Planning and Development Section, PMSS/DPKO, at which they discussed inter alia the [Applicant]'s appointment to MONUC and the level of the post. The [Applicant] was advised that his case was under consideration by OHRM, that in the meantime he should travel to MONUC and that 'in the event that exceptional approval were granted for his movement to the professional category, this would operate retroactively from the date of his entry upon duty'.

... Soon after his arrival to MONUC, the [Applicant] received a letter dated 6 May 2003 offering him a fixed-term appointment of 2 months and 19 days as Chief, Movement Control, at the FS-5/III level.

... On 4 June 2003, the [Applicant] submitted to the MONUC Chief Civilian Personnel Officer a statement, where he inter alia declined to sign his letter of appointment with MONUC on the grounds that it did 'not reflect any change in level from [his] previous post in UNOMIG'.

... Following an advice of the MONUC Chief Civilian Personnel Officer, on 7 July 2003 the [Applicant] signed the offer of appointment so as to protect his legal interests with the Organization.

... On 8 July 2003, the MONUC Chief Civilian Personnel Officer informed the [Applicant] that OHRM did not endorse his request for conversion to the P-4 level, that PMSS was in the process of contesting the OHRM's decision and would keep the MONUC informed of the outcome.

... On 22 September 2003, the [Applicant] reportedly wrote to the MONUC Director of Administration about his concerns related to his appointment with MONUC.

... On 9 October 2003, the Chief Civilian Personnel Officer of the MONUC acknowledged the [Applicant]'s concerns about the offer of appointment and his conversion to the P-4 level and advised him that his concerns were 'being addressed with PMSS' and a follow up fax was sent in

that regard. Under cover of the same memorandum, the CCPO also provided to the [Applicant] his new letter of appointment for the period 1 August 2003 to 31 July 2004 still at the FS-5 level, which the [Applicant] refused to sign until the question of his grade was resolved.

... On 1 May 2004, the [Applicant] had a meeting with the Chief and another official of the MONUC Personnel Section, at which he signed his letter of appointment. However, on 7 May 2004, the [Applicant] informed the Chief Civilian Personnel Officer that he signed his letter of appointment with reservations and only for specific legal and insurance reasons.

... On 9 August 2004, the PMSS reportedly informed the MONUC Administration that 'OHRM could not support the movement of staff member from the non-professional to the professional category, other than through the G to P examination and/or for staff at the FS-6 level or higher, who [were] eligible for consideration to professional posts'.

... On 30 September 2004, the [Applicant] complained to the Director of Administration, MONUC, about 'the lack of resolution of [his] grade/level in [his] appointment as Chief Movement Control Officer' emphasizing that he was 'competitively selected for [the] P-4 post' and expressing understanding that 'OHRM [did] not support [his] advancement to that level'. Despite his serious misgivings about the manner in which the matter had been managed and in order to resolve the 'apparent stalemate', the [Applicant] expressed willingness 'to forego his pursuit of P4 promotion at [the] time, in favour of ... [(i)] substantive FS6 level backdated to 20 April 2003, [his] EOD to MONUC [and (ii)] SPA to FS7 backdated to 20 July 2003, i.e. three months after [his] EOD [to MONUC]'.

... On 14 March 2005, the MONUC Personnel Section informed the [Applicant], with reference to his memorandum of 30 September 2004, that 'following consideration by PMSS and OHRM, [the Applicant's] proposal [to forego pursuit of movement to the higher P-4 level in favour of accepting a retroactive grade level of FS-6, backdated to his arrival at MONUC, 20 April 2003] ha[d] not been approved [and] [...] that [his] case w[ould] be considered in the broader context of all such outstanding cases'.

... On 25 March 2005, the [Applicant] wrote to the Secretary-General seeking 'assistance for the expedited review of [his] case'. This communication was received by the Respondent only on 20 April 2005.

... On 12 August 2005, the [Applicant] forwarded his statement of appeal dated 15 July 2005 to the Coordinator of the New York Panel of Counsel requesting it to be submitted to the [JAB] and explaining the delay in the submission by exigencies of service. The [Applicant]'s request was subsequently corroborated by a statement dated 15 August 2005 from the OIC [Officer-in-Charge] of the MONUC Administration.

