

(Signatures)

Arnold KEAN
Vice-President, presiding

Herbert REIS
Member

Geneva, 1 June 1983

Luis de POSADAS MONTERO
Member

Jean HARDY
Executive Secretary

Judgement No. 304

(Original: English)

Case No. 273:
Moser (classification of post)

Against: The Secretary-General
of the United Nations

Request by a former staff member of UNIDO to rescind administrative decision refusing to reclassify the Applicant's post from the General Service to the Professional category.

Conclusion of the Joint Appeals Board that a memorandum from UNIDO Personnel Services to the Applicant conveying information concerning upgrading of posts in the UNIDO service to which he was assigned did not affect the Applicant's rights and could not be construed as an administrative decision and that, consequently, the Board had no competence to entertain the request.—Notwithstanding the JAB conclusion the Tribunal finds the application receivable under article 7.1 of its statute.

Question of the existence of an administrative decision against which an appeal can be filed.—The Tribunal finds that the memorandum of the UNIDO Personnel Services regarding the Applicant's request for reclassification of post constituted an administrative decision.

Case remanded to the Joint Appeals Board for consideration of its merits.

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 M. 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 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 23 December 1981, the Applicant filed an application in which he requested the Tribunal:

“(a) To declare his application receivable;

“(b) To rescind the decision of 21 December 1971 by which the Appellant's post was classified in the General Service Category, as a consequence of his Austrian nationality and the understanding between UNIDO and IAEA [International Atomic Energy Agency] with respect to

the classification of posts for Austrian nationals in the Viennese duty station;

“(c) To rescind the decision of 27 July 1977 by which the Appellant’s request for reclassification of his post to the appropriate level in the Professional Category was rejected;

“(d) To order that the Appellant’s post be reclassified to the appropriate level in the Professional Category (not lower than level P-2), and to order that his grade be brought into harmony with the new classification level of his post, both with effect as of 1 March 1972, the date of his EOD [entry on duty] in UNIDO, until 28 August 1978, the date of his separation from service;

“(e) To order that the Respondent pays to the Appellant the difference in salary between the categories/levels G-7 and the appropriate level in the Professional Category (not lower than level P-2) for the period 1 March 1972 to 28 August 1978, including all benefits and allowances as compensation for the material injury sustained by him;

“(f) To order that a sum equivalent to two years net base salary be paid to the Appellant as compensation for the moral injury sustained by him.”

Whereas the Respondent filed his answer on 26 March 1982;

Whereas the Applicant filed written observations on 30 June 1982;

Whereas, at the request of the Tribunal, the Respondent submitted additional information on 5 and 7 October 1982;

Whereas, on 14 October 1982, the Tribunal deferred consideration of the case to its following session in order to enable the Respondent to provide further information;

Whereas the Respondent provided such information on 30 November 1982 and the Applicant commented on it on 9 February 1983;

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.

On 6 June 1973 the Chief of the Administrative Management Section recommended in a memorandum to the Director of the Division of Administration that action be taken to upgrade the programmers to the professional level in line with those established by Headquarters in New York, pointing out that a study of the market in Vienna for programmers had revealed that it was not realistic to expect to recruit programmers at the general service level without a reasonable expectation of promotion to the professional level. On 9 October 1973, in a memorandum to the Acting Director of the Division of Administration, the Chief of the Administrative Management Section reiterated that the continuing general service classification of the majority of the programming staff could lead to serious and detrimental consequences for UNIDO and requested that New York be approached once more in order to arrange the reclassification to professional status of four staff members of the Section, including the Applicant, each of whom had the required level of education and

experience and had been performing the duties of a programmer/analyst since recruitment. On 27 November 1973 the four staff members in question addressed the following petition to the Acting Director of the Division of Administration:

“Upgrading of Programming staff

“With reference to Information Circular UNIDO/Adm/PS/INF.314 of 12 November 1973, and to Mr. M. A. Niazi [Chief of the Administrative Management Section]’s memoranda and letter related to the above subject . . . we would draw to your attention the fact that we are, and have been, performing the duties of professional Programmer/Analysts as defined by the CCAQ Document ‘Common Grading Standard—Electronic Data Processing Posts’ (CCAQ/SEC/219(GEN) dated 15 November 1971 . . . Furthermore, we have been made aware that positions similar to ours at UN Headquarters in New York are classified as P-1 during an initial training period of one year, and thereafter automatic promotions to the P-2 level are granted. (See ST/ADM/SER.A/1273-27 September 1968.) It is our understanding from Mr. L. Slaughter, Director, EDP and Information Systems Service, UN New York, that this training period has been reduced to six months.

