

VIII. The Tribunal finds that the same considerations apply to the present case and consequently decides that the Applicant is not entitled to the benefit of acquired rights in respect of the procedure to be followed for the purpose of her possible promotion to the Professional category.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Endre USTOR
President

Arnold KEAN
Vice-President

New York, 13 October 1983

Herbert REIS
Member

Jean HARDY
Executive Secretary

Judgement No. 312

(Original: English)

Case No. 299:
Roberts

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

Request by a staff member of UNIDO for rescinding the administrative decision not to promote him to P-5 level and for payment of compensation.

Conclusion of the Joint Appeals Board that, although there was no evidence of prejudice, the Applicant's candidature for a higher-level post was denied full and fair consideration in view of unfavourable comments contained in the evaluation of his candidature by his supervisors, at variance with favourable periodic reports that had been made previously.—Recommendation that special measures be taken to provide the Applicant with improved prospects for promotion and that compensation of the amount of three months' net salary be paid.—Recommendation to grant compensation accepted.

The Tribunal reiterated the general rule that promotions are subject to the discretion of the Secretary-General, in accordance with chapter IV of Staff Regulations and chapter IV of Staff Rules.—Claims based on the existence of an expectation of promotion are not admissible.—The Tribunal can only establish whether prejudice, breaches of procedure or any other extraneous factor has vitiated the decision.—The Tribunal finds no compelling evidence that the contested decision was based on prejudice.—Judgement No. 225.—The Tribunal notes the existence of a disturbing inconsistency between the Applicant's performance reports and reservations expressed when recommending the appointment of another staff member, which the Applicant had no opportunity of rebutting.—Such discrepancy constitutes an irregularity which entails the responsibility of the Administration though it is not sufficient to render null and void the appointment of another staff member to the post in question.

Award of compensation equal to three months' net salary.—Award of \$US 1,000 as costs.—All other pleas rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Herbert Reis; Mr. Luis de Posadas Montero;

Whereas, on 25 October 1982, David Arthur Roberts, a former staff member of the United Nations Industrial Development Organization, hereinafter called UNIDO, filed an application the pleas of which he summed up as follows:

"1. For UNIDO to submit copies of JAB [Joint Appeals Board] drafts or of reports Nos. 1 through 6 concerning my case without this action delaying consideration of my case.

"2. That the detailed report of the Panel for Investigation of Allegations of Discriminatory Treatment be considered an official document and that its willful delay was wrongful and malicious.

"3. That the wrongful administrative decision of not promoting me to a P-5 post be rescinded.

"4. \$US 100,000 damages for libel or malicious injury, slander, misuse of power, discrimination, prejudice, imputation of limited usefulness, derogatory allegations pertaining to my character and for loss of career.

"5. \$US 100,000 for wrongful administrative decisions.

"6. \$US 100,000 for ill-treatment and mental anguish.

"7. Adjustment of termination indemnity according to proper pay scale and Staff Regulation 9.3 (b) with moratory interest from 30 November 1981.

"8. Adjustment of repatriation grant according to proper pay scale with moratory interest as from 30 November 1981.

"9. Reimbursement for lost annual leave with moratory interest as from 30 November 1981.

"10. Moratory interest at 12 per cent on all other damages as from 1 June 1980, including damages for procedural delay.

"11. \$US 10,000 for costs of submissions to the Panel, the JAB and this present submission.

"12. For damages for breach of contract, I request the sum applicable for full pay until age 60 and in addition for UNIDO to effect all payments to my UN pension fund.

"13. For further damages to my health and career, \$US 100,000.

"14. For UNIDO to pay any additional income tax I may owe as a result of damages received.

"15. *OR*, in lieu of pleas 2-13, \$US 250,000, should the Secretary-General decide to exercise his option under Article 9, paragraph 1 of the Statute, provided the provision of paragraph 14, above, is met.";

Whereas the Respondent filed his answer on 18 February 1983;

Whereas the Applicant filed written observations on 15 March 1983;

Whereas the Respondent submitted additional documents on 26 May 1983;