... On 24 August 2005, the [Applicant]'s statement of appeal was received by the New York [JAB]."

On 22 March 2007, the JAB submitted its report to the Secretary-General. Its considerations, conclusions, and recommendations read, in part, as follows:

“Considerations

49. The Panel noted that the parties were in disagreement and there was some confusion about the decision in question and about when and how the Appellant was notified about it. Accordingly, the Panel decided to review the subject-matter of the appeal and the *terminus a quo* closely.

50. As for the Appellant, the Panel noted the following key contentions on the matter: (i) the decision at hand was *'non-approval of [his] promotion to P4 level on appointment as Chief Movement Control Officer MONUC through competitive recruitment'*; (ii) the Appellant was informed about the decision in question by a memorandum from the OIC, Personnel Section/MONUC dated 14 March 2005; (iii) when the Appellant received his letter of appointment (on 6 May 2003) *'case was under review with OHRM [and] no decision had been taken'*; (iv) when the Appellant was notified that OHRM rejected his request (on 8 July 2003 (23 August 2003)) *'the case was being contested by PMSS so [was] therefore still ongoing'*; and (v) the 14 March 2005 memorandum was *'the only decision on which [the Appellant] could instigate an appeal'*.

51. As for the Respondent, the Panel considered the following key contentions: (i) the decision at hand was *'the decision to reassign [the Appellant] to the vacant post of Chief Movement Control Officer, MONUC, at the FS-5 level'*; (ii) *'the Appellant initially received notice of the administrative decision ... in the letter of appointment dated 6 May 2003'*; (iii) the Appellant received further confirmation of the decision in the letter of 8 July 2003; (iv) *'neither the Appellant's ongoing discussions with PMSDS and OHRM, nor the settlement proposals made ... in the letter dated 30 September 2004 [could] serve to revive for appeal purposes the original decision'*; (v) *'memorandum of 14 March 2005 [did] not constitute a new administrative decision ... but rather a reiteration of the prior decision concerning the Appellant's grade'*.

52. The Panel examined the documents on file and first of all the memorandum of 14 March 2005. The Panel found that this memorandum was of no relevance to the decision not to appoint the Appellant at the P-4 level. Rather, it was the Respondent's reply to the Appellant's *'proposal'* to be granted a *'substantive FS6 level backdated to 20 April 2003, [his] EOD to MONUC [and] SPA to FS7 level backdated to 20 July 2003, i.e. three months after [his] EOD [to MONUC]'*. In the Panel's opinion, the fact that the Appellant made his proposal in order to solve the *'apparent stalemate'* with regard to the decision to appoint him at the FS-5 level did not make the Respondent's reply to the proposal relevant to the original decision. In addition, the Panel found that the Respondent's reply to the proposal was open-ended insofar as it was followed by an advice that the Appellant's case would be *'considered [by PMSS] in the broader context of all such outstanding cases'*. Accordingly, there was no decision to be challenged.

53. The Panel then examined the memorandum of 8 July 2003 from the CCPO to the Appellant, by which the Appellant was informed that *'OHRM did not endorse [his] request for the conversion of [his] grade to the P-4 level'* and that *'PMSS [was] in the process of contesting the decision of OHRM...'* While the language of the CCPO's memo was somewhat ambiguous, the Panel agreed with the Respondent that it contained no new administrative decision on the Appellant's appointment level with MONUC. At best, it was confirmation of the original decision.

54. Thus, the Panel determined that the letter of appointment forwarded to the Appellant on 6 May 2003 was indeed the very first official notification to the Appellant about his appointment level with MONUC. Accordingly, the Panel agreed that the *terminus a quo* in the present case should be 6 May 2003, i.e. the date when the Appellant received the said letter of appointment. In this connection, the Panel dismissed the Appellant's contention that [...] no [...] decision [had been] taken on 6 May 2003 and on 8 July 2003 because [at both dates] the matter was still under review [by] OHRM.

