

restricted itself by legally erroneous conditions which automatically eliminated the Applicant, cannot be equated with the loss of salary and allowances which the Applicant suffered as a result of not being promoted in January 1981. The fact is that the Applicant did not have a right to promotion. While the Secretary-General was under the strict obligation to respect the rules of form and substance applicable in the case, he was free to choose among the various candidates.

XXII. In view of the overall circumstances of the case, the Tribunal decides that the Applicant shall be fairly compensated for the injury he sustained as a result both of the refusal to take his candidature into consideration and of the delays caused in the hearing of his appeal, by the award of overall compensation equivalent to two months of his net base salary as at 29 January 1981, the date on which he filed an appeal with the Joint Appeals Board.

(Signatures)

Arnold KEAN

Vice-President, presiding

Luis M. de POSADAS MONTERO

Member

Geneva, 10 June 1983

Roger PINTO

Member

Jean HARDY

Executive Secretary

Judgement No. 311

(Original: English)

Case No. 304:
Schurz

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

Request by a staff member of UNIDO for recognition of her right to be considered for promotion to the Professional category in accordance with the rules in force prior to the adoption of General Assembly resolution 33/143.

Conclusion of the Joint Appeals Board that information circular ST/IC/81/19 introduced conditions not contained in Judgement No. 266 (Capiro) or which were required by the pre-1979 system of promotion.—Recommendation that the Applicant should be promoted retroactively to the Professional category.—Recommendation rejected.

Interpretation of administrative instruction ST/AI/268/Add.1 and of information circular ST/IC/81/19.—The Tribunal finds that the Applicant is not entitled to benefit from these provisions.—Question of the conformity of information circular ST/IC/81/19 with Judgement No. 266.—Question of acquired rights in the context of transition from one system of promotion to another.—Finding in Judgement No. 295 (Sue-Ting-Len) that the mere length of the staff member's service and the nature of her activities could not be invoked as acquired rights at the time the new system was introduced.—Finding in Judgement No. 296 (Sun) that information circular ST/IC/81/19 gave proper effect to the considerations which determine what allowance should be made for acquired rights in the event of the introduction of a new system of promotion.—The Tribunal concludes that the Applicant is not entitled to claim the benefit of acquired rights.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Mr. Arnold Kean, Vice-President; Mr. Herbert Reis;

Whereas on 11 November 1982 Ernestine Schurz, a 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 January 1983;

Whereas the pleas of the application read:

“I contest the decision of the Secretary-General

“(i) not to accept the UNIDO J.A.B. [Joint Appeals Board]’s recommendation in its Report No. 10 . . . and, consequently

“(ii) to take no further action on my case and request the rescission of that decision by the Administrative Tribunal.

“The Tribunal is requested to endorse the recommendations made by the UNIDO J.A.B. in its Report No. 10 . . . in particular ‘that ways and means should be found to ensure that the appellant be promoted retroactively into the Professional category in which her other colleagues who perform similar functions are’.”

Whereas the Respondent filed his answer on 13 April 1983;

Whereas the Applicant filed written observations on 21 June 1983;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNIDO on 15 July 1968 as a clerk at the G-3 level. She was promoted to the G-4 level on 1 February 1969 and received a permanent appointment with a promotion to the G-5 level on 1 September 1970. She was promoted to the G-6 level as an Administrative Clerk on 1 January 1973 and to the G-7 level as an Administrative Assistant on 1 January 1977. On 7 December 1978, in a memorandum addressed to the Personnel Services Section, the Officer-in-Charge of the Training Section of the Industrial Operations Division, where the Applicant was working, recommended that she be promoted to the Professional category. On 27 March 1979, however, the Personnel Services Section submitted to the UNIDO Appointment and Promotion Panel, on behalf of the Executive Director, a recommendation for promotion of the Applicant to the G-8 level. On 1 January 1981 the Applicant was promoted to the G-8 level and became a Professional Assistant. On 15 January 1981 she wrote to the Head of the Personnel Service asking him to examine her case for promotion to the Professional category in the light of additional information provided by her as well as on the basis of intrinsic merit, successful performance and current responsibilities; she concluded:

“In conclusion, I would like to say that as far back as 1976 I have performed as a Fellowship Officer.

“Evidence of this could be found in my personal file as well as by comparing the duties which have been entrusted to me with those of the other fellowship officers of the Unit.

“I submit for your consideration that the tremendous increase in responsibilities I have had to shoulder since 1976 would be justification in itself to apply to my case the exceptions [from the system of competitive

examinations] provided for in Administrative Instruction ST/AI/268/Add.1.

“Further, I would also like to draw your attention to the fact that I have fulfilled successfully these duties and that I was not only put forward for promotion, but that I have invariably been rated as an ‘Outstanding staff member’.

