

Judgement No. 325

(Original: English)

Case No. 317:
Moser (alleged violation of article 2
of the Universal Declaration
of Human Rights)

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

Request by a former staff member of UNIDO to declare the application receivable though the Joint Appeals Board had not granted a further extension of the time-limit, and to rescind the decision to classify the Applicant's post in the General Service category on account of his nationality, in alleged violation of article 2 of the Universal Declaration of Human Rights.

The Joint Appeals Board dismissed the appeal since the Applicant did not submit a statement of appeal, despite several extensions of the time-limit.

The Tribunal notes that the material aspects of the case are identical to the case considered in Judgement No. 304 and remanded to the Joint Appeals Board for consideration on merits.—The only new element is the legal ground on which the Applicant bases his claim.—The Tribunal holds that there should not be two different rulings on the same set of facts, even if the legal arguments put forward are different.—The Tribunal will rule on merits if and when the case comes again before it, after the Joint Appeals Board has completed its work, taking into account any new legal arguments which the Applicant is free to make.—As the Tribunal refuses to consider the pleas the question of receivability does not arise.—The Tribunal notes with concern that the Joint Appeals Board notified the Applicant of its refusal to extend the time-limit only after it expired, thus depriving him of an opportunity to be heard.

Application rejected, subject to the above proviso.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
 Composed of Mr. Samar Sen, Vice-President, presiding; Mr. T. Mutuale;
 Mr. Luis M. de Posadas Montero;

Whereas, on 12 January 1983, Hans Jürgen Moser, a former staff member of the United Nations Industrial Development Organization, hereinafter called UNIDO, filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 31 October 1983;

Whereas the Applicant, in the pleas of his application, requested the Tribunal:

“(a) To accept the application and to declare it receivable even though the Joint Appeals Board [JAB] in UNIDO has not granted a further extension of the time limit. The Administrative Tribunal is also asked to declare that the appellant's request for an extension of the time limit was justified in view of the fact that his counsel was on two months' leave prior to the expiration of the time limit initially set by the Board;

“(b) To accept that the consideration of the appellant's nationality in the determination of the classification level of his post constituted non-observance and violation of the provisions of Article 2 of the Universal

Declaration of Human Rights, which provide that 'everyone is entitled to all rights set forth in this Declaration without distinction of any kind, such as . . . national origin . . .';

“(c) To order the rescinding of the decision taken on 21 December 1971 in which, during the classification action for the appellant’s post, the Secretary-General applied for the appellant’s Austrian nationality as a criterion in the determination of the post’s classification level, thereby violating the provisions of Article 2 of the Universal Declaration of Human Rights;

“(d) To order the rescinding of the decision taken by the Secretary-General on 24 January 1980, in which he rejected the appellant’s claim to take action to correct the illegal situation into which the appellant was placed in the course of the consideration of his Austrian nationality as a criterion in the classification action for his post in December 1971;

“(e) To order the payment of two years’ net base salary, including all benefits and allowances, to the appellant in compensation for the moral injury sustained by him.”;

Whereas, on 30 January 1984, the Respondent filed his answer, in which he requested the Tribunal:

“to find that the JAB properly decided not to grant further extensions of time to Applicant to formulate and clarify his appeal and to find that this appeal is identical to another appeal already pending before the JAB and thus to reject the Application. Nevertheless, Respondent does not object to Tribunal ordering that, in the event of any decision based on a recommendation of the JAB in Case No. 273 being appealed by Applicant to the Tribunal, the papers in this Case should be added to the dossier in Case No. 273.”

Whereas the facts in the case are as follows:

On 23 February 1980 the Applicant, an Austrian national who had served with UNIDO as a Programmer until 28 August 1978, addressed to the Secretary-General of the United Nations a memorandum entitled “Discriminatory treatment in the United Nations Secretariat” in which, after referring to correspondence with the Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat in which he had unsuccessfully alleged “discriminatory treatment under article 2 of the Universal Declaration of Human Rights”, he requested that the matter be reviewed under Staff Rule 111.3 (a). On 22 April 1980 the Applicant, having received no reply, lodged an appeal with the UNIDO Joint Appeals Board. From his statement of appeal, entitled “Discriminatory Treatment in the United Nations Secretariat” and supported by 13 attachments containing a detailed outline of the case submitted to the Board, it is clear that the Applicant alleged discriminatory treatment under article 2 of the Universal Declaration of Human Rights with reference to the classification of his post of Programmer in the General Service category as a consequence of his Austrian nationality. The representative of the Secretary-General submitted his answer to the appeal on 12 March 1981. On 25 August 1981, in a memorandum to the Secretary of the Joint Appeals Board, the Applicant asked that the title of his appeal be changed from “Discriminatory Treatment in the United Nations Secretariat” to “Violation of article 2 of the Universal Declaration of Human Rights” for the following reason:

“The change in the title of this appeal arises from a counsel’s information that discrimination *per se* cannot be appealed against. As my discrimina-

tion due to my nationality resulted from a violation of the said article, the violation of this article is now the title of this appeal.”