55. The Panel did not agree with the Appellant's logic. First of all, a review of a decision in general requires that the decision must have already been taken at some point. Secondly, in the case of the Appellant, it would seem that the decision to appoint him at the FS-5 level could have been taken one way or another even before he reported to MONUC. It would also appear that the Appellant was somehow informed about it. [The Panel sees no reason] why else [the Applicant would have] requested the matter to be reviewed and why else he was demonstrating strong reluctance to travel to MONUC without the issue being resolved and later equally strong resistance to sign the letter of appointment showing his level as FS-5.

56. Having determined the decision in question and the terminus a quo, the Panel therefore reviewed the circumstances and the Appellant's explanations to that effect, which prevented him from initiating the appeal proceedings against the contested decision within the established time limits.

57. More specifically, the Panel reviewed the following of the Appellant's key contentions on the circumstances and the reasons of a delay: (i) the Appellant '*was led to believe by PMSS and mission staff that the case would be resolved in a positive manner*'; (ii) the Appellant '*was not kept fully apprised of the progress of his case*'; (iii) '*the actions taken by MONUC Personnel Section, PMSS and OHRM were not transparent and he was not informed or shown all related correspondence in a timely fashion*'; (iv) the Appellant '*took the initiative to reach an amicable settlement...*'; (v) '*the staff rules make provision for late submissions should exceptional circumstances exist*'; (vi) '*extenuating circumstances did exist and were duly supported by the high level management of MONUC ... MONUC [was] a very difficult, stressful and demanding peacekeeping mission... The Appellant was required to respond to the situation of the mission in a very volatile and ever-changing environment, which he did effectively and with dedication... The Appellant ... should not be penalized for commitment to his duties in peacekeeping operations and loyalty to the United Nations Organization... His case [should] be considered receivable on the grounds of exceptional circumstances*'; (vii) '*[Director of Administration, MONUC] advised the Appellant to Appeal on the grounds of ... memorandum of 14 March 2005 as all avenues to the mission and PMSS had been exhausted. Until this time the Appellant was under the impression that his case was still under review by OHRM*'.

58. The Panel reviewed the issue in light of the available jurisprudence of the United Nations Administrative Tribunal on the time limits and '*exceptional circumstances*' in the appeal proceedings.

59. The Panel noted, in particular, a principle re-iterated by the Tribunal in judgment No. 961 Salma (2000) that when an Applicant failed to submit his appeal within the specified time limits, the only way to proceed with the review of the merits of such an appeal would be for a JAB Panel to waive these time limits and the only way the JAB Panel could do so would be by finding that there were exceptional circumstances.

60. The Panel noted further that as per judgment No. 372 Kayigamba (1986), '*the factors that the [JAB] might consider relevant in determining the existence or absence of 'exceptional circumstances' are circumscribed [and it was] only circumstances beyond the control of the appellant [that might] be deemed to constitute 'exceptional circumstances' and warrant a waiver of the prescribed time-limits...*'.

61. The Panel also noted that '*once it [was] clear that a decision [was] made, the time for initiating the appeals process beg[an] to run and [neither] further correspondence on the issue [nor] the Administration's response to the renewed request [nor even] the negotiations between the parties ... would normally [emphasis added] stop [the time limits] from running [or] would restart the counting of time [or] would ... necessarily suspend the time limits for initiating the formal proceedings*' (judgments No. 1054 Obuyu (2002) and No. 1211 Muigai (2004)).

62. In the present case, the Panel agreed that the '*extenuating circumstances*' referred to by the Appellant were in principle relevant and sufficient in explaining a relatively small delay (less than a month) in the submission of the Appellant's statement of appeal against the administrative decision notified to him by a memorandum of 14 March 2005. However, as it was determined by the Panel, the Respondent's memorandum of 14 March 2005 and therefore the Appellant's recourse against it were not relevant to the decision in question, i.e. to the original decision to appoint him at FS-5 level.

