NINETY-NINTH SESSION

Judgment No. 2441

The Administrative Tribunal,

Considering the complaint filed by Miss J.H. against the International Labour Organization (ILO) on 26 August 2004, the ILO's reply of 1 November, the complainant's rejoinder of 26 November 2004, and the Organization's surrejoinder of 31 January 2005;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1945 and is of Chinese nationality. In 1988 she entered the service of the International Labour Office – the ILO's secretariat – as a Translator/Reviser, at grade P.4 in the Translation and Meetings Branch (known at the time as TRADUC). In 1994 TRADUC was merged with RELOFF/CA the unit in the Official Relations Branch which was then responsible for the translation of Governing Body documentation. The branch formed as a result of the merger was named the Official Documentation Branch (OFFDOC). The complainant has been working in the Chinese Unit of OFFDOC.

On 14 March 2001 the Office and the Staff Union signed the Collective Agreement on Arrangements for the Establishment of a Baseline Classification and Grading. By a minute of 17 May 2001 the complainant was notified that her position had been matched to the generic job title of "Senior Translator/Reviser" at grade P.4. She sought a review of that initial matching/grading claiming that the title should be "Senior Translator/Reviser, chief of unit", at grade P.5. On 8 October 2001 the complainant's supervisor confirmed that the initial job matching/grading decision would stand. Meanwhile, in August 2001, the complainant had asked that her request for review be referred to the Independent Review Group (IRG).

On 1 August 2001 an internal competition – 2001/31 – was opened to fill the grade P.5 position of Senior Translator/Reviser (Head of Chinese Unit) in OFFDOC. By a minute of 28 August the complainant protested against the decision to fill that position by competition, contending, inter alia, that she had held the position since 1988; nevertheless she applied for the post. The Director of the Human Resources Development Department wrote to the complainant on 20 September 2001, informing her that the post that had been put up for competition was a new post and was not the one she occupied. On 8 February 2002 she was officially informed that her colleague, Ms W., who also held P.4, had been selected for the P.5 post.

In the course of a two and a half year period, the complainant filed four grievances with the Joint Panel. The first of these was submitted on 30 November 2001; in it she asked the Joint Panel to review the grading decision as she had heard nothing from the Independent Review Group. The IRG issued a report in March 2002, recommending that her post be confirmed at P.4. However, in a minute dated 27 March the complainant was informed by the Secretary of the IRG that the Director-General considered the decision taken by the IRG to be an interim one, on the grounds that the complainant had not been given an opportunity to provide oral or written comments. The Joint Panel issued its report on 9 April 2002, recommending, inter alia, that a new IRG panel should be established to re-examine the matter and should allow the complainant to make written submissions or be heard in person. The Director-General endorsed that recommendation, and the complainant was informed of his decision by letter of 15 May 2002. The complainant had submitted comments to the IRG on 24 April and submitted further comments on 12 November 2002. The IRG took a "final decision" on 21 August 2003, reaffirming, in an unsigned minute, its original decision that the complainant's post should remain at P.4.

Meanwhile, on 25 June 2002 the complainant had submitted a second grievance to the Joint Panel, contesting the decision to fill the post of Head of the Chinese Unit by competition 2001/31. The Joint Panel reported on her case on 18 October 2002. It found that there was no evidence of a procedural flaw or unfair treatment in the context of the competition. The Director-General's decision, confirming the selection made in competition 2001/31, was

notified to the complainant by letter of 28 November 2002. On 19 December 2002 the complainant was awarded a personal promotion to grade P.5, with effect from 1 October 2000.

The complainant filed a third grievance with the Joint Panel on 24 October 2003, contesting the IRG's "final decision". The Joint Panel issued a recommendation on 23 January 2004. It found that the IRG's report showed evidence of procedural flaws, particularly as the report was too cursory and did not show what information had been taken into account. It recommended that the IRG prepare a more detailed report. The Director-General upheld the Joint Panel's recommendations. His decision was notified to the complainant by letter of 24 February 2004. It was said therein that the IRG was being invited to conduct a review of all the information provided by the complainant and was being asked to supply her with a detailed report. On 18 March 2004 the IRG issued a "final decision" in a format that was in conformity with the Joint Panel's recommendation. It confirmed the decision to maintain the complainant's post at P.4. The Human Resources Policy and Administration Branch endorsed that decision on 5 April 2004.

On 2 April 2004 the complainant had forwarded what constituted a fourth grievance to the Joint Panel, alleging unfair treatment with regard to the filling of the post of Head of the Chinese Unit. The Joint Panel issued a report on 25 June 2004. It recommended that no further action was needed either with regard to the outcome of the competition or regarding the procedure to review the baseline grading of her post. The Director-General endorsed the Panel's recommendations. That decision was conveyed to the complainant by letter of 8 July 2004. That is the impugned decision.

