



ADMINISTRATIVE TRIBUNAL

Judgement No. 1482

Case No. 1542

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, President; Mr. Goh Joon Seng, Second Vice-
President; Ms. Jacqueline R. Scott,

Whereas, on 31 July 2007, a staff member of the United Nations, filed an Application containing
pleas which read, in part, as follows:

“II. PLEAS

10. ...*[T]o find:*

(b) that the present [A]pplication is receivable under Article 7 of its Statute.

....”

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, and once thereafter until 25
February;

Whereas the Respondent filed his Answer on 19 February 2008;

Whereas the Applicant filed Written Observations on 30 April 2008;

Whereas, on 31 July 2009, the Tribunal declared the Application receivable and decided to
postpone consideration of the merits of this case until its next session;

Whereas on 2 September 2009, the Respondent filed his Answer on the merits;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“Employment History

... The [Applicant] entered the service of the United Nations Conference on Trade and Development (UNCTAD) on 9 December 2001 in Geneva, Switzerland. She was granted a fixed-term appointment as a Legal Officer (level P-4, step 1).

... On 9 December 2003, [the Applicant’s] fixed-term appointment was extended for two more years and her step was raised to III.

... On 9 December 2005, the [Applicant] was promoted to the P-5 level, step I. Her functional title changed to Chief of Legal Section.

Summary of Facts

... In March 2001, the [Applicant] applied for a fixed-term position as Legal Officer, P-4, in the Trade Logistics Branch at UNCTAD. By letter dated 31 August 2001, ... Human Resources ..., HRMS [Human Resources Management Services], UNOG [United Nations Office in Geneva] advised the [Applicant] that she had been selected for the above-mentioned position.

... By e-mail dated 8 October 2001, the [Applicant] contacted ... Human Resources ..., HRMS, UNOG, asking [them] to reconsider the step at which she was appointed. [The Applicant] wondered whether the fact that ‘[she has] 11, not 10 years relevant professional experience and hold[s] several qualifications not mentioned in the vacancy announcement had been sufficiently taken into account’.

... By e-mail dated 10 October 2001, ... Human Resources ..., HRMS, UNOG, asked [the Applicant] to clarify when she exactly obtained her LLM (Masters of Law) and to provide ... a copy of the LLM diploma. Furthermore, [the Applicant was] informed ... that ‘our calculation considers only the number of years of relevant none-repetitive and progressive experience’ and that ‘giving full credit to your background and qualifications (10 years and 1 month after the LLM), [the Applicant is] eligible to be put, as per the UN standard, at level P-4/1 of the salary scale.’

... By letter dated 11 October 2001, the [Applicant] reiterated that she was convinced that her relevant professional experience and qualifications exceeded the requirements set out in the vacancy announcement for the position she was offered and that therefore, she should be appointed at a higher step of the P-4 scale than the first step.

... By e-mail dated 16 October 2001, ... Human Resources ..., HRMS, UNOG, further explained the way steps are calculated in the UN and reconfirmed that the level/step i.e. P-4, step 1 offered to the [Applicant] would remain unchanged.

... On 22 January 2002, the [Applicant] signed the letter of appointment accepting the appointment at step 1, grade P-4.

... On 19 October 2004, the [Applicant] requested the Assistant Secretary General, Office of Human Resources Management to review the decision to appoint her at step 1 of the P-4 grade. On 29 October 2004, the Chief, Administrative Law Unit, New York acknowledged receipt of the [Applicant’s] letter.

... On 14 December 2004, a Human Resources Officer, UNOG, contacted the [Applicant] asking her to submit a P 11 form, as well as copies of her academic degree in order to proceed with the request expeditiously.

... On 18 January 2005, the [Applicant] contacted a Human Resources Officer, enquiring whether she would soon receive a response.

....”

On 28 January 2005, the Applicant lodged with the JAB. The JAB adopted its report on 21 December 2006. Its considerations and recommendation read, in part, as follows:

“Considerations

21. Concerning admissibility *ratione materiae*, the Panel confirmed that the Appellant did indeed contest an administrative decision under the terms of Staff Regulation 11.1, namely the decision to ‘appoint [her] at step 1 at the P 4 grade’ upon initial appointment.

