UNITED NATIONS

ADMINISTRATIVE TRIBUNAL

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ADMINISTRATIVE TRIBUNAL

Judgement No. 388

Case No. 273: MOSER

AGAINST: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Jerome Ackerman;

Whereas on 23 December 1981, Hans Jürgen Moser, a former staff member of the United Nations Industrial Development Organization, hereinafter referred to as UNIDO, filed an application against a communication of 27 July 1977 by the Officer-in-charge of the Personnel Services Section;

Whereas the communication of 27 July 1977 contained an unfavourable response to the Applicant's specific request for reclassification of the post he encumbered at the time, from the General Service Category to the Professional Category;

Whereas on 1 June 1983, the Tribunal rendered Judgement No. 304 in Case No. 273: Moser (Classification of Post). The Tribunal declared that notwithstanding the Joint Appeals Board conclusion to the contrary, the communication of 27 July 1977 referred to above, constituted an administrative decision, and therefore the application was "receivable by the Tribunal in accordance with article 7.1 of its Statute". In addition, the Tribunal "remand[ed] the case, including the additional information received by the Tribunal, to the Joint Appeals Board for consideration of the merits".

Whereas on 31 October 1983, the Applicant filed an application against a decision by the Joint Appeals Board to dismiss an appeal lodged before the Board by the Applicant. In that appeal, the Applicant had 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;

Whereas on 16 May 1984, the Tribunal rendered Judgement No. 325 in Case No. 317: Moser (alleged violation of Article 2 of the Universal Declaration of Human Rights). The Tribunal declared 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". It held that the facts in that judgement were "identical" to the facts in Judgement No. 304 and declared 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 Tribunal refrained from examining the merits of the appeal and held that it would "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".

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 January 1985, 30 April 1985 and 1 July 1985, the time-limit for the filing of an application to the Tribunal;

Whereas on 8 July 1985, the Applicant filed an application that did not fulfil the formal requirements of the Rules of the Tribunal;

Whereas on 31 March 1986, the Applicant, after making the necessary corrections, filed a corrected application the pleas of which read as follows:

"The Applicant requests the Tribunal:

a) To declare his application receivable;

b) To declare the following definitions, which contradict the opinion of the Joint Appeals Board, as legally valid:

- there is a right to reclassification of [a] post if the necessity for such an action arises;

- the acceptance of an offer for a certain post by the incumbent does not constitute a classification criterion recognized under the provisions of Staff Regulation 2.1;

- the announcement of a classification system by the General Assembly cannot affect a post's classification level at a time prior to this announcement;

- the principle of recruitment of staff on as low expenses as possible cannot replace the proper execution of the provisions laid down in Staff Regulation 2.1;

- the principle "Equal pay for equal work" had been violated in the Applicant's case;

- the violation of a certain Rule or Regulation by the Administration cannot be justified by the necessity to observe another one;

- the violation of a certain Rule or Regulation may be claimed at any time, even if it is recognized several years after it had taken place, or if it proved necessary to claim this violation several years after it had occurred;

- a staff member whose post was classified in the General Service Category as a result of the violation of Staff Regulation 2.1, but which post should have been classified in the Professional Category following a proper execution of this same Regulation, has the rights to which Professional staff are entitled;

c) To confirm that the provisions laid down in Staff Regulation 2.1 have been violated by the UNIDO Administration in the present case;

d) To confirm that the provisions laid down in Article 2 of the Universal Declaration of Human Rights (discrimination due to nationality) have been violated by the UNIDO Administration in the present case;

e) To rescind the decision of 21 December 1971 by which the UNIDO Administration classified the Applicant's post 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;

f) To rescind the decision of 27 July 1977 by which the Applicant's request for reclassification of his post to the appropriate level in the Professional Category was rejected by the UNIDO Administration on the basis of alleged bad performance, and also on the grounds spelled out under e);