63. With regard to the circumstances, which *'prevented'* the Appellant from availing himself in due time of the appeal proceedings against the decision in question, the Panel did not find anything beyond the Appellant's control except for the explicit and consistent support, which PMSS/DPKO provided to the Appellant throughout the whole story.

64. In this regard, the Panel noted that it was the PMSS who *'persuaded'* the Appellant in the first place to apply for the post in question and convinced him that he was eligible to do so. It was also the PMSS who *'by mistake'* accepted the Appellant's application for the vacancy announcement in question and, after the mistake was *'discovered'*, did everything possible and impossible to relocate the Appellant to MONUC as *'reassignment'*, giving him in the meantime assurances that his case would be positively reviewed and he should have no worries to that effect. It was again the PMSS who on behalf of the Appellant and probably in their own interests as well decided to contest the OHRM's decision of 8 July 2003 to reject the Appellant's request for conversion to the P-4 level and then advised the Appellant to file an appeal, when it exhausted all available to it venues for recourse.

65. In fact, the Panel was surprised and concerned about such an explicit nature and extent of the PMSS' efforts to have the post filled with the Appellant and to get him promoted to the P-4 level. In the Panel's experience, it was quite unusual and by itself constituted a very exceptional thing. Of a bigger concern for the Panel was, however, a strong feeling that the PMSS' implicit and explicit support of the Appellant's claims was tantamount to the circumvention of the selection process. The *'mistake'*, which triggered the whole confusion and conflict, could well have been intentional. Once it was *'discovered'* and the selection process got stuck, the PMSS found a *'work-around'* and requested the release of the Appellant for the post in question on the basis of reassignment, hoping, probably, to sort out the issue of his appointment level afterwards using his actual performance of the duties as an additional argument. In this regard, the Panel recalled that the reassignment fax, which was sent to UNOMIG requesting the Appellant's release, made no reference to the Appellant's application for the post of Chief Movement Control Officer in MONUC and to the outcome of the related selection process. At the same time other correspondence available in the dossier confirms that the Appellant's reassignment to MONUC was indeed the direct result of his application and selection for the post in question. Accordingly, the Panel found that the actions of the PMSS were not transparent, were illegitimate and as such seriously tainted the selection process and the selection decision.

66. In view of the above findings and with reference to the UNAT's *'circumscribed'* definition of the exceptional circumstances, the Panel agreed that in the present case the *'negotiations'*, which were conducted between PMSS and OHRM on the Appellant's case, amounted to such exceptional circumstances, which were beyond the Appellant's control and which would warrant, in principle, a waiver of the established time limits.

67. With regard to the merits of the case, the Panel decided that the parties' contentions on the Appellant's eligibility for P-4 level were moot because the selection process, which led to the Appellant's relocation to MONUC and his placement on the post of Chief Movement Control Officer was seriously tainted by administrative mistakes and by non-transparent actions of the PMSS. The Panel dismissed therefore the Respondent's contention that no Appellant's rights were violated and that there were no grounds to seek relief. To the contrary, the tainted selection decision and process affected the rights of the applicants, including those of the Appellant, for a full and fair consideration. Under normal circumstances, the respondent would have been expected to cancel the vacancy announcement in its entirety and to start the selection process all over again. This is, of course, not possible in the present case.

68. Accordingly, the Panel agreed that the Appellant deserved compensation for the violation of his rights.

Conclusions

69. The Panel concluded that the decision in question was the Respondent's decision to appoint the Appellant to MONUC at his personal level (FS-5).

70. The Panel also concluded that the Appellant was notified about the decision in question on 6 May 2003 and therefore his recourse against it dated 25 March 2005 was in principle time-barred.

71. The Panel found that the explicit and implicit support, provided to the Appellant by PMSS in and throughout his dispute with OHRM over the decision in question, including but not limited to, formal litigation against the decision at hand on behalf of the Appellant, constituted an '*exceptional circumstance*' for the purposes of waiving the established time limits. The Panel therefore agreed to waive the established time limits and found the appeal receivable.

72. On the merits, the Panel found that the selection process and the corresponding selection decision, which led to the Appellant's relocation to MONUC and his placement on the post in question at his personal level, were seriously tainted by the occurred administrative mistakes and by non-transparent actions of the PMSS.