B. The complainant's appeal is directed against the baseline job matching of her post as well as the opening of competition 2001/31 and its outcome. She has five main pleas.

She pleads breach of the principle of equal treatment. She objects to the fact that a competition was opened for the post of Head of the Chinese Unit, particularly as her male counterparts in three of the working-language units were appointed head of their respective units without there being a competition. She considers that the Organization's refusal to regrade her post to P.5, as well as its decision to open an internal competition for the post of Head of the Chinese Unit, constituted discriminatory action and unfair treatment. In addition, by proceeding to appoint her colleague Head of the Chinese Unit at P.5 without waiting for the IRG's decision on her request for review of the job matching/grading of her post, the Administration created a *fait accompli* which may well have had an influence on the IRG's decision to recommend maintaining her post at P.4.

She believes that the IRG did not deal with her request for review in a fair and equitable manner. For one thing, there was undue procrastination in the procedure, given that it started in May 2001 and did not end until July 2004, which caused her prejudice.

The complainant alleges procedural flaws in both the selection procedure in competition 2001/31 and the procedure before the Joint Panel. She takes issue with the fact that the Joint Panel divided her internal complaint of June 2002 into "two parts", dealing with the review request separately from the issue of competition 2001/31. To her the two matters were inseparable: if her post had been regraded to P.5, the competition would not have been necessary. She refers to the irregularities in the procedure before the IRG that were identified by the Joint Panel in the reports it issued on two of her grievances.

She alleges disregard of essential facts. At the time of competition 2001/31, the Administration disregarded the fact that she had been in charge of most of the work in the Chinese Unit since 1988. It also overlooked the fact that she had had more practical experience than the colleague who was appointed Head of the Unit. In particular, it was not taken into account that at the time when the competition was opened her colleague was only working 50 per cent of her time in the Chinese Unit – the other 50 per cent being devoted to interpretation duties in the Official Relations Branch (RELOFF).

Lastly, she submits that the drop in status that she experienced was an affront to her dignity and caused her moral injury.

On those grounds she seeks: the quashing of the Director-General's decisions of 28 November 2002 and 8 July 2004; the cancellation of competition 2001/31; the regrading of her position to that of "Senior Translator/Reviser, Head of Unit" at P.5, with retroactive effect to 1 January 2000; material and moral damages for "the excessive time taken by the procedure" as well as for "the fact that [her] internal complaint to the Joint Panel was divided into two

parts which [were] in fact logically inseparable", and the "stress caused by the arbitrary and inequitable handling" of her case; and payment of 5,000 Swiss francs in compensation for professional and moral injury.

C. In its reply the Organization contends that the complainant's claims for the quashing of the decision of 28 November 2002 and the cancellation of competition 2001/31 are time-barred and thus irreceivable. The complainant was advised in the decision of 28 November that she could appeal to the Tribunal within a 90-day time limit, but she did not avail herself of that opportunity. She cannot now reopen the issue concerning the competition by arguing that it was wrong to divide her internal complaint into two parts. The Organization also considers the complainant's claim for material and moral damages to be irreceivable as she has not pursued the three matters raised in that claim before the Joint Panel.

On the merits, with regard to the classification of the complainant's position, it asserts that according to the case law the grading of posts is a matter that lies within the discretion of the executive head of an organisation, and is subject to only limited review by the Tribunal. It denies that there was breach of the principle of equal treatment. The posts of the three officials she refers to were upgraded from P.4 to P.5 in the baseline matching/grading exercise to reflect the classification unit's conclusion that each of those three officials was the *de facto* head of unit. That was not done in the complainant's case because, contrary to what she asserts, she was not the acting head of unit. She and her P.4 colleague had both been sharing the supervisory responsibility in the Chinese Unit since 1994.

It rebuts her allegations of procedural flaws. First, appointing a head of the Chinese Unit could not have had any negative effect on the grading of the post held by the complainant. This is so precisely because, contrary to what she argues, the two issues are not interdependent. Separating the two issues of the competition and the grading review was also justified by the different appeal procedures that apply, as they are governed by the provisions of two different Collective Agreements. Second, the Organization asserts that the length of the review procedure cannot be seen as a procedural flaw as there were objective reasons for the delays.The only "notable delay" was the time it took for the IRG to issue its "final decision" of 21 August 2003, but the complainant has not shown that she suffered injury by the delay in that decision.