g) To order that the Applicant's post be reclassified to the appropriate level in the Professional Category (not lower than category/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 November 1978, the date of his separation from service;

h) to order that the Respondent pays to the Applicant the sum of 43.500 US Dollars, which is equivalent to the minimum difference in salary between the categories/ levels G-7/step 8 and P-2/step 4 respectively for the overall period of his service, as compensation for the material injury sustained by him as a result of misclassification;

i) To order that a sum equivalent to two years net base salary (on the basis of P-2/step 4) be paid to the Applicant as compensation for the moral injury sustained by him as a result of the wrong classification of his post;

j) To order that a sum equivalent to two years net base salary (on the basis of P-2/step 4) be paid to the Applicant as compensation for the moral injury sustained by him as a result of his discrimination due to his Austrian nationality."

Whereas the Respondent filed his answer on 29 October 1986;

Whereas the facts of the case have been set forth in Judgements No. 304 and 325;

Whereas the Joint Appeals Board adopted its report on 29 May 1984;

Its conclusions and recommendations read as follows:

"25. The Board concludes that the memorandum of Personnel Services Section of UNIDO, dated 27 July 1977 in reply to the appellant's memorandum dated 10 June 1977 did not in any way violate the staff member's terms of appointment, including all pertinent Regulations and Rules which did not provide for a staff member's right as such to classification.

26. The classification of the appellant's post was determined by the Secretary-General within the guidelines established by Staff Regulation 2.1. Before 1 January 1980 there was no system of classification within the Organization and no conclusions from the new system should be drawn with regard to the present case which dates back to 1974-1977.

27. The Board has found no evidence that there has been any extraneous considerations, prejudice or discrimination in the Administration's handling of the appellant's recruitment at the General Service level and the maintaining of his services at the same level until his separation on 28 August 1978. Other programmers of various nationalities, including Austrians who entered the service of the Organization at about the same time as the appellant had been promoted in 1975 and 1976 from the General Service into the Professional Category on the basis of their performance. But this was obviously done because of their outstanding performance.

28. The Board is of the view that there was no obligation on the Secretary-General, during the period in which the appellant was in the service of the United Nations, to promote him. Even if the post occupied by the appellant ought to have been classified at the professional level, the appellant would not have been entitled automatically to promotion to the professional level nor to any other compensation in this regard.

29. The Board rejects the appellant's claim to classification as stated ... above and consequently rejects his claim for compensation as stated ... above."

On 11 September 1984, the Assistant Secretary-General for Personnel Services informed the Applicant that he had taken note of the Board's report; had decided to maintain the contested decision and to take no further action on the case.

On 31 March 1986, the Applicant filed the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant's post was classified in the General Service Category solely because of his Austrian nationality, in violation of Article 2 of the Universal Declaration of Human Rights.

2. The Joint Appeals Board refused to investigate the understanding between UNIDO and IAEA to classify Austrian programmers in the General Service Category.

3. 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.

4. The Applicant performed functions recognized at the Professional level even though his post was classified in the General Service Category.

5. Programmers' posts at Headquarters are classified at the Professional level. Accordingly, the Applicant's post with an identical nature of duties and responsibilities should not be classified as a General Service post.

6. The Applicant's lower salary compared to the salaries of the Applicant's colleagues violates the spirit of Article 23 of the Universal Declaration of Human Rights which provides for "equal pay for equal work".

Whereas the Respondent's principal contentions are:

1. 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.

2. The Applicant would not have been entitled to an automatic promotion to the Professional Category even if the post that he encumbered had been classified at a higher level.

3. Since there were no prejudicial or discriminatory factors in the classification process, the classification of the Applicant's post in the General Service Category did not violate Article 2 of the Declaration of Human Rights.

