ADMINISTRATIVE TRIBUNAL

Judgement No. 459

Case No. 477: MOORE-WOODROFFE Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, First Vice-President, presiding; Mr. Jerome Ackerman, Second Vice-President; Mr. Ahmed Osman;

Whereas, on 19 August 1988, Jeanne Wendy Moore-Woodroffe, a staff member of the United Nations filed an application, the pleas of which read as follows:

> "(a) The Applicant requests the United Nations Tribunal to find that the decision of Dr. Nicol, the Executive Director of UNITAR [United Nations Institute for Training and Research] at the material time, was the proper decision to make because it followed proper consultations with the Appointment and Promotion Board of UNITAR, and was in conformity with the rules of UNITAR for such purposes;
>
> (b) The Applicant requests the Tribunal to find that the abolition of her post by Dr. Nicol's successor was done in bad faith, and was intended to avoid the decision of Dr. Nicol to have Ms. Jeanne Wendy Moore promoted from G-5 to P-2;
>
> (c) The Applicant prays to the Tribunal to apply its precedent in Case No. 406: Walter [Judgement No. 390 (1987)] in which the Tribunal decided in favour of the Applicant, as the facts and figures of Case No. 406: Walter are very close to the case of the Applicant."

Whereas the Respondent filed his answer on 23 September 1988;

Whereas, on 19 October 1989, the Tribunal put questions to the Respondent and on 23 October 1989, he provided answers thereto;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 6 October 1967. She served on two successive three month fixed-term appointments as a Stenographer, at the G-3, step 1 level, until 6 April 1968 when she was offered a probationary appointment. On 16 August 1968, the Applicant was seconded to the United Nations Institute for Training and Research (UNITAR), initially for a period of one year, as a Clerk Stenographer. On 1 May 1969, the Applicant was transferred to UNITAR and, on 1 April 1970, she was granted a permanent appointment. On 1 April 1973, the Applicant was promoted to the G-4 level and on 1 April 1977, to the G-5 level as an Administrative Assistant.

In November 1982, Mr. Davidson Nicol, the UNITAR Executive Director then in office, submitted to the Appointment and Promotion Board a series of recommendations of staff in the General Service category for promotion to the Professional category. The Applicant was one of such staff members. In a letter dated 2 December 1982, the Chairman of the Board informed the Executive Director that the Board had decide to "postpone" its review of the cases presented to it, pending receipt of further information from the UNITAR Administration. An exchange of correspondence ensued between the Executive Director and the Chairman of the Board concerning this question.

In a letter dated 10 December 1982, the Chairman of the Board set forth a series of "points of principle" which had been raised at the Board during its review of the Executive Director's recommendations. He noted, concerning recommendations of General Service staff for promotion to the Professional category, that they

had posed special problems, since such promotions, within the U.N. Secretariat, were governed by the competitive examination mandated by the U.N. General Assembly.

In a reply dated 16 December 1982, the Executive Director explained to the Chairman of the Board that the question of promotion of General Service staff to the Professional category had not been resolved in a satisfactory manner at the United Nations Secretariat; that he had "great difficulty in receiving definitive advice from the U.N. Office of Personnel Services on this matter", and that in the exercise of UNITAR's autonomy, he had decided that competitive examinations were not necessary in UNITAR. He therefore reiterated his recommendation to promote the Applicant. On the same date, the Executive Director wrote to the Applicant a letter that reads in part as follows:

> "Dear Ms. Moore,
>
> I am pleased to inform you about your promotion to P-2 with effect from 1 December 1982.
>
> The appropriate step will be decided by me in consultation with the Finance and Administration Section soon.
>
> I am sorry that because of the financial constraints now alleviated, this promotion could not be made earlier or with retroactive effect.
>
> ..."

In a memorandum dated 22 December 1982, the Executive Director notified the Chief, Finance and Administration, UNITAR, that "after full consultation with the Appointment and Promotion Board and its Chairman" and "by virtue of the powers conferred on [him] by [the UNITAR] Statute on staffing of the Institute", he had decided to promote a series of UNITAR staff members. The Applicant was included among them.

On 23 December 1982, a Personnel Action form was issued to

implement the Applicant's promotion to the P-2 level, effective 1 December 1982, as "approved by Executive Director, UNITAR and Under-Secretary-General, United Nations vide his memorandum ... of 16 December 1982."

Mr. Davidson Nicol's term as Executive Director of UNITAR expired on 31 December 1982. The Applicant was informed on 4 January 1983, that his successor, Mr. Michel Doo Kinguí, had "suspended" the decision taken by Mr. Nicol on her promotion until he had the opportunity to examine the case in the light of the views expressed on the matter by the UNITAR Board of Trustees and the UNITAR Appointment and Promotion Board. According to the minutes of a meeting of the Appointment and Promotion Board held on 3 March 1983, the Board recommended no promotions from the General Service to the Professional category.

In a letter dated 29 September 1983, the Executive Director informed the Applicant that, on account of the Institute's financial situation, her post would be abolished, effective 31 December 1983. He referred to negotiations with the United Nations Office of Personnel Services (OPS) with a view to the absorption by the Secretariat, of staff members occupying posts that would be abolished. However, if those negotiations were to prove unsuccessful, and OPS could not reassign the Applicant within the Secretariat, her appointment would be terminated on the grounds of abolition of post in accordance with the provisions of staff regulation 9.1 (a). A similar letter was sent to six other staff members.

On 13 October 1983, the Applicant, together with her six colleagues, requested the Secretary-General to review the administrative decision to abolish their posts. Having received no reply from the Secretary-General, on 14 November 1983, the seven co-signatories of the letter, including the Applicant, lodged an appeal to the Joint Appeals Board.

On 26 January 1984, the Officer-in-Charge, OPS, referring to arrangements made for the extension of the Applicant's appointment with UNITAR until 31 January 1984, advised her that from 1 February to 30 April 1984, she would be assigned within the U.N. Secretariat and during this period OPS would, on a priority basis, endeavour to find her a permanent placement. If these efforts proved to be unsuccessful, the Administration would have no alternative but to initiate proceedings to terminate her appointment on the