73. The Panel found further that the tainted selection process resulted in violation of the Applicant's rights for a full and fair consideration of his application. Taking into account the seriousness of the violation and the fact that the violations were committed by the very same officials who were supposed to ensure strict compliance of the process with the existing rules and regulations, the Panel agreed that the Appellant deserved financial compensation for the violation of his rights. Also, the Respondent may wish to consider recovering this money from the emoluments of the responsible officials.

Recommendations

74. The Panel recommended that the Appellant be paid financial compensation for violation of his rights in the amount of 3 (three) months net base salary.

75. The Panel recommended further that the amount of compensation to be awarded to the Appellant be recovered from the emoluments of the responsible administrative officials.

76. The Panel made no other recommendations with regard to this appeal."

On 22 August 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

"The Secretary-General, having read the report in the light of the specific circumstances of the case, has decided to accept the recommendation of the JAB that you be awarded an amount equivalent to three months net base salary for the violation of your rights. The Secretary-General does not agree that the administrative errors committed in the context of your case, amount to gross negligence or otherwise warrant the exercise of his discretionary authority under the Staff Rule 112.3. He has therefore decided to reject the recommendation that said amount be recovered from the emoluments of the responsible administrative officials."

On 16 July 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent has not properly observed due process and has failed to fully observe and apply the pertinent UN Staff Regulations and Rules, Procedures and Administrative Instructions, and the Respondent's Personnel Policy Guidelines and Procedures, as a result of which certain of its administrative actions and decisions are tainted and defective.
2. The Applicant's rights were violated.
3. The Applicant has not been fully and fairly compensated.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has accepted the JAB's findings, and therefore the only issue at stake is that of the adequacy of compensation.
2. The Applicant has been fully and fairly compensated for the violation of his due process rights. His request for additional compensation is excessive and should be denied.

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

I. The Applicant contests the decision by the Respondent (a) not to promote him to the P-4 level; and (b) not to award him adequate compensation although he accepted the findings of the JAB that he had not been treated fairly by the Respondent and that his rights had been violated. Therefore, he requests the Tribunal to order that he be promoted to the P-4 level retroactive to EOD date in MONUC of 20 April 2003, by exceptional circumstances. He further requests the Tribunal to award him retroactively compensation equivalent to the appropriate salary and allowances of the P-4 level and also compensation for mental anguish, stress, anxiety, and suffering.

II. The Applicant alleges that he did not receive full and fair consideration on the issue of promotion to a P-4 position. Specifically, he claims that he was misled into believing that his case would be resolved in a positive manner; that when he received his appointment to MONUC he was under the assumption that he would receive the offer at the P-4 level, which was the advertised level of the post. However, instead of being promoted, after more than two years, he was finally advised that he could not be granted the level of his MONUC post.

III. The Tribunal has reviewed the Applicant's arguments and confirms the decision of the JAB and of the Secretary-General that the Applicant's due process rights were violated. However, the Tribunal finds that despite the fact that the Applicant was not granted the contested position, the Tribunal cannot order his retroactive promotion to the P-4 level, because the Applicant is not entitled to this position according to the United Nations Regulations. Specifically, promotion from FS-5 to the Professional category can be

obtained solely by competitive examination, pursuant to General Assembly resolution 33/143 of 20 December 1978, and Administrative Instruction ST/AI/279, now ST/AI/360/Rev. 1/Corr. 1 of 8 December 1993. The latter provides that the competitive examination for promotion is open to any Field Service staff member at a level up to and including FS-5. It provides further, at Section 4, that successful candidates shall be recommended for promotion only to the P-2 level.