“I am asking for my case to be examined and judged entirely on merit and qualifiable results. I contend that the exceptions provided for in Administrative Instruction ST/AI/268/Add.1 should also apply to me, although my case will require special consideration, since the prevailing situation highlights the fact that my case is neither fully covered by the Administrative Instruction ST/AI/268 nor by any other relevant instruction issued so far. Hence my request to have my case examined in the light of the circumstances outlined above.

“The Division of Industrial Operations recently reiterated its previous assurance that a post would be made available if my request were to be accepted.”

On 2 February 1981 the Head of the Personnel Service declined to comply with the Applicant's request, pointing out that her post was not among the 51 posts covered by Administrative Instruction ST/AI/268/Add.1. On 26 February 1981, in a letter to the Executive Director, the Applicant reiterated her request for a review of her case under that Administrative Instruction. On 22 April 1981 she wrote again to the Head of the Personnel Service, seeking exemption from the competitive examination by virtue of Information Circular ST/IC/81/19 which had been issued on 10 March 1981 following the judgement (No. 266) rendered by the Tribunal in the Capio case. On 27 April 1981, in reply to the Applicant's letters of 26 February and 22 April 1981, the Head of the Personnel Service advised her that UNIDO could not apply the transitional measures to her case, on the following grounds:

“[under ST/IC/81/19] two preconditions must be met in order to qualify for a special review according to the old system: the staff members must have been assigned the functions of a Professional post and the Departments or Office concerned must have recommended the staff member for promotion to the Professional category prior to the issuance of the Secretary-General's Bulletin SGB/173 and Administrative Instruction ST/AI/268.

“Without commenting on the question of whether you were actually assigned the functions of a Professional post or not and thus fulfilled the first of the two requirements stated above, I am obliged to inform you that you do not meet the second prerequisite for submission of your case to the Appointment and Promotion Committee for review under the system of promotion to the Professional category in effect prior to the introduction of the competitive examinations.

“ . . .
“In view of the recent instruction I am obliged to inform you that your name was not among the Departmental recommendations for promotion to the Professional category in 1979.”

On 4 August 1981 the Applicant requested the Secretary-General to review the administrative decision contained in that communication and on 4 September 1981, having received no answer, she lodged an appeal with the Joint Appeals Board. The Board submitted its report on 5 April 1982. The Board's conclusions and recommendations read as follows:

“Conclusions and recommendations

“29. The Board finds that neither Administrative Instruction ST/AI/268/Add.1 nor the Information Circular ST/IC/81/19 (UNIDO/ADM/PS/INF.775) grants the appellant an exemption from taking the competitive examination for promotion into the Professional category.

“30. The Board is of the view that the Information Circular ST/IC/81/19 introduces conditions which were neither in the Judgement No. 266 of the Administrative Tribunal nor required by the pre-1979 system of promotion from the General Service category into the Professional category.

“31. The Board wishes to add that the facts of the case, especially the fact that the appellant has been performing since 1976 functions previously performed by a P-4, would tend to support her demand for promotion at least to P-1/P-2; the Board recommends that ways and means should be found to ensure that the appellant be promoted retroactively into the Professional category in which her other colleagues who perform similar functions are.”

On 6 August 1982 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General, having re-examined her case in the light of the Board's report, had decided not to accept the Board's recommendation, and, consequently, to take no further action on her case. On 11 November 1982 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Joint Appeals Board expressed in its report the insufficiency of the existing framework of pertinent Instructions with regard to the Applicant's specific case.

2. The argument that the Applicant's promotion to the Professional category was recommended not at Department, but only at Division, level is not valid. There is no evidence for the assumption that the Executive Director by not forwarding the first recommendation at Division level had the intention of depriving the Applicant of the possibility of a promotion to the Professional category for the rest of her life. Furthermore, the essence of paragraph 3 of ST/IC/81/19 is to stress the precedence character of Judgement No. 266 and not to restrict the level at which recommendations comparable to the case in question were to be prepared.

Whereas the Respondent's principal contentions are:

1. Methods by which staff are recommended to the Secretary-General for promotion into the Professional category are “statutory” measures subject to change at any time. The General Assembly's directive to the Secretary-General to establish competitive procedures for promotion of General Service staff into the Professional category is a valid and proper exercise of the Assembly's authority pursuant to Article 101 of the Charter.

2. The measures established by the Secretary-General to permit a transition between the two systems of promotion ensure that the introduction of the competitive examination system does not have retroactive effect and does not violate any staff member's rights.

The Tribunal, having deliberated from 4 to 13 October 1983, now pronounces the following judgement:

I. There is no dispute between the parties as to the facts of the case, which were properly established by the Joint Appeals Board.

II. The first legal question to be decided by the Tribunal is whether the Joint Appeals Board has correctly interpreted Administrative Instruction ST/AI/268/Add.1 of 6 December 1979 and Information Circular ST/IC/81/19 of 10 March 1981 in finding that neither of them grants the Applicant exemption from taking the competitive examination for promotion to the Professional category.

III. In this respect the Board reported as follows:

“27. The Board notes that the conditions required by the Administrative Instruction on transitional measures, ST/AI/268/Add.1, as necessary in order to obtain exemption from the competitive examination were not fulfilled by the appellant. The special review under the Administrative Instruction was limited to staff members who were fulfilling and continue to fulfil any one of the duties of the 51 P-1/P-2 posts listed in information circular ST/IC/79/54 and Add.1 as subject to competitive examination. The list of posts was also annexed to ST/AI/268/Add.1. The post occupied by the appellant was not among the 51 listed posts.

“28. The Board recognizes that ST/IC/81/19 is also not applicable to the appellant since she does not fulfil the conditions required, namely,

“(a) that the staff member had been assigned to the functions of a Professional post, and

“(b) that the Department had prepared a recommendation for promotion to the Professional category before the issuance of the Secretary-General’s Bulletin (SGB/173) and Administrative Instruction (ST/AI/268 of 29 August 1979).”

IV. The Tribunal cannot but subscribe to this part of the report and on the basis of these considerations the Tribunal finds that the Applicant is not entitled to the benefits of the Administrative Instruction and Information Circular mentioned above.

V. The Applicant, however, contends not so much that her right is founded on the documents mentioned above but rather that Information Circular ST/IC/81/19 is not in conformity with the spirit of Judgement No. 266 (*Capio*).

The Applicant complains that Respondent rejected the recommendation of the Joint Appeals Board which—on the pattern of the *Capio* judgement—was that “ways and means should be found to ensure that the appellant be promoted retroactively into the Professional category in which her other colleagues who perform similar functions are”.

VI. The Joint Appeals Board relied heavily on Judgement No. 266 from which it quoted *inter alia* the following passages:

“The Tribunal notes, however, that in the promotion system established in 1957, certain benefits and advantages are granted to staff members for services performed. Evaluation with a view to promotion is based on the conditions in which the person concerned performs professional functions; furthermore, a staff member can be included in the promotion register irrespective of the classification of the post he occupies. Those are prerogatives recognized in connexion with the promotion procedure but distinct from it. It is legitimate to speak of acquired rights with regard to these prerogatives attached to services performed at the time

when the procedure is initiated, and apply to them the judicial precedents established by the Tribunal (Judgements No. 82: *Puvrez* and No. 202: *Quéquiner*). Respect for acquired rights means that the complex of benefits and advantages to which a staff member is entitled for services rendered before the entry into force of a new rule cannot be impaired.

“Since the necessary administrative measures relating to the Applicant’s suitability to be considered for promotion in 1979 had been taken prior to the adoption of resolution 33/143 and prior to the issue of administrative instruction ST/AI/268 of 29 August 1979, the Applicant had thereby acquired the right to have her suitability for a P-2 post evaluated according to the method established in 1957, and not by the competitive examination method.” (paragraph VIII)

After an analysis of this text and of the conditions of promotion as they existed before the introduction of the present system, the Board came to the conclusion

“that ST/IC/81/19, which requires that the staff member’s ‘department or office had prepared recommendations’ for his or her promotion prior to 29 August 1979, is not in accord with the law as stated in the Capiro Judgement since under the 1957 promotion system the right of a staff member with the necessary minimum period of service in grade to be considered for promotion did not depend in any way on a recommendation, or the preparation of one, by his or her department or office. Nor did the right depend upon assignment to the functions of a Professional post, as also required by the Circular. The right resulted from having served in grade for the required minimum period (or from an accelerated recommendation, or inclusion in the ‘relevant group of staff’ considered in connexion with such recommendation), and no additional requirement or condition could be added when that right became an acquired right under the law as stated by the Tribunal.”

VII. The Joint Appeals Board adopted its report on 5 April 1982 and therefore was not in a position to take into consideration the Tribunal’s Judgements No. 295 (*Sue-Ting-Len*) and No. 296 (*Sun*) rendered in October 1982 which amplified the views of the Tribunal on this subject.

The Tribunal found in Judgement No. 295 (*Sue-Ting-Len*) that the mere length of the staff member’s services and the nature of her activities could not be invoked as establishing acquired rights at the time the new system of promotion was introduced. The Tribunal stated that the purpose of the various transitional arrangements was

“to prevent the new system from having retroactive effect when the chances of promotion of the staff member concerned under the previous system are already reasonably ensured at the time the competitive examination system enters into force. Hence it cannot be contested that the Secretary-General has sought to ensure respect for acquired rights, a principle laid down in Regulation 12.1 of the Staff Regulations” (paragraph III).

The Tribunal emphasized in Judgement No. 296 (*Sun*) that Information Circular ST/IC/81/19 setting forth the transitional measures adopted following the Capiro judgement

“adequately expresses and gives proper effect to the considerations which, in the view of the Tribunal, determine what allowance should be made for acquired rights in the event of the introduction by the General Assembly of a new system for the promotions in question” (paragraph IV).

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;