“We would like to point out that each of us is operating with full and total responsibility for one of UNIDO’s computer systems which include the Accounting System, the Regular Payroll, the Project Budget Projection and the Management Information System for Project Implementation (MISPI). Our data processing experience ranges from a minimum of two and one half years to over seven and one half years. In addition, each of us meets the educational qualifications laid down by the CCAQ, having amongst us two doctorate degrees, and a master’s degree in computer science.

“We believe that the above information is adequate to support the reclassification of each of us to the professional level. We would be most grateful for your consideration of our case.”

On 28 February 1974 the new Chief of the Administrative Management Section wrote to the Chief of Personnel Services to bring to his attention “the undesirable situation caused by the continued undergrading of the programming staff”, pointing out that the job to be performed was unquestionably that of a professional and that the performance in the case of each of the staff members concerned was in fact that of a professional. On 10 June 1977, in a memorandum to the Head of the Personnel Services Section, the Applicant, referring to a United Nations Secretariat vacancy notice offering a P-2 programmer post at Headquarters in New York, asked that provision be made for a reclassification of his post to the appropriate level in the professional category, with effect from the date on which he had met the requirements for a programmer post, in order to bring his grade into harmony with the Secretariat’s grading standards. On 27 July 1977 the Officer-in-Charge of the Personnel Services Section sent him the following reply:

“2. As you have indicated, Secretariat vacancy notice no. 77-083-N.Y. is for a P-2 Programmer’s post at Headquarters, New York, and is not concerned with any current or existing vacancy in the UNIDO Secretariat. I feel certain that you are aware that you are free to apply for this vacancy should you wish to do so. No doubt such an application would receive very careful consideration.

“3. I regret that I find your request for reclassification of your post in UNIDO based on the above job description somewhat puzzling. The UNIDO job description against which you were recruited was graded at the G-7/8 level and I would point out that the Programmer/Analyst post in the Computer Services has been upgraded for some time now from the General Service to the Professional Category and a number of the Programmers who were recruited at the same level as yourself have since been promoted to the Professional level based on their superior performance. I can only come to the conclusion that, all other things being equal, your lack of a similar promotion as your colleagues is due to your poor performance at the G-7 level.”

On 16 August 1977 the Applicant requested the Executive Director “to reconsider the personnel decision, communicated to me on 27 July 1977”. On 10 October 1977 the Executive Director replied that in his view no administrative decision had been conveyed to the Applicant in the memorandum of 27 July 1977. On 12 July 1979 the Applicant requested the Secretary-General to review the contested decision and on 13 September 1979, having received no reply, he lodged an appeal with the UNIDO Joint Appeals Board. The Board submitted its report on 14 October 1980. The Board’s conclusions and recommendations read as follows:

“Conclusions and Recommendations

“26. The Board concludes that, in the particular circumstances of this case, the memorandum of Personnel Services, UNIDO, dated 27 July 1977 in reply to the appellant’s memorandum dated 10 June 1977 cannot be construed as an administrative decision. This memorandum merely conveyed information concerning the upgrading of posts in the Computer Services of UNIDO and did not in any way affect the rights and obligations of the appellant.

“27. The Board concludes that in the absence of an administrative decision which may be contested as involving the non-observance of the staff member’s terms of appointment, including all pertinent Regulations and Rules, it has no competence under the authority vested in it by Staff Rule 111.1 (c) to entertain this appeal.

“28. The Board wishes to emphasize *obiter* that it has not considered the appellant’s qualifications for a post in the Professional category or the nature of the appellant’s work as deserving to be classified in the Professional category. Nor have the circumstances under which most of the other programmers who were recruited at the same time as the appellant and were later promoted been considered by the Board.

“29. Having decided that the present appeal is not receivable, the questions of recommending the reclassification of the appellant’s previous post or the payment of the difference in salary between the categories/levels G-7 and P-2 do not arise.”

On 8 December 1980 the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General had taken note of the Board’s unanimous decision not to entertain the appeal on the grounds of lack of competence. On 23 December 1981 the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The reply to the Applicant's request for reclassification constituted a negative decision to the effect that the request was rejected. The application is therefore receivable.