IV. The Tribunal has previously held in Judgement No. 1303 (2006):

“What was being referred to by the Chief, Staffing Support Section, as precluding her from short-listing the Applicant were a number of General Assembly resolutions, principal amongst them being Section 1, paragraph 1 (g) of General Assembly resolution 33/143, entitled ‘Personnel questions’, of 20 December 1978, which provides that:

‘[m]ovement of staff from the General Service category to the Professional category should be limited to the P-1 and P-2 levels and be permitted up to 30 per cent of the total posts available for appointment at those levels and such recruitment should be conducted exclusively through competitive methods of selection from General Service staff with at least five years’ experience and post secondary educational qualifications,’

and General Assembly resolution 35/210, also entitled ‘Personnel questions’, of 17 December 1980, which, inter alia, provides that ‘movement of staff from the General Service category ... is to be regulated exclusively through competitive examination ... *No exception shall be authorised.*’” (Emphasis added).

The Tribunal finds that even if the Applicant had been successful in the competitive examination, he could only have been promoted to the P-2 level, and not to the P-4 level he sought.

V. Nevertheless, the Respondent has acknowledged that the Applicant’s “name should not have been included in the shortlist of eligible candidates for the P-4 post as he was still at the FS-5 level at the time he applied for this position in view of the prohibition for a movement from FS-5 to the Professional category without a break in service” or success in the G to P examination. Moreover, the Respondent has admitted errors in the post selection and placement process, as well as lack of transparency in the PMSS’s efforts to promote the Applicant on an exceptional basis. The Respondent however submits that the Applicant has been appropriately compensated. Furthermore, the Tribunal accepts the Respondent’s argument that the Applicant should have known that the promotion he was requesting was prohibited and thus he should not have relied on being promoted from the FS-5 level to the P-4 level. On the other hand, the Tribunal is not satisfied with the fact that the Administration was creating the expectation that the Applicant be promoted to the P-4 level on an exceptional basis. In this regard, the Tribunal has previously held:

“It is the Tribunal’s view that procedures, especially in matters where the Organization’s employees’ career and personal work satisfaction are involved, must be thoroughly respected in order to avoid injury - substantive or moral - to its staff members.” (See Judgement No.1230 (2005), referring to Judgement No. 1156, *Fedorchenko* (2003)).

In the instant case, the Tribunal finds that the Applicant’s procedural rights were violated.

VI. With regard to the compensation and its adequacy, the Tribunal has repeatedly held that the compensation should be proportionate to the harm. The Tribunal finds that the Applicant is entitled to compensation for the irregularities caused during his selection process and the expectancy created due to the Administration's promise to promote him to the P-4 level.

In Judgement No. 879, *Karmel* (1998), the Tribunal made the following finding:

“The Applicant should be compensated for the anguish of not knowing whether she was going to be separated from the Organization; the humiliation of not receiving any permanent post for which she applied; and the stress to which she was subjected by the conduct of the Administration.”

Although the Applicant should have known that his promotion was not in accordance with the United Nations Regulations and thus, his promotion would be invalid, the Tribunal recognizes the harm

“inflicted on the Applicant arising from the confusion created by the terms of his employment and the error made by the Administration as to when the contract, as per the terms of the original offer of appointment, expired”. (See Judgement No. 1102, *Hijaz* (2003)).

Therefore, the Tribunal is of the opinion that the Applicant should be awarded compensation for the defects in the promotion process by the Administration and the mental stress he suffered. The Tribunal is equally of the opinion that the three months' pay awarded by the Secretary-General as compensation to the Applicant was sufficient.

VII. The Tribunal further recalls that an important element to take into consideration for awarding compensation is the causal link between the Applicant's damage and the fact that provoked it. In the case at hand, the Tribunal finds that there is no causal link between the fact that the Applicant occupied a position classified at the P-4 level although he was FS-5, with the alleged harm to his career and to his salary, which was not equivalent to appropriate salary and allowance at the P-4 level. To the contrary, the Applicant was given an opportunity to show that he could perform very well, at a higher level, and was promoted immediately upon assumption of his next post with UNIFIL, on 9 September 2005.

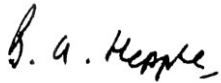
VIII. The Tribunal finds that the Applicant suffered no financial loss during the period under review since he was not entitled to get a P-4 position through the regular process and had he been promoted, his promotion would have been null and void.

IX. In view of the foregoing, 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