

VI. Taking all these considerations into account, the Tribunal awards to the Applicant compensation in the sum of \$4,000.

VII. The Tribunal orders the Respondent to pay \$4,000 to the Applicant.

All other pleas are rejected.

*(Signatures)*

Samar SEN  
*Vice-President, presiding*

Luis de POSADAS MONTERO  
*Member*

Arnold KEAN  
*Vice-President*

Nicholas TESLENKO  
*Acting Executive Secretary*

*New York, 12 October 1982*

---

### **Judgement No. 299**

*(Original: English)*

**Case No. 274:**  
**Moser (termination of appointment)**

*Against:* **The Secretary-General  
of the United Nations**

---

*Termination of the employment of a staff member holding a permanent appointment on the ground of unsatisfactory service.*

*Pleas relating to the withholding of the Applicant's within-grade salary increment.—The pleas are not receivable since they were not the subject of an opinion of the Joint Appeals Board.*

*Request to reverse the decision to terminate the Applicant's appointment.—Argument based on procedural irregularities.—Procedural irregularities committed in dealing with the termination.—Although there were departures from the required procedures, the requirements of due process were satisfied.—Allegation relating to the existence of an extraneous factor.—Irrelevance of the allegation.—The application rejected.*

---

#### **THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,**

Composed of Mr. Endre Ustor, President; Mr. Samar Sen, Vice-President; Mr. Arnold Kean, Vice-President; Mr. Luis de Posadas Montero, alternate member;

Whereas at the request of Hans Jürgen Moser, a former staff member of the United Nations Industrial Development Organization, hereinafter called UNIDO, the President of the Tribunal, with the agreement of the Respondent, successively extended to 1 March 1981, 25 May 1981, 12 August 1981, 1 November 1981 and 2 January 1982 the time-limit for the filing of an application to the Tribunal;

Whereas, on 4 January 1982, the Applicant filed an application in which he requested the Tribunal:

“1. To rescind the decision of 6 April 1976, by which the UNIDO Administration withheld the Appellant’s within-grade increment;

“2. To rescind the decision of 27 April 1977, by which the UNIDO Administration withheld the Appellant’s within-grade increment;

“3. To rescind the decision of 1 March 1978, by which the UNIDO Administration withheld the Appellant’s within-grade increment;

“4. To validate [*sic*] the violation of the provisions of the Administrative Instruction ST/AI/222 in the course of the Appellant’s termination;

“5. To validate [*sic*] the existence of an extraneous factor in the reasons for the Appellant’s termination;

“6. To order that the case be remanded for correction of procedure, if only procedural irregularities are recognized;

“7. To order that the Appellant be reinstated in his former post if the existence of an extraneous factor in the reasons for the Appellant’s termination is validated [*sic*]; should the Secretary-General make use of the option left to him under article 9 of the Statute of the Administrative Tribunal, the Tribunal should consider it justified, under article 9 of its Statute, that the Respondent should pay to the Applicant a sum equivalent to five years’ net base salary, in order to compensate the moral and material injury sustained by him in the course of his termination and the withholding of within-grade increments.”

Whereas the Respondent filed his answer on 18 June 1982;

Whereas the Applicant filed written observations on 16 August 1982;

Whereas on 29 September 1982, the Tribunal requested the Respondent to produce a document;

Whereas on 1 October 1982, the Respondent produced the document requested by the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, an Austrian national, entered the service of UNIDO on 1 March 1972 as a Programmer Aide in the Administrative Management Section, Division of Administration, with a fixed-term appointment for six months at the G-7 level. On 1 September 1972, his appointment was extended for two months and on 1 October 1972 it was converted to a probationary appointment which in turn was converted to a permanent appointment on 1 February 1974. On 1 May 1974 his functional title was changed to Programmer.

The Applicant’s performance from 1 March 1972 to 31 January 1973 and from 1 February 1973 to 30 September 1973 was evaluated in two periodic reports in which he was rated as “an efficient staff member giving complete satisfaction”. In a third periodic report, covering the period from 1 October 1973 to 30 September 1975, the Chief of the Administrative Management Section, as second reporting officer, rated the Applicant as “a staff member who maintains only a minimum standard” and commented:

“For the first year after my arrival at UNIDO (January 1974) Mr. Moser’s industry, co-operation, attitude, and responsibility were below the standards I would deem acceptable in any employees UN or otherwise. However, over the past ten

months there seems to have been some improvement in these critical areas. Hopefully this will continue to develop to the point where Mr. Moser is an asset to UNIDO."