The Applicant added:

“In this context, I would like to inform you that I do not intend to comment on the respondent’s statement, so that you can forward this appeal without any delay.”

On 22 March 1982 the Applicant again requested, in a memorandum to the Chairman of the Joint Appeals Board, that the appeal “be forwarded” to the Board. On 23 March 1982 the Secretary of the Joint Appeals Board asked the Applicant whether it was still his intention not to comment on the statement of 12 March 1981 by the representative of the Secretary-General, suggesting that since the Applicant had changed the title of his appeal he might also wish to consider whether the substance of his statement of appeal should be correspondingly modified. On 6 May 1982 the Secretary of the Joint Appeals Board advised the Applicant on behalf of the Board that in view of the fact that the basis of his appeal had been changed by him, he should submit a new clear statement of appeal stating precisely the grounds of appeal and the relevant supporting evidence as well as the remedies he sought from the Board. On 1 June 1982 the Applicant replied that the sole reason for his refusal to comment on the statement by the representative of the Secretary-General arose from the fact that he was convinced that he had raised all the points necessary in support of his claims in his statement of appeal; he added, however, that since a new statement was requested of him he would submit such a statement as soon as possible, but that he might need some support in drafting it. On 3 June 1982 the Secretary of the Joint Appeals Board informed the Applicant that his “request for extension of time” would be submitted “to the Board for its decision”. On 18 June 1982 the Applicant was asked to submit his statement by 19 July 1982, a time-limit which was subsequently extended to 30 September 1982 at the request of his counsel. On 27 September 1982 he asked for a further extension of the time-limit until 30 October 1982 on the ground that he had been unable to communicate with his counsel, who had been on leave for approximately two months. On 18 October 1982 the Secretary of the Joint Appeals Board informed the Applicant that the Board had been unable to grant a further extension to 30 October 1982 and had decided to dismiss the appeal “since the appellant [had] not, despite several extensions of time, submitted a statement of appeal”. On 12 January 1983 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s request for an extension of the time-limit for submitting the new statement of appeal requested by the Joint Appeals Board was justified in view of his counsel’s absence on official business and on home leave.
2. As the Applicant is no longer a staff member of UNIDO, communication by mail is time-consuming and subject to delay.

Whereas the Respondent’s principal contentions are:

1. The Joint Appeals Board properly exercised its discretion to impose a limit on the length of time it would allow the Applicant to formulate the grounds of his appeal.
2. In any event, the substance of the case is, in all material aspects, identical with case No. 273 which was remanded to the Joint Appeals Board for consideration on its merits by the Tribunal in Judgement No. 304 and is now pending before the Board.

The Tribunal, having deliberated from 7 to 16 May 1984, now pronounces the following judgement:

I. The Tribunal, after carefully examining the facts mentioned by the Applicant, cannot but agree with the Respondent when he submits that in its material aspects this case is identical with case No. 273 which was considered by the Tribunal in Judgement No. 304 and remanded to the Joint Appeals Board for consideration of the merits.

The only differences that the Tribunal has been able to find between the present case and case No. 273 are those connected with the legal grounds on which the Applicant bases his claim; in the present case the Applicant seeks redress on the basis of alleged violation of article 2 of the Universal Declaration of Human Rights, while in case No. 273 his claim is sought to be sustained by other legal arguments.

II. Since the facts relative to the two cases are identical, there is no need, in the Tribunal's view, to treat the two cases as separate.

The Tribunal holds that there should not be two different rulings on the same set of facts, even if the legal arguments put forward were different in the two instances. The introduction of new legal arguments can at best augment and fortify the legal aspects brought before the Tribunal but cannot create a new case when the facts are the same. The Tribunal refrains therefore from examining the merits of the present case and will rule on them only after the Joint Appeals Board has completed its work in relation to case No. 273, if and when the case comes to the Tribunal in accordance with article 7 of its Statute.

As for the new legal arguments concerning the Universal Declaration of Human Rights, the Tribunal holds that the Applicant is free to advance them both before the Joint Appeals Board in case No. 273 if the stage of the proceedings on it makes it possible to do so and before the Tribunal if the case comes before it in the future.

III. The Applicant also requests the Tribunal to declare his application receivable in spite of not having been previously examined by the Joint Appeals Board because the Board did not extend the time-limit for the Applicant to make his submission. Since the Tribunal refuses to consider the Applicant's pleas as they are identical with those of another pending case, the question of the time-limit has become irrelevant. Nevertheless, the Tribunal notes with concern that the Joint Appeals Board only notified the Applicant of its refusal to extend the time-limit after it had expired, thus depriving the Applicant of an opportunity to be heard by the Board.

IV. For the foregoing reasons, the application is rejected subject to the proviso indicated above.

(Signatures)

Samar SEN
Vice-President, presiding

T. MUTUALE
Member

Geneva, 16 May 1984

Luis M. de POSADAS MONTERO
Member

Jean HARDY
Executive Secretary