Nor has she shown that an essential fact was disregarded. While it is true that her colleague, Ms W., had duties in RELOFF, it did not change the situation that both officials had supervisory responsibility for certain distinct functions carried out in the Chinese Unit.

The ILO argues that the complainant has failed to demonstrate how the duration of the lengthy procedure affected her professional or material well-being. It maintains that the handling of her case by the Office was neither arbitrary nor inequitable, and considers that her claim in this regard is unsubstantiated.In addition, it considers her claims regarding competition 2001/31 to be devoid of merit. It points out that the complainant received a personal promotion to P.5 at the end of 2002, with retroactive effect to October 2000.

D. In her rejoinder the complainant presses her pleas, arguing that her responsibilities in her unit were similar to those of all the heads of the working-language units in OFFDOC.

E. In its surrejoinder the Organization maintains its arguments. It states that at the time of the baseline grading exercise the complainant's situation was different from that of her colleagues in other units, as they were *de facto* heads, alone in charge of their respective units, while she was not. In her case there was shared responsibility. It thus denies that there was any discrimination against the complainant.

CONSIDERATIONS

1. In 1994 there was a merger of two separate ILO language units – TRADUC and the unit responsible for the translation of Governing Body documents in the Official Relations Branch (known as RELOFF/CA). The new branch was named the Official Document Branch (OFFDOC) and comprises seven units, three for official languages (English, French and Spanish) and four for working languages (Arabic, Russian, German and Chinese). Until then, the complainant had been employed in TRADUC and Ms W. in RELOFF/CA as translator/revisers for the Chinese language. After the merger, they were both employed in the Chinese Unit of OFFDOC and both held P.4 posts, with Ms W. being responsible for translation and revision for Governing Body documents and the complainant for all other work.

2. It was decided in 2001 that each of the four working languages should have a post of Head of Unit.

3. As a parallel exercise, the Office and the Staff Union signed a Collective Agreement in March 2001 for the establishment of "a baseline classification and grading" based, amongst other considerations, on the "principles of fairness and equity". In three of the working-language units a P.4 translator/reviser post was regraded to P.5 and the incumbent made head of the relevant unit as part of the baseline classification and grading exercise. However, the complainant's post was maintained at P.4 and a new P.5 post of Head of the Chinese Unit was created.

4. The complainant requested a review of the decision to maintain her post at P.4, claiming, amongst other things, that she had been the victim of gender discrimination. In this regard, she asserted that the comparable posts in the other working-language units, all held by men, had been regraded whereas hers had not.

5. Having received no reply to her request for a review of the grading decision relating to her post, she requested that the matter be referred to the Independent Review Group (IRG), on 14 August 2001. In the meantime, on 1 August, the new P.5 post of Head of the Chinese Unit was advertised and put up for internal competition. The complainant requested that the advertisement be withdrawn on the basis that her post should be regraded at P.5 and reclassified as Head of the Unit. That request was also refused.

6. The IRG proceedings with respect to the baseline classification and grading of the complainant's post were beset by delays and procedural irregularities and were the subject of two separate proceedings before the Joint Panel. Detailed reasons were finally provided by the IRG on 18 March 2004, confirming the post at P.4.

7. The complainant applied unsuccessfully for the new P.5 post of Head of the Chinese Unit. On 8 February 2002 she was informed that the post had gone to Ms W., the other person holding a P.4 post in the Unit. On 25 June the complainant submitted a grievance to the Joint Panel, claiming discrimination and unfair treatment in the creation and filling of the P.5 post. On 18 October 2002 the Joint Panel issued its report, affirming an earlier decision relating to the IRG proceedings that the baseline classification and regrading exercise was distinct from the selection and recruitment procedures and was to be dealt with separately. So far as concerns the selection of Ms W. for the new P.5 post, the Joint Panel found neither procedural flaw nor unfair treatment and recommended that no action be taken with regard to the outcome of the competition. The Director-General accepted that finding and recommendation. The complainant was so informed on 28 November 2002.

8. On 2 April 2004 the complainant filed a grievance with the Joint Panel, claiming that the final decision of the IRG relating to the grading of her post was procedurally flawed, discriminatory and unfair. She requested that her "complaint concerning discrimination and unfair treatment in respect of the creation and the filling of the post of [Head of the Chinese Unit] be dealt with by the Joint Panel". The Joint Panel did not recommend any action with respect to the creation and filling of the new P.5 post, holding that the issue was *res judicata*. On the question of the baseline classification and grading exercise, the Joint Panel concluded that the "process ultimately was transparent and fair" and, thus, it did not recommend any further action on that issue. The Director-General accepted that conclusion and the complainant was so informed by letter dated 8 July 2004. The decision embodied in that letter is the subject of the complaint.