Whereas the Applicant submitted an additional written statement on 3 June 1983;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNIDO on 1 June 1973, on transfer from the International Civil Aviation Organization, under a fixed-term appointment for two years as a Contracts Officer at the P-4 level. His appointment was extended for two years on 1 June 1975, for three years on 1 June 1977 and again for three years on 1 June 1980. The Applicant's service

with UNIDO has been evaluated in three periodic reports and in one performance evaluation report. In the three periodic reports, covering the periods 1 June 1973–31 August 1974, 1 September 1974–28 February 1975, and 1 March 1975–31 December 1976 respectively, he was rated as “an efficient staff member giving complete satisfaction”; in the third report, the first reporting officer, Mr. D. F. Mant, referring to the fact that the Applicant, in addition to his normal work as a Contracts Officer, had acted as Officer-in-Charge of Contracts Services from 21 June 1974 to 24 August 1975, noted:

“As Officer-in-Charge of the Contracts Service to 24 August 1975, Mr. Roberts continued to manage the work effectively at a time when the work output was at a very high level (approximately 100% increase in the output of contracts in the first eight months of 1975 compared to the similar period in 1974).”

In the performance evaluation report, which covered the period 1 January 1977–15 November 1978, the Applicant’s performance was described as “very good” and the first reporting officer, Mr. D. Gardellin, noted *inter alia*: “The staff member’s relationship with his colleagues and the public is excellent in every respect.”

The Purchase and Contracts Service, in which the Applicant was serving, was an entity headed by a D-1, Mr. D. F. Mant, and divided into a Purchasing unit and a Contracting unit. A Senior Officer (P-5) was in charge of each unit, Mr. W. Behr being in charge of Purchasing and Mr. D. Gardellin in charge of Contracts. On 3 September 1979, in anticipation of Mr. Behr’s retirement on 31 May 1980, the Applicant applied for his post in a memorandum to Mr. Mant reading:

“Thank you for agreeing during our recent conversation to consider my candidacy for the subject post. As also agreed, this memorandum is written to formally confirm my interest.

“A perusal of my personnel file will indicate that I have relevant purchasing experience going back to January, 1956 when, during a period of three years, I was Warehouse Manager in charge of securing all supplies for a multi-million dollar project. More recently and immediately prior to my transfer to your Section in 1973, I was Chief of General Services in ICAO, Montreal, for four years where my duties included the actual direction of the Purchasing Unit.

“It is now my definite intention to work until age 60 and I am confident that I could manage Purchasing Services in a most efficient manner while implementing necessary streamlining procedures to cope with an ever-increasing workload, as I have done in Contracts Services during periods when in charge.

“In your consideration of the above, please also remember that I have worked effectively at P-4 level for more than ten years and am at present blocked at step 12, the top level of my grade.”

The Applicant’s candidature was evaluated on 16 October 1979 by Mr. Behr and Mr. Mant, and he was not recommended for the post. The evaluation was as follows:

“The Purchase Unit output over the last three years has increased by 30% each year and we see this trend continuing.

“The need in this post is for enthusiastic and energetic leadership from a man young enough to give a worthwhile number of years of service, once familiar with the job and in control of its responsibilities.

“In PAC [Purchase and Contracts] we know Mr. Roberts’ abilities, character and personality well and while we consider him to be a good Contracts Officer, we do not consider that he has the necessary qualities we want for this post and also he has in our opinion too short a period of service left to retirement (4 years and 2 months).”

On 3 March 1980, in a memorandum to the Executive Director of UNIDO, the Chief of Secretariat Recruitment, Personnel Services Section, of UNIDO recommended that another Contracts Officer, Mr. S. Jonsson, be assigned to the post. The recommendation read as follows:

“2. The post of Chief, Purchase Service Unit, is classified at the P-5 level. There are currently in the Section two staff members serving at the P-4 level. They are Mr. Igor Soloviev (USSR) and Mr. David Roberts (USA), the more senior of the two, both of whom are ‘Contracts Officers’. Mr. Soloviev was not considered suitable to replace Mr. Behr because of his relatively short experience in UNIDO (he joined in August 1978) and his language ability in English. This is of paramount importance in the Purchase Service Unit when related to drawing up technical specifications for equipment, etc. Mr. Roberts, who would have been the logical choice from the seniority point of view to replace Mr. Behr, is considered unsuitable for the post because, in Mr. Mant’s view, his management capabilities are not up to the task and he does have some difficulties in getting along with people, particularly secretaries. This proves disruptive to the work. On the occasions that he has been Officer-in-Charge of the Purchase Service Unit he appeared unable to take decisions and was unable to gather unto himself or control the excess work. In reviewing this Section both Mr. Butaev and Mr. Mant agree that Mr. Jonsson, who is recommended for promotion to the P-4 level in the 1980 Promotion Review, is the most suitable officer in the Section to replace Mr. Behr.