On 23 December 1975, the Applicant filed a rebuttal to this periodic report in a memorandum addressed to Mr. L. G. Poole, Personnel Officer; he stated *inter alia*:

"2. I have been employed at the G-7 level since I joined UNIDO in March 1972. My appeal for equitable treatment, to which I had become accustomed during my employment with IBM, is, I believe, responsible for the current adverse report.

"3. My attitude towards the UN and towards my work in the organization has always been one of deep devotion (as witnessed in two periodic reports from Mr. Niazi), but my attitude in the face of an unequitable grading situation is an altogether different matter. This attitude is the subject of the current report, which implies *inter alia* that I have no right to react to an illegal situation. . . .

"4. The report is based on a relatively short period (7 months out of 2 years) under the supervision of Mr. Tucker in order to paint as negative a picture as possible of my efforts to secure a legally proper and equitable grade.

"5. Before taking up in detail the various points of the report, it would seem to be necessary to describe something of the background in explanation of the low evaluations found in this report.

"6. When I joined UNIDO in 1972, I accepted appointment at the G-7/05 level following Mr. Niazi's [then Chief of the Administrative Management Section] explanation that promotion to the P-category was impossible from the G-8 level, and that, despite the fact that staff engaged in the kind of work involved should be graded on the P-level, promotion was precluded by the quota problem for Austrian nationals. In fact, my G-7 grading was indicated to be of a temporary nature since I was considered the technically most experienced staff member of AMS (of course, nothing is available in writing on this subject).

" . . .

"10. Mr. Gillcrust's [Chief of the Administrative Management Section] evaluations seem to be based solely on my reactions to an illegal grading situation. The current report has, in my opinion, very little to do with my abilities, experience and job performance. I am apparently not the only staff member who has reacted to Mr. Gillcrust's managerial methods, but, unfortunately, the other two staff members in our Section, who came into contact with Mr. Gillcrust, left the Section after his appearance.

" . . . "

The matters raised in the Applicant's rebuttal were investigated by the Director of the Administrative Services Division who, on 13 May 1976, communicated the following appraisal to the Personnel Services Section:

" . . .

"2. I find that Mr. Moser is incorrect in stating that his current grading in the UNIDO Secretariat is 'illegal'. He accepted an appointment at the G-7 level, as did a number of his colleagues, but no guarantee could have been, or was, given that he would reach the professional category. There are at the present time three other G-7 Programmers in the Computer Service as well as three who hold professional appointments. Nor is Mr. Moser correct in stating that the report reflects only the opinion of Mr. Tucker, who supervised him for seven months in 1974. While

account was taken of Mr. Tucker's views, Section I of the report was prepared by Mr. Moffat, Mr. Moser's current supervisor, and by Mr. Gillcrist, his Chief.

"3. Mr. Moser compares his own qualifications and experience with those of others in the Section and concludes that two of his three supervisors were not qualified to judge his work, while the third, Mr. Gillcrist, was biased against him. However, while it might be possible for one supervisor to make an inaccurate assessment of a staff member's performance, I do not believe that three supervisors in succession would do so.

"4. I find that the report gives a fair assessment of Mr. Moser's performance during the period in question and it is to be greatly regretted that a staff member of his undoubted intelligence and ability should have allowed his disappointment with his grading to affect his attitude and output to the extent indicated."

This appraisal was transmitted to the Applicant on 19 May 1976. In the meantime, the annual within-grade salary increment of the Applicant, due in March 1976, had been withheld on the recommendation of the Chief of the Computer Services Unit on the ground that his performance and conduct could not be considered satisfactory, and on 17 May 1976, the Applicant had submitted a rebuttal against this decision. The matter was investigated by the Director of the Administrative Services Division, who upheld the decision, and on 9 June 1976, the Applicant was advised accordingly. In a fourth periodic report, covering the period from 1 October 1975 to 31 January 1977, the Applicant again received the overall rating of "a staff member who maintains only a minimum standard" and the same second reporting officer, now Chief of the Computer Services Unit, commented:

"Mr. Moser's open hypercritical attitude towards his work and colleagues has improved over this reporting period. His productivity also has picked up, although it is still borderline as to acceptability."