22. Concerning admissibility *ratione temporis*, the Panel took note of the Respondent’s contention that the appeal was time-barred and recalled Staff Rule 111.2 (a) which at the time read...:

‘A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; *such letter must be sent within two months from the date the staff member received notification of the decision in writing*’. (emphasis added)

23. The Panel found that the date of the administrative decision was ... 22 January 2002 when the Appellant signed her letter of Appointment. Considering the two-month time limit, the Appellant had until 22 March 2002 to write to the Secretary-General requesting administrative review of the decision. The Panel noted that the Appellant’s letter to the Secretary-General was dated 19 October 2004 and therefore almost two years and nine months later. The Panel stressed that the Appellant had not met the time limit stipulated in Staff Rule 111.2 (a).

24. The Panel then proceeded to verify whether exceptional circumstances existed motivating a waiver from the statutory time limit. It recalled that according to Staff Rule 111.2 (f)

‘An appeal should not be receivable unless the time limits specified in paragraph a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal’.

and that Art. 13 of the Rules of Procedure of the Geneva Joint Appeals Board stated that

‘When the question of receivability has been raised, the Panel constituted to consider the appeal shall rule first on this preliminary issue. The Panel may request statements, supporting evidence and comments relating to this issue and shall decide, on the basis thereof, if exceptional circumstances justify a waiver of the time-limits under Staff Rule 111.2(f), bearing in mind that the onus of proving exceptional circumstances lies with the Appellant’.

25. It noted that the Appellant argued that at the time she did not have access or knowledge of the existence of any written guidelines to determine the step. According to her, she only learned about the ‘Guidelines for Determination of Level and Step of Recruitment to the Professional

Category and above' when they were posted on the UNCTAD Intranet on 30 September 2004 and that it was only then that she realised that guidelines must have existed when she was initially appointed.

26. In view of this argumentation, the Panel examined whether the contention that she neither knew nor had access to the guidelines in force at that time could be considered as exceptional circumstances. It recalled that UNAT [United Nations Administrative Tribunal], had constantly held that 'only circumstances beyond the control of the Appellant, which prevented the staff member from submitting a request for review and filing an appeal in time, may be deemed to constitute exceptional circumstances' (Judgments No. 372, *Kayigamba*, 1986, No. 913, *Midaya* 1999, No. 1106 *Iqbal* 2003) and that this definition was applied strictly. Furthermore, it stressed that in UNAT judgment No. 1213 *Wyss*, the Tribunal insisted on the importance of procedural rules being respected as they were of utmost importance for ensuring the well functioning of the Organization.

27. The Panel noted that the Appellant's exchange of e-mails and letters with the Human Resources Officer prior to appointment shows that she understood that the UN operates according to set criteria in classifying qualification and experience and had requested that consideration be given to revising her step for her appointment level. Thus, following her appointment, in the Panel's view, there were no circumstances beyond the control of the Appellant which prevented her from requesting review within the time limits. She could have contacted Human Resources anytime after entry on duty to inquire on which basis the decision to appoint her at step 1 had been taken. Therefore, the Panel deemed the appeal to be inadmissible *ratione temporis*.

28. Finally[,] the Panel remarked that according to Staff Rule 103.15

'A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made written claim: In the case of the cancellation (...); in every other case, within one year following the date on which the staff member would have been entitled to the initial payment.'

29. It pointed out that this provision was applicable to the Appellant's case and that it would have allowed the Appellant within the time frame of one year e.g. until 22 January 2003 to take action against the decision to grant her only step 1. The Panel noted that the Appellant had also remained passive in this regard. It further noted that the Appellant stressed that no guidelines were available to staff members either in printed or electronic form, i.e. in the UN Human Resources Handbook. However, Staff Rules are easily accessible. Thus, there was an ample period of time for the Appellant to contact Human Resources and request clarification as to the basis on which the decision to appoint her at P-4, step 1 had been taken and to take action to invoke Staff Rule 103.15.

Conclusions and Recommendations

30. The Panel concludes that the appeal is time-barred and therefore inadmissible. Therefore, it recommends the Secretary-General to reject the appeal as inadmissible.

Special Remark

31. The Panel stressed that external candidates unfamiliar with the United Nations procedures and rules will generally accept the views of OHRM in good faith in deciding to comply with offered appointment levels. It would be good practice, however if the Administration were to inform the incoming staff member also of the provision/guideline upon which its decisions were based. This would be especially helpful in cases where staff were recruited externally and were not familiar with the UN system as yet."

On 10 May 2007, the Officer-in-Charge for the Department of Management transmitted a copy of the report to the Applicant and informed her as follows:

“The Secretary-General accepts the JAB’s findings and, in accordance with its unanimous recommendation, has decided to take no further action in this case. Pursuant to Staff Rule 111.2(p), this decision is ‘the final decision on the appeal’. Therefore, any recourse in respect of it should be addressed to the Administrative Tribunal.”