“3. Mr. Jonsson joined UNIDO in 1969 as Finance Officer at the P-2 level. In March 1970 he transferred to the then Technical Equipment Procurement and Contracting Office as Contracts Officer. Having resigned from UNIDO service in January 1974 he rejoined in March 1977 again as Contracts Officer with PAC. He has a good performance record throughout his career with UNIDO. Mr. Mant says of Mr. Jonsson in his last periodic report covering February to November 1978 that he is a ‘complete Contracts Officer in that he maintains a high professional ability combined with an enthusiastic and effective approach to work. The reliance I place upon his ability and good judgement is evidenced by my delegation to him of the authority to negotiate and sign on my behalf the contract for the Rwanda Pyrethrum Plant at a value of \$US 3 million’. Mr. Jonsson has also been noted as giving an outstanding performance.

“4. Personnel Services Section fully supports the above proposal, which is in line with the policy of career development for staff already on board, and your authorization is now sought to officially reassign Mr. Jonsson to the post of Acting Chief, Purchase Service Unit, upon the retirement of Mr. Behr. Recruitment action would then be initiated to replace Mr. Jonsson in his duties as Contracts Officer at the lower level.

“ . . . ”

The Executive Director accepted that recommendation on 8 March 1980 and, on 1 June 1980, Mr. Jonsson took over the functions of Mr. Behr. On 11 June 1980 the Applicant, who was not among those recommended by the Appointment and Promotion Board for promotion to the P-5 level, filed a recourse against his omission from the promotion register. The Board re-examined his case and found no grounds for including him in the promotion register. On 27 June 1980 the Applicant complained of discriminatory treatment in a memorandum addressed to the Panel to Investigate Allegations of Discriminatory Treatment. A member of the Panel, Mr. A. Bassili, investigated the complaint and concluded, in a report dated 10 July 1980 and transmitted to the Applicant on 2 October 1980, that there was no case of blatant discrimination by Mr. Mant against the Applicant either in the appointment of Mr. Jonsson as Chief of the Purchasing Unit or in any other action. On 29 October 1980 the Applicant filed an appeal with the Joint Appeals Board of UNIDO, which submitted its report on 21 August 1981. The Board's conclusions and recommendations read as follows:

“Conclusions and recommendations

“30. Recognizing that Staff Rule 111.1 (b) excludes it from examining the substantive issue of efficiency or relative inefficiency, the Board limited its examination of the appellant's contention that he should have been appointed to the post of Chief, Purchasing Services, to consideration of whether there had been personal prejudice against him, misuse of procedure, or incomplete consideration of the facts in arriving at the decision, or whether the decision failed to observe the terms of employment of the appellant.

“31. Concerning the appellant's appeal against the conclusion of the Panel to Investigate Allegations of Discriminatory Treatment to the effect that no discrimination had been practiced against the appellant either as regards the appointment of another staff member to the post of Chief, Purchasing, or in any other action, the Board concludes that since the Panel's conclusion does not constitute an administrative decision within the terms of Staff Regulation 11.1, the Board does not consider it within its competence to examine the findings and recommendations of the Panel.

“32. In view of the unexplained sudden change of judgement on the appellant's performance and qualifications as well as the previously mentioned references to the appellant's age and the alleged need for new blood, although the Board did not find any conclusive evidence on this matter, it does not exclude the possibility that extraneous factors may have influenced the evaluation of the appellant's candidature by his supervisor.

“33. The Board finds that the appellant did not present compelling evidence that the administrative decisions relating to the classification of the post of Chief, Purchasing Services, or the selection of a successor to Mr. Behr were based upon prejudice. Nor is there evidence that procedures other than those customarily followed were used in processing the appellant's application for the post; the application was brought to the attention of the Executive Director, who had full access to information concerning the appellant's background, experience and performance. However, the Board finds that the assessment presented to the Executive Director in the memorandum of 3 March 1980 concerning the appellant's performance as officer-in-charge and his ability to get along with other staff