The Applicant refused to sign the periodic report. On 27 April 1977, Mr. Poole recommended in a special report that the Applicant's annual within-grade salary increment, due in March 1977, be withheld. This recommendation was approved by the Head of the Personnel Services Section and on 28 April 1977, the Applicant was advised of that decision and of his right to submit a rebuttal to the special report. On 5 May 1977, the Applicant returned the unsigned periodic report and the special report to Mr. Poole, who on 13 May 1977, sent them back to him, reminding him of his right to rebut both the periodic report and the special report on the withholding of his salary increment. On 16 January 1978, the Personnel Services Section sent to the UNIDO Appointment and Promotion Panel, for review, a recommendation by the Executive Director to the Secretary-General that the Applicant's permanent appointment be terminated on grounds of unsatisfactory service in accordance with Staff Regulation 9.1(a). A copy of the recommendation was sent on the same day to the Applicant, who was advised of his rights under paragraph 7 of Administrative Instruction ST/AI/222. On 30 January 1978, the Applicant submitted comments on the recommendation for termination of his appointment. In its report dated 28 February 1978, to the Appointment and Promotion Board at Headquarters, the UNIDO Appointment and Promotion Panel recommended that the Applicant's permanent appointment be terminated for unsatisfactory service in accordance with Staff Regulation 9.1(a). This recommendation was endorsed by the Appointment and

Promotion Board on 27 March 1978 and subsequently approved on behalf of the Secretary-General. By a formal notice of termination dated 21 August 1978, the Applicant was advised that the effective date of his separation would be 28 August 1978, the Secretary-General having decided to pay him compensation in lieu of three months' notice, and that he would receive termination indemnity in accordance with Annex III (a) to the Staff Regulations. On 19 September 1978, the Applicant requested the Executive Director to reconsider the termination decision on the ground that the proposal for the termination of his appointment should have been reviewed by the Appointment and Promotion Committee since a programmer's post was, according to the nature of the duties and responsibilities required, classified in the professional category throughout the United Nations Secretariat.

On 22 December 1978, the Applicant redirected his request to the Secretary-General. On 14 February 1979, the Assistant Secretary-General for Personnel Services advised him that the Secretary-General had decided to maintain the termination decision. On 21 June 1979, the Applicant lodged an appeal with the UNIDO Joint Appeals Board, which submitted its report on 23 May 1980. The Board's conclusions and recommendations read as follows:

*"Conclusions and Recommendations*

"33. It has not been established that the termination of the appellant's permanent contract was motivated by any extraneous factor. On the contrary, the evidence shows that the appellant's unsatisfactory services led to the termination. Whether the unsatisfactory performance was due to the appellant's unwillingness to achieve a high standard because of his attitude towards the classification of his post, is not a matter for the Board to decide.

"34. The procedure followed in terminating the appellant's appointment involved the non-observance of specific requirements as regards a special periodic report and the composition of the joint review panel. The Board considers these deficiencies as affecting the completeness of the procedure. However, a consensus was reached among the Board members that the procedure should otherwise be considered fair and reasonable. The Board therefore reluctantly came to the conclusion that the requirements of due process were generally speaking satisfied.

"35. For the reasons given above, the Board rejects the appellant's request that the decision of 28 August 1978 to terminate his appointment be rescinded. Consequently, the question of reinstating the appellant or paying him his salary, allowances and benefits since 28 August 1978 does not arise."

On 20 August 1980, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the contested decision. On 4 January 1982, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The body which reviewed the termination proposal was improperly composed.
2. The procedure prescribed in Administrative Instruction ST/AI/240 was not observed as the UNIDO Administration failed to produce a special report in support of the termination proposal.
3. The procedural irregularities pointed out by the Applicant were recognized by the UNIDO Joint Appeals Board which chose to overlook them. The Board also overlooked the inconsistency of the initiation of termination proceedings on the basis of an assessment of the Applicant's performance that clearly indicated certain improvements.

4. Although the UNIDO Administration alleged that the Applicant's performance was the sole reason for his termination, it is clear that such was not the case, and that an extraneous factor was involved. The Applicant's dissatisfaction with the classification level of his post was the true reason for his termination, and the alleged negative attitude of the Applicant was not substantiated by the assessment in the last relevant performance evaluation.

Whereas the Respondent's principal contentions are:

1. The termination of the Applicant's permanent appointment was a valid exercise of the Respondent's authority under Staff Regulation 9.1(a) to terminate a permanent appointment on the ground of unsatisfactory service:

- (a) It was duly established that the Applicant's services were unsatisfactory;
- (b) There was no procedural defect sufficient to vitiate the decision.