2. Staff Regulation 2.1 has been repeatedly violated by the UNIDO Administration as classification criteria other than "the nature of the duties and responsibilities required" have been taken into account.

3. Since Staff Regulation 2.1 has been violated, the Applicant has a right to reclassification of his post, and he has no other remedy.

4. The view that equal classification of posts can only be claimed for posts within the professional category is unacceptable. The fact that the misclassification of the Applicant's post was even more serious than in the Champoury case should not limit his rights under the Staff Rules.

5. The United Nations is not entitled to apply any system of recruitment which violates a Staff Regulation.

6. The announcement of a classification review in UNIDO for 1980 does not affect the present case.

7. The fact that the Applicant had accepted the offer of a post in the general service category did not justify the misclassification of his post.

8. The understanding between UNIDO and IAEA to classify Austrian programmers in the general service category was not binding on the Applicant.

9. The Applicant is entitled to rely on the principle "Equal pay for equal work".

Whereas the Respondent's principal contentions are:

1. The application should be rejected because no administrative decision concerning the Applicant's contract of employment or the terms of his appointment has been taken by the Respondent.

2. The classification of the Applicant's post was determined by the Secretary-General within broad guidelines established by Staff Regulation 2.1. The Applicant has no right to have a post classified at a level other than that determined by the Secretary-General in accordance with Staff Regulation 2.1.

3. Staff members have no right to promotion so even if the post encumbered by the Applicant, a former general service staff member, ought to have been classified at the professional level—which the Respondent denies—the Applicant would not be entitled to promotion to the professional level or to extra compensation under Staff Rule 103.11.

The Tribunal, having deliberated from 18 May to 1 June 1983, now pronounces the following judgement:

I. The Tribunal notes that the Applicant previously submitted this dispute to the Joint Appeals Board and that the latter communicated its opinion to the Secretary-General. Accordingly, the application is receivable by the Tribunal in accordance with article 7.1 of its Statute, notwithstanding that the Joint Appeals Board reached the conclusion that it had no competence to entertain the appeal.

II. The reason for the Joint Appeals Board's view was that there was no administrative decision against which an appeal could be filed. The Tribunal is of the opinion that the Board's conclusion on this point was not justified inasmuch as an administrative decision was made when an unfavourable response was given in a memorandum of 27 July 1977 by the Officer-in-Charge of the Personnel Services Section to the Applicant's specific request in a memorandum of 10 June 1977 for reclassification of his post.

III. In a memorandum addressed to the Executive Director of UNIDO on 16 August 1977, the Applicant referred to the memorandum of 27 July 1977 as having "rejected my request for reclassification of my post". On 10 October 1977, the Executive Director replied that "it is my view that no administrative decision was conveyed to you in the memorandum dated 27 July 1977" which "merely provided the information that the Programmer/Analyst posts in the Computer Services, UNIDO had already been upgraded to the Professional category, and that this was confirmed by the fact that four Programmers had been promoted over a period of time from the General Service category to the Professional category". However, by 27 July 1977, the date of the memorandum in question, the Applicant must already have been aware that four Programmers at UNIDO had previously been promoted, so that there had been no need for the Officer-in-Charge of the Personnel Services Section to "provide the information". In all the circumstances, the Applicant can only have interpreted the Executive Director's reply as a confirmation of the refusal to upgrade the Applicant's own post.

IV. The Applicant's continued employment in the same work and with the same classification as before removed all doubt that his request for reclassification had been rejected.

V. For the foregoing reasons, the Tribunal remands the case, including the additional information received by the Tribunal, to the Joint Appeals Board for consideration of the merits.

(Signatures)

Endre USTOR
President

Samar SEN
Vice-President

Arnold KEAN
Vice-President

Geneva, 1 June 1983

Luis de POSADAS MONTERO
Alternate Member

Jean HARDY
Executive Secretary

Judgement No. 305

(Original: English)

Case No. 301:
Jabbour

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

Request by a former staff member of the United Nations to rescind the decision not to renew his fixed-term appointment.

Recommendation of the Joint Appeals Board to grant to the Applicant compensation equivalent to three months' net base salary on account of inequitable and irregular treatment.— Recommendation rejected.

Question whether the Administration has carried out its contractual and other obligations in its treatment of the Applicant.—The Tribunal finds that the Applicant had no legal expectation for extension of his appointment but that, having been retained in service for many years and having rendered satisfactory services, he could reasonably expect a measure of accommodation, either in the form of an extension or of a serious effort to find him alternative employment.—