members violated the rights of the staff member in that an assessment of his performance was presented which was totally at variance with the assessment contained in successive periodic reports and which the staff member was given no opportunity to rebut, since he was not informed of the assessment. While the Board did not find compelling evidence of discrimination with respect to the administrative decisions contested by the appellant, at the same time it found no satisfactory explanation for the discrepancy between the assessment of the appellant's performance contained in the periodic reports prepared by his supervisor and the assessment of performance contained in the memorandum of 3 March 1980 to the Executive Director. The Board has no reason to doubt the validity of the favourable terms of the periodic reports and does not share the view that such assessments should be considered solely relevant to the appellant's performance as a contracts officer—particularly with regard to the assessment of the appellant's ability to get along with people and to his performance during an extended period as officer-in-charge of the contracts section. The Board shared the view expressed by the Administrative Tribunal of the United Nations in its Judgement No. 225 of 6 October 1977 that it is 'reprehensible' for a supervisor to make favourable periodic reports which are subsequently retracted. In this connexion, the Board noted the view expressed by the International Civil Service Commission in its report on the work of its thirteenth session (ICSC/R.267 of 27 March 1981) that 'the supervisor also had a shared responsibility with the subordinate to develop the subordinate's abilities, knowledge, potential and, ultimately, career and, thereby, the potential of the organization's work force'. The Board felt that this responsibility was inadequately recognized, with adverse effects upon the career prospects of the appellant.

"34. The Board accepts the contention of the appellant, in the light of the foregoing considerations, that the terms of his employment were not observed in that he was denied full and fair consideration in his application for a post for which, on the basis of his qualifications, experience and favourable performance reports as well as seniority, he had reasonable expectation to be selected. The selection of another person, junior in grade, for the post of Chief, Purchasing Services, significantly reduced the appellant's prospects for promotion to the P-5 level by filling both posts in the section classified at that level and by denying the appellant opportunities to assume increased responsibilities and to perform at a higher level. While the classification of the remaining posts in the section at P-3 did not directly affect the appellant's grade and cannot be considered a discriminatory act, the fact remains that satisfactory or even outstanding performance in a post graded P-3 is unlikely to offer strong justification for promotion from P-4 to P-5.

"35. The Board finds that the appellant was deprived of a full and fair consideration for the post of Chief, Purchasing Services, in that an adverse decision concerning his candidature was taken at least in part on the basis of an unfavourable assessment of his performance, inconsistent with his periodic reports, and of which the appellant was unaware. The Board noted the decision of the [ILO] Administrative Tribunal in its Judgement No. 367 of 13 November 1978 to compensate the claimant for failure on the part of the Administration 'to observe the general obligation of showing concern for the dignity and reputation of staff members'.

“36. Although the Board is not in a position to recommend that the decision to appoint another person to the post of Chief, Purchasing Services, be rescinded, it does, however, recommend that special measures be taken to provide to the appellant improved prospects for promotion to P-5.

“37. The Board recommends that a further review of the appellant’s record of service and qualifications be made by a senior officer preferably not a member of the Purchase and Contracts Section or of the Personnel Service and, if the results of the review are favourable, the appellant should be given full consideration for all available posts within the Organization at the P-5 level for which his education and experience qualify him.

“38. In view of the considerations mentioned above, the Board recommends payment to the appellant of the amount of three months’ net salary as compensation for the damages suffered by the appellant.”

On 30 November 1981 the Applicant’s fixed-term appointment was terminated for reasons of health and with effect from 1 December 1981 a disability benefit was paid to him by the United Nations Joint Staff Pension Fund. On 5 August 1982 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 take note of the Board’s report, to grant him compensation in an amount equivalent to three months’ net base salary in settlement of the appeal, and to take no further action in the case. On 25 October 1982 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Applicant has suffered through discrimination and wrongful administrative decisions by UNIDO as well as through libel, malicious injury, slander and misuse of power.
2. Ill-treatment of the Applicant brought about his permanent disability as well as suffering and financial losses through UNIDO’s breach of his contract.

Whereas the Respondent’s principal contentions are:

1. Staff members have no right to promotion; and established procedures for considering staff for promotion were followed in the Applicant’s case.
2. Staff members have no right to be assigned to any specific post or responsibilities; and the assignment of a staff member other than the Applicant was a proper exercise of administrative discretion.
3. Periodic reports on staff members’ performance under the Staff Rules do not constitute the only proper bases for considering staff members’ relative suitability for assignments or promotion; possible discrepancy between the Applicant’s periodic reports and his supervisor’s unfavourable assessment for the purpose of a possible new assignment did not violate the Applicant’s rights and did not entitle him to compensation.

The Tribunal, having deliberated from 3 to 17 October 1983, now pronounces the following judgement:

- I. The two main complaints that the Applicant places before the Tribunal are the decision not to promote him to the post of Chief, Purchasing Services, at UNIDO, and the conclusion reached by the Panel to Investigate Allegations of Discriminatory Treatment to the effect that he was not discriminated against. However, in substance, these two complaints are identical, insofar as both are

consequences of the decision of the Administration to promote another staff member to the P-5 post for which the Applicant had applied.