2. The denial to the Applicant of his salary increment was a valid exercise of the Respondent's authority under Staff Rule 103.8(a) to withhold the award of such salary increment:

- (a) The granting of a salary increment is dependent upon the satisfactory performance and conduct of staff members;
- (b) There was no procedural defect sufficient to vitiate the decisions.

The Tribunal, having deliberated from 24 September to 13 October 1982, now pronounces the following judgement:

I. Of the pleas made by the Applicant, the first three relate to the withholding of the Applicant's within-grade salary increments. There is no evidence before the Tribunal that this question was the subject of an opinion of the Joint Appeals Board. These pleas are therefore not receivable by the Tribunal under article 7, paragraph 1, of the Statute.

II. The Respondent has discretion to terminate a staff member's appointment for unsatisfactory service. The Applicant invites the Tribunal to reverse the Secretary-General's decision because of procedural irregularities and because an extraneous factor was taken into consideration.

III. The Tribunal finds that there were in fact procedural irregularities in dealing with the Applicant's termination:

(1) Paragraphs 16 and 18 of Administrative Instruction ST/AI/240 (which took effect on 1 February 1977) required a special performance evaluation report (not on the standard report form) to be made and copies supplied to the Applicant, "when there is a recommendation or decision involving disciplinary action, suspension from duties or termination". The Respondent does not deny that this requirement was not complied with, but submits that there had been "continuous evaluation" of the Applicant's performance.

(2) The procedure laid down by Administrative Instruction ST/AI/222 (dated 10 January 1974) for termination of permanent appointments for unsatisfactory service was not complied with. The Respondent does not deny that the joint review body which dealt with the Applicant's case was not restricted to the five members listed in paragraph 3 of the above-mentioned Administrative Instruction but consisted of nine members (though the Applicant alleges there were twelve). In addition, a so-called "*ex-officio*" representative of the Personnel Department was also present.

IV. The Applicant further relies on a letter from Mr. Salameh to Mr. Holmes,

referred to in an undated "note for Mr. Dietschy". The Tribunal has obtained from Counsel for Respondent a facsimile copy of that letter, dated 2 April 1974, from which it appears that the letter was marked "personal and confidential" and was addressed by the Chief, Staff Services, at Headquarters, to the Chief, Personnel Services, at UNIDO. The Applicant relies on the letter as imposing two additional procedural prerequisites before a staff member could be dismissed for unsatisfactory service. However, a personal and confidential communication within the Personnel Department as to the advisable way to proceed cannot be accepted as conferring rights on staff members, to whom it was not addressed.

V. The Tribunal agrees with the conclusion of the Joint Appeals Board that, although there were departures from the required procedures, the requirements of due process were satisfied. The Applicant was fully aware of the adverse reports which had been made and that his performance was under continuous criticism from his superiors. He was given, and took, the opportunity to rebut the criticism. The Tribunal refers to Judgement No. 131 (Restrepo), paragraph V of which states:

"It is clear that at the time of her termination the Applicant knew . . . that her services were considered unsatisfactory . . . there is no doubt that the Applicant was in fact aware of the real reason for her termination and that consequently, when she exercised her right of appeal, she was in a position to argue her case properly."

VI. The Tribunal is also of the opinion that although the Applicant received periodic performance evaluation reports which rated him as maintaining "only a minimum standard", and no reports which actually rated him as an "unsatisfactory staff member", it was open to the Secretary-General to consider a succession of "minimum standard" reports to constitute "unsatisfactory" service which enabled him to terminate the Applicant's appointment in accordance with Staff Regulation 9.1. Moreover, the successive withholding of within-grade salary increments was further evidence that the Applicant's service could be considered unsatisfactory.

VII. The Applicant alleges that his separation was based upon an extraneous factor: his dissatisfaction with the classification of his post. This may have contributed to the poor quality of his work, but unsatisfactory service was the proximate cause of his dismissal and it was for this alone that he was separated from service.

VIII. For these reasons, the Applicant's pleas 1 to 3 are not receivable and his other pleas are rejected.

*(Signatures)*

Endre USTOR  
*President*

Samar SEN  
*Vice-President*

Arnold KEAN  
*Vice-President*

*New York, 13 October 1982*

Luis de POSADAS MONTERO  
*Alternate Member*

Nicholas TESLENKO  
*Acting Executive Secretary*