On 31 July 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Application is receivable. There was no delay in submitting the request for administrative review as she was not aware of the existence of a claim before late September 2004, when the Revised Grading Guidelines were posted on the UNCTAD intranet.
2. Alternatively, any delay was not unreasonable, but due to exceptional circumstances beyond her control.

Whereas the Respondent’s principal contentions are:

1. The Application is not receivable.
2. The Applicant has not shown exceptional circumstances warranting the JAB’s waiver of the applicable time limits.

The Tribunal, having deliberated from 2 to 25 November 2009, now pronounces the following Judgement:

I. In its Judgement No. 1470 (2009), related to the present case, the Tribunal determined that the JAB had erred in its finding that the Applicant’s appeal was not receivable *ratione temporis* and ordered the parties to submit arguments on the merits. Having received the parties submissions, the Tribunal will now proceed to consider the substantive issues in the Application.

II. The question is whether the Applicant’s recruitment as a Legal Officer at the P4 step, 1 level in December 2001 was correctly made or, whether the Applicant was entitled as a matter of law, to an appointment at the P4, step IV instead. The Applicant claims that the Respondent had failed, to her prejudice, to apply the “relevant UN rules as set out in the Standard of Recruitment and Grading for the Professional and Higher Categories 1994 (1994 Grading Standard Guidelines) [hereinafter referred to as the Grading Standard] in particular, the Respondent failed to determine the appropriate step with the grade in accordance with paragraphs 9,10, 14, 15, and 16 of the relevant 1994 Grading Standards Guidelines which

do not require the exercise of discretion but relate to “(a) a number of years of relevant professional experience required for candidates with different academic qualifications (b) the computation of years of professional experience and (c) the granting of additional steps within Grade for candidates with additional qualifications and/or professional experience”. On the assumption that the Respondent had wrongly applied the 1994 Guidelines to the Applicant’s qualification and experience, she claims compensation for loss of earning and pension contributions from 9 December 2001 to 31 August 2005, when she was promoted to the P5 level or failing that, full compensation for the Respondent’s failure to determine correctly the step within grade at the time of initial appointment.

III. It is helpful to recall the main facts relating to this claim. The events giving rise to this case started with the publication on 30 January 2001 of the Vacancy Announcement (VA) for a Legal Officer P4 in Geneva for the Trade and Logistics Branch, Division for Services Infrastructure for Development and Trade Efficiency, UNCTAD. Under the heading of “qualification and experience” the announcement called for an “Advanced University degree in law, with specialization in commercial maritime transport law” and “at least 10 years of experience in commercial maritime law, of which preferably five years at the international level”. The Applicant applied for this post in March, and was notified of her selection at the P4 step 1 level in August 2001. In October 2001, there was an exchange of correspondence in which the Applicant requested a reconsideration of the step level she had been offered. In her communication the Applicant stated: “[A]s you can see from my CV I completed my LLM degree in September 1990. I also have been in full time employment in the field of commercial maritime law since 1.11. 1990. I also hold a PhD in a relevant field and am a fully qualified lawyer in both common law jurisdiction (UK Barrister) and a civil law jurisdiction (Greek Dikigoros). I believe that my additional experience and qualifications should qualify me for appointment at a somewhat higher level than the minimum entry level of the P4 Grade and would therefore be grateful if you would kindly consider revising the step at which I am appointed”. The management immediately responded that “[g]iving full credit to your background and qualifications (10 years and one month after the LLM) [y]ou are eligible to be put as per the UN standards, at the level of P4/1 of the salary scale. Kindly note that this is a First Officer level for UN purposes and not a minimum entry level”.

IV. The main issue on which the parties differ is the Applicant’s claim that she had eleven years and one month experience at the time she took up her position on 9 December 2002 and that the total of her experience should have been taken into account for the purpose of determining the step level at which she was appointed. The Respondent, on the other hand, only gave her credit for those years of experience accruing after she obtained the relevant advanced degree, i.e., after 2 July 1991. The other significant divergence between the Applicant and the Respondent to which the Applicant also referred, relates to the impact on the Step level of the PhD she obtained in 1999 – three years before her appointment. However,

turning to this dispute, the Tribunal will consider the broader issues that affect the Tribunal's consideration of the present case.