II. The Applicant has, in fact, merely made use of two different channels to substantiate his one basic claim, that is, that his failure to obtain promotion to the post in question was due to prejudice and discrimination against him. This being the essential issue before the Tribunal, the Tribunal considers its duty to state once more that, as far as promotions are concerned, the general rule is that they are subject to the discretion of the Secretary-General (see chapter IV of the Staff Regulations and chapter IV of the Staff Rules; see also Judgement No. 134: *Fürst*) and that, consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy.

III. Such being the general rule, it follows that decisions on promotions cannot be challenged on the ground of inadequate consideration of performance or length of service or on any other similar ground.

IV. Nevertheless, the discretionary decision of the Secretary-General may be challenged on the ground that extraneous factors were taken into consideration.

V. This is the Applicant's contention in this case, viz. that it was through prejudice, discrimination and a breach of procedure that he did not obtain the promotion he was seeking. In addition he asserts that he was thereby deprived of a promotion to which he had a well-founded expectancy.

The Joint Appeals Board's report, at least partially, shares this view when it says in paragraph 34 that the Applicant had "reasonable expectation to be selected".

VI. The Tribunal cannot agree with these views and points out once more that claims based on the existence of an expectation of promotion are not admissible. Therefore, in this case, the task of the Tribunal can only be to establish whether the existence of prejudice, breach of procedure or any other extraneous factor has vitiated the contested decision.

VII. In this respect, the Tribunal concurs with the Joint Appeals Board's conclusion that the Applicant has not presented compelling evidence that the administrative decision relating to the selection of the person who was to occupy the post sought by him was based upon prejudice.

VIII. The Tribunal also concurs with the Joint Appeals Board's conclusion that the customary procedures were, as a whole, followed in reviewing the Applicant's candidacy for the post. The Tribunal also agrees with the Joint Appeals Board that there was a disturbing inconsistency between the ratings and comments in the Applicant's performance reports and the reservations expressed in a memorandum of 3 March 1980 to the Executive Director recommending the appointment of another staff member to the post in question.

IX. In this respect, the Tribunal cannot but reiterate the view expressed in its Judgement No. 225 that it is reprehensible for a supervisor to make favourable periodic reports which are subsequently retracted. The Tribunal finds that the expression by superior officials of appraisals of their subordinates that differ from those they have officially stated in evaluation reports entails responsibility for the Administration, insofar as such appraisals influence in a negative way decisions regarding the advancement of staff members who have

not had the chance of rebutting or perhaps even of being aware of the existence of such negative appraisals.

X. In this particular case, it is the Tribunal's view that the existence of a discrepancy between the evaluation of the Applicant's performance by his supervisors in official reports and that expressed outside such reports constitutes an irregularity because it supplied the promotion body with an appraisal of his performance which he had no opportunity of rebutting.

XI. Accordingly, the Tribunal decides that compensation is due to the Applicant as a consequence of this irregularity. This compensation was adequately assessed by the Joint Appeals Board at three months' net base salary. Nevertheless, this irregularity was not sufficient to render null and void the Executive Director's decision, taken in the exercise of his discretionary powers, to appoint to the post in question a staff member other than the Applicant. Thus, the appointment is legally valid in spite of the above-mentioned irregularity.

XII. The Applicant makes a number of other requests, some of which relate to the proceedings before the Panel to Investigate Allegations of Discriminatory Treatment.

Having found, in agreement with the Joint Appeals Board, that the Applicant has not presented compelling evidence that he has been discriminated against, the Tribunal is of opinion that all the pleas relating to the proceedings before the Panel must be rejected.

XIII. Other pleas refer to damage caused to the Applicant's health as a consequence of his non-promotion. While appreciating the strain to which the Applicant has been submitted, the Tribunal is unable to grant any compensation on that score, inasmuch as the only flaw observed in the conduct of the Administration cannot be considered the cause of the Applicant's ill health.

XIV. Pleas 7, 8 and 9 were not put forward in the Applicant's submission to the Joint Appeals Board and are therefore not receivable.

XV. The Tribunal awards costs to the Applicant in the amount of \$1,000.

XVI. All other pleas are rejected.

(Signatures)

Arnold KEAN
Vice-President, presiding

Herbert REIS
Member

New York, 17 October 1983

L. de POSADAS MONTERO
Member

Jean HARDY
Executive Secretary