9. It is contended in the complaint, as it was before the Joint Panel, that the decision not to regrade the complainant's post as "Senior Translator/Reviser, Head of Unit" at P.5 was procedurally flawed, discriminatory and unfair. The complainant seeks an order that her post be regraded accordingly with effect from 1 January 2000. To that end she seeks the quashing of the Director-General's decision of 28 November 2002, effectively refusing to set aside the competition for the P.5 post and, also, the decision of 8 July 2004 refusing to regrade her post in the manner indicated. She also seeks material and moral damages on account of the delay in the proceedings before the IRG and the splitting of her case into two parts which, she claims, are "logically inseparable". She also seeks 5,000 Swiss francs in compensation for "the professional and moral injury suffered".

10. In its reply the Organization points out that the complainant's claims for damages and compensation were made for the first time in her complaint to the Tribunal and contends that those claims are not receivable. It also contends that the complainant cannot now challenge the decision of 28 November 2002 not to set aside the competition for the new P.5 post as the time within which to file a complaint had long passed when the present complaint was filed. That is undoubtedly correct so far as the selection procedures are challenged, those procedures having been the subject of the Joint Panel's findings and the Director-General's decision of 28 November 2002. Thus, the Tribunal has no jurisdiction to entertain the claims that there were procedural flaws in that selection

process, that essential facts were overlooked or that the process itself was arbitrary. However, the main contention in the complaint is that the complainant's post should have been reclassified as Head of Unit, at grade P.5, as part of the baseline classification and grading exercise and that accordingly the P.5 post should never have been advertised. The final decision arising out of the classification and grading exercise was not taken until 8 July 2004 and, accordingly, that aspect of the complaint is receivable.

11. At the centre of the complainant's argument is the contention that she was at all relevant times the *de facto* head of the Chinese Unit and, thus, her position was comparable with that of the persons who became heads of the other working-language units. It is not in issue that when they were regraded, those persons were solely responsible for their Units and that each was the only person graded P.4 in the relevant Unit. The situation had not always been such. After the merger, each Unit had had two persons graded P.4 who both participated in Branch meetings as Heads of Units, as had been and remained the case in the Chinese Unit. However, the situation changed in the other Units as the result of retirements and thus, when the regrading exercise was carried out, the situation was that each of the remaining P.4 officials was solely responsible for the Unit concerned.

12. It is true that the complainant assumed the major responsibility for the management of the Chinese Unit until Ms W.'s appointment as Head of Unit. Until then, Ms W. was concerned only with the Unit's work for the Governing Body and spent half of her time working as an interpreter outside the Unit. Thus, it fell to the complainant to supervise the work of the two P.3 translators within the Unit, to organise and allocate work between herself and those translators and to assume managerial responsibility for external collaborators. However, she had no responsibility for Governing Body documents and she did not supervise Ms W. Although she was mainly responsible for the Chinese Unit, she was not solely responsible. She was thus in a relevantly different position from the persons in the other working-language units and, on that account, her claims of gender discrimination must be rejected.

13. The fact that the complainant was not solely responsible for the Chinese Unit led the IRG to reject her claim to be regraded and reclassified. In this regard, the IRG stated in its final report that "although some of [her] duties could be taken as belonging to the P5 level, they do not constitute managerial responsibility for the Unit as a whole, as required under the factor 'nature and complexity of the job', which states that a single language unit is managed by the incumbent".

14. The complainant also contends that the decision not to regrade and reclassify her post was flawed by the failure to take account of the fact that Ms W. had spent half of her time working outside the Unit and that, leaving aside Governing Body work, she herself had been solely responsible for the Chinese Unit for 14 years.

15. As with discretionary decisions, decisions with respect to regrading and reclassification are subject only to limited review. It is clear from Judgment 1281 that such a decision can only be set aside if "it was taken without authority or shows some procedural or formal flaw or a mistake of fact or of law, or overlooks some material fact, or is an abuse of authority, or draws a clearly mistaken conclusion from the facts". As already explained, the decision in issue was not discriminatory and is not an abuse of process on that account. And neither Ms W.'s limited role in the Chinese Unit nor the complainant's responsibility for managing the Unit, save for Governing Body work, are material facts. The material consideration was whether the complainant managed the entire Chinese Unit. She did not. The IRG was thus bound to refuse to regrade and reclassify her post.

16. It is regrettable that the regrading exercise was protracted and subject to procedural irregularities which were the subject of earlier recommendations by the Joint Panel. In the end, however, they resulted in no prejudice to the complainant who had no entitlement to the regrading that she sought.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mrs Flerida

Ruth P. Romero, Judge, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Flerida Ruth P. Romero

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.