V. There is agreement between the parties that the reference point for determining the step level is a document dated 21 November 1994 entitled "Standard of Recruitment and Grading for the Professional and Higher Categories". The status of the document is not altogether clear, but it is the application of this document to the facts of this case which has given rise to the disputation between the Applicant and the Respondent. The Tribunal is obliged to observe that the drafting of this document leaves much to be desired, and the intent of the drafter is unclear. It is not surprising that the terms and the language of the document gave rise to this prolonged dispute.

VI. The Applicant considers the document as a legislative text of a nature comparable to Staff Regulations and Rules and Administrative Instructions through which rights and entitlements are normally devolved. Whilst the control of the initial appointment of a staff member is a matter of the highest importance both to the staff members and the Organization, it has also to be borne in mind that this is an area which overlaps with the principles of contract. However, administrative law also plays a significant part in the process; one does not entirely exclude the other, as this case demonstrates the vague and difficult nature of a document which purports to set out "Standards" and "Guidelines". Therefore, it is not surprising that the parties differ in their perspectives - the Applicant characterizes the document as one setting out rights and entitlements, whereas the Respondent emphasizes its discretionary nature.

VII. The Tribunal has, after careful consideration, come to the view that this document reflects the largely discretionary nature of the process of recruitment. At the very outset, there is emphasis on the difficulties of precisely "defining" the criteria, that is to say, the necessary and sufficient conditions for determining the grade, and it is assumed, the step level, at which a candidate should be recruited. There is a clear acknowledgement that the process of evaluating the academic qualifications and working experience is not a case of applying criteria mechanically but necessarily involves judgement. Apart from the title of the document, there is repeated use of terms such as "relevant" and "take account of" which import clear notions of discretion or of judgement. Nonetheless, the text does make an effort to provide certain benchmarks and not leave the process entirely to the whim and fancy of an Administration. To that extent, the attempt is made to circumscribe the exercise of discretion. It would be wrong therefore to rule out that in an appropriate case a challenge could not be mounted successfully, outside of the general jurisprudence controlling the exercise of discretion but based on the text of the Grading Standard. The Grading Standard at a minimum strengthens the obligation on the part of the Administration to carefully examine and weigh a staff member's qualification and work experience carefully against stipulated requirements and to arrive at a conclusion in a considered and deliberative manner. When challenged, the expectation is that the

Administration will be in a position to provide documentation and other material to justify the discharge of this duty.

VIII. The Tribunal does not perceive any inconsistency between this position and the approach of the Tribunal in Judgement No. 1206, *Scott* (2004) where the Tribunal stated as follows:

“[I]t is not really essential for the Tribunal to adjudicate upon the proposition advanced by the Applicant that, upon the proper construction of the Grading Standard, he *might* or *could* have been recruited at the higher step. This is so because the Applicant cannot establish that he had any right to have been recruited at the higher step, or establish any right to have his step adjusted upwards, and that any such *right* has been denied.” (See *Scott, ibid*, paragraph II).

“Under the [1994 Guidelines], it is clear that the work experience of a candidate is to be considered more favourably if the candidate has enjoyed progressive responsibilities and more diversified experience with the passage of time than would be the case had his experience been of a more static or repetitive nature. It was for the Administration to make a subjective assessment as to the quality and relevance of the Applicant’s pre-recruitment experience as, under the terms of the Grading Standard, it was not to be assessed merely on the basis of time served. There are clearly many subjective evaluations to be made by the Administration in its evaluation of an applicant and, indeed, in determining the terms of any appointment which they might choose to offer the candidate selected to fill the post.” (See *Scott, ibid*, paragraph III).”

IX. The Tribunal accepts as correct the Respondent’s analysis of the judgement in *Scott* - that the Tribunal ruled in favour of the Applicant solely on the grounds that the Administration had improperly stated that there was a mandatory ceiling preventing new recruits from being placed beyond Step VI level when in fact such a statutory maximum did not exist. In *Scott*, the Tribunal found that the misstatement had not served to induce the applicant to accept the post but had led to long and distressing proceedings and on that account awarded compensation. The reason given to the applicant in *Scott*, that there was a maximum step level, was incorrect. As the Tribunal stated in *Scott*, the “justification or answer offered ought to have been that the step VI level, being the entry level upon which the appointment had been offered and upon which it was accepted, had been fixed by the Administration in the exercise of its discretion in relation to the evaluation of the value of the Applicant’s pre-recruitment experience or for such other legitimate reasons as might have been invoked”.

X. The Applicant in the present case alleges that the discretion of the Administration was abused and frivolously exercised, and also alludes to age discrimination. It is clear, however, that this is not the pith and substance of her complaint. She does not bring enough evidence to establish such a case.