The Tribunal having deliberated from 13 May 1987 to 4 June 1987, now pronounces the following judgement:

I. The Tribunal considers first the question whether in this case the Applicant had the right to ask for his General Service post to be reclassified as a Professional post. The Respondent argues that staff members in General Service posts have no such right, inter alia, relying heavily on the notion that in seeking reclassification, the Applicant was, in reality, demanding a promotion and that since no staff member has a right to a promotion, the Applicant had no right to reclassification.

The Tribunal holds in this respect that the classification of a particular post is altogether different from the promotion of its incumbent. The classification of each post depends on the nature of the duties and responsibilities assigned to it and not on the personal qualifications, experience or performance of the incumbent. Therefore, posts should be classified according to their respective job descriptions, which must be presumed to set forth accurately the nature of the duties and responsibilities of the job. Classification refers to the task to be performed by the incumbent of a given post; promotion is, in principle, connected to the way that task is performed, and takes into consideration performance evaluation reports.

As a consequence, the non-existence of a right to promotion for staff members is irrelevant as far as post classification is concerned.

II. The Tribunal now turns to the arguments concerning the way the post classification exercise should be carried out by the Secretary-General. Respondent's position appears to be that, with respect to General Service posts, the broad authority of the Secretary-General under Staff Regulation 2.1 confers on him virtually absolute discretion to determine the level of a post classification. The Tribunal notes that the discretion of the Secretary-General cannot be deemed absolute, for even in the exercise of his discretionary powers, the Secretary-General cannot disregard, but must function within, the requirements of the applicable regulations.

The Respondent has also contended that at the time in question the General Assembly had not authorized the Secretary-General to reclassify the Applicant's post from the General Service to the Professional Category so that Staff Regulation 2.1 did not compel any such reclassification, and that in any event the Applicant's post had been classified properly.

Although prior to 1 January 1980 no system of classification had been set up, the provisions of Staff Regulation 2.1 were in force. They required that "in conformity with principles laid down by the General Assembly ... posts and staff" should be classified "according to the nature of the duties and responsibilities required." No principles laid down by the General Assembly at the time in question were inconsistent with, or had modified the latter quoted words of Staff Regulation 2.1, and therefore those words provide the criterion by which staff members were entitled to have their posts classified. Staff Regulation 2.1 applies to General Service as well as to Professional posts, for nothing in the language of the Regulation suggests the contrary.

III. From the aforesaid it follows, in the Tribunal's view, that if it can be proven that a particular post has been classified without duly taking into consideration "the nature of the duties and responsibilities required" such a classification may be successfully challenged. This

must, of course, be done by timely action on the part of the staff member once he or she knows or has reason to believe that Staff Regulation 2.1 has not been complied with.

IV. Inasmuch as the Applicant has based his claim on the allegation that posts involving the performance of duties substantially similar to his were included in the Professional Category in New York, while his remained in the General Service Category, the Tribunal must consider whether this allegation was sustained by sufficient evidence.

V. For this purpose, on 6 October 1982, the Tribunal requested the Administration to inform it whether the "duties of a programmer working in the General Service category in UNIDO in the period from 1 March 1972 to 28 August 1978 differed substantially from those of a Programmer working at Professional level at Headquarters". The Respondent answered on 30 November 1982, saying that, of the three available post descriptions concerning the Applicant's post, it would only consider two for the purpose of drawing the required comparison. The third post description, dated September 1974 was not considered because, in the Respondent's opinion, "[the] incumbent did not perform the work of that description and was not assigned to it." The Respondent then went on to evaluate the duties mentioned in the first two job descriptions, which it thought comparable to the Applicant's post, as against those of a Programmer's post at Headquarters and came to the conclusion that, as the latter were of a more complex nature than the former, the duties of the post encumbered by the Applicant were not of a professional level.