XI. This brings the Tribunal to the Applicant’s claim that the Tribunal should revise the Applicant’s entry level to P4, Step IV with compensation and benefits for the period 9 December 2001 to 31 August 2005, based on the Applicant’s eleven years’ work experience. Additionally, the Applicant requests the Tribunal to find that the acquisition of a PhD in 1999 should have also entitled her, as a matter of law, not discretion, to additional steps.

XII. The facts are not in doubt. The Applicant obtained her first degree in August 1989 and can lay claim to ten years and eight months of experience since her first degree. But what was specifically required in the Vacancy Announcement was an “advanced degree”. She acquired that on 2 July 1991. The Applicant claims that the years of experience should be counted from her first degree, i.e. experience both before and after the LL.M. The Respondent claims that because the “baseline” was an advanced degree, it is experience after the LL.M that was material to the vacancy in question. In general terms, the Applicant’s point of view has some validity, but the Respondent’s position is more anchored in the requirements of the Vacancy Announcement. The Tribunal does not read the wording, for example, of article 16 of the Grading Standard as creating a mandatory requirement that each year of experience the Applicant had prior to the LL.M automatically gives her a right to a step. Reading the Grading Standard as a whole, the evaluation of experience or the granting of steps is clearly not a mechanical process of counting time. Thus, the Applicant’s work experience as a research assistant prior to obtaining her LL.M would only be counted if the Respondent in his discretion determined that such experience was of sufficient “high quality” to earn credit. The Respondent reasonably determined that it was not. Instead, the Respondent gave the Applicant credit for her work as a research assistant at Oxford for the period July to October 1991 and at Southampton from November 1991 to September 1992 in counting the ten years of work experience after her LL.M. The Tribunal finds this a reasonable application of the provisions of the Grading Standard, given the Respondent’s discretionary power in this regard, and the specific terms of the VA itself.

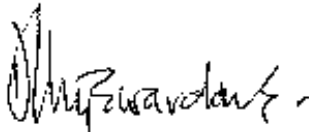
XIII. The Applicant fails to accord sufficient importance to the reason why shorter experience is accepted as a more advanced degree is obtained. A part from time spent in study for such a degree, which may itself be experience, there is clearly an assumption that experience acquired after a degree is obtained is likely to be qualitatively superior and warrants recognition. Therefore, the Administration is justified in proceeding on the basis it did, as an advanced degree was the baseline from which the process proceeded. It is true that the Vacancy Announcement did not explicitly state that the ten years experience were required *after* the advanced degree, but it asked for *at least* ten years experience, and it is a reasonable exercise of the Respondent’s discretion in the circumstances of this case to only count the ten years after the degree. The Grading Standard did not preclude examining the experience at an earlier stage, but in that case it needed to satisfy the requirement that it should not only be “relevant” but of “good quality” and “progressively responsible and diversified” – all criteria which allow for a great deal of subjective judgement and not simply a mechanical calculation.

XIV. Lastly, the Tribunal considers the Applicant’s contention regarding the impact of her PhD on the recruitment process. The Applicant argues that eight years of experience is sufficient for an appointment at P4 Step I, and the additional years she has from the time of her first degree would take her to the Step IV level. The Respondent, on the other hand, approaches the PhD in the same way as the LL.M, and the

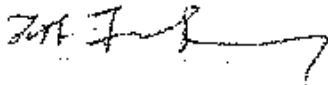
Tribunal is not persuaded that this is incorrect. The Applicant did not have eight years of experience after the PhD even for appointment on that basis, and it is more to the Applicant's advantage to use her LL.M as the base degree. The Respondent admits that the Applicant's alternative approach is not strictly contradicted by the Grading Standard. However, it is clear that the Applicant's interpretation is also not a compelling or inevitable conclusion from the wording in the Grading Standard. In the Respondent's view and, this is in accord with the Tribunal's assessment of the text of the Grading Standard, the more consonant interpretation is that the criteria should be applied not mechanically but with judgement - that experience should be evaluated on the basis that it should be relevant, progressive, and diversified. The Tribunal is unable to conclude that the Applicant had an entitlement or right to three additional steps on the basis of the wording of the Grading Standard. The Tribunal is also satisfied that the Respondent did not act capriciously in applying the Grading Standard to the Applicant.

XV. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)



Dayendra Sena Wijewardane
President



Goh Joon Seng
Second Vice-President



Jacqueline R. Scott
Member

New York, 25 November 2009



Tamara Shockley
Executive Secretary