VI. The Tribunal notes that this conclusion overlooks the fact that, at Headquarters, there are posts denominated "Associate Programmer/Trainee Programmer" which are classified in the Professional Category, and the duties of which are less complex and might be of less importance than those of the Applicant's post in Vienna. Thus, from the fact that the duties of a Programmer's post at Headquarters are considered to be of a higher level than those of the Applicant's post in Vienna, it does not necessarily follow, as the Respondent contends, that the Applicant's post does not belong in the Professional Category.

VII. Beyond this, the third post description, although discarded by the Administration for the reasons mentioned above, refers to duties of a "clearly professional" nature, in the words of the Respondent. By this admission, the whole case comes to hinge on whether the duties and responsibilities embodied in the third post description dated September 1974 were or were not applicable to the post encumbered by the Applicant.

VIII. As noted above, the Respondent did not consider this last post description on the grounds that "[the] incumbent did not perform the work of that description and was not assigned to it." However, the Tribunal finds, on the basis of the evidence produced and chiefly on the basis of a memorandum of 28 February 1974 from Mr. James Gillcrist (then Chief, Administrative Management Office) stating that "In short, the job [the Applicant's post] to be performed is unquestionably that of a professional", and of an assessment dated 1 July 1977 by Mr. Gillcrist (then Chief, Computer Services), that the duties and responsibilities of the professional programmer post in the September 1974 description were entrusted to the Applicant, although in his superior's opinion, he did not perform them satisfactorily.

At this point, the Tribunal wishes to stress again that the nature of a post and the duties attached to it are not to be confused with the way in which its duties are performed by the incumbent. If, as in this case, the duties of a post are professional in nature, the fact that its incumbent is unable or unwilling to perform them properly is irrelevant as far as the nature of the post is concerned. That the Applicant's performance might show that he was unable or unwilling to perform at a professional level was a matter to be dealt with through other channels, such as the termination procedure that took place in this case, but it does not affect the nature of the post and its responsibilities and, ultimately, its classification.

IX. Thus, the admissions on the part of the Respondent as to the nature of the Applicant's post as "unquestionably" and "clearly" professional are considered by the Tribunal as sufficient to establish

that the Applicant's post was improperly kept in the General Service Category and should have been placed in the Professional Category.

X. The Applicant's claim with respect to the improper classification of his post is, therefore, well-founded.

XI. The Tribunal further considers that the fact that the Applicant accepted employment in the General Service Category in spite of indications that the work expected from him would be of a higher level does not in itself debar him from seeking a proper classification of his post. Regardless of who filled the post, the classification by the Administration did not duly reflect the nature of the duties and responsibilities involved and this impropriety was not cured by the staff member's acceptance of the job offered to him. Otherwise the door would be open to possibilities for evasion of important protections accorded to staff members under the Staff Regulations.

XII. The Tribunal does not find that the General Service classification of the post encumbered by the Applicant was established or maintained for the purpose of discrimination against Austrians on the basis of their national origin. But, even if there were some consideration of national origin in connection with the classification, this would not, in the circumstances of this case, have altered the Tribunal's view regarding the amount to be awarded as damages.

XIII. In view of the foregoing, the Tribunal need not consider further other allegations of the Applicant, in particular those asserting discrimination based on his nationality.

XIV. Before the JAB, the Respondent alleged that requests for reclassification of posts had no connection with the staff members' conditions of service and that, therefore, the JAB was not competent to deal with the Applicant's request. The JAB implicitly rejected this argument by taking up the case on its merits, and the argument appears to have been abandoned by the Respondent. To avoid any uncertainty regarding this point, the Tribunal considers that classification of their posts is part of staff members' conditions of service.

XV. For the above-mentioned reasons and taking into consideration all the circumstances of the case, the Tribunal awards the Applicant compensation of $US 10,000. All other pleas are rejected.

(Signatures)

Mr. Arnold KEAN
First Vice-President

Mr. Luis de POSADAS MONTERO
Second Vice-President

Mr. Jerome ACKERMAN
Member

Geneva, 4 June 1987

R. Maria VICIEN-MILBURN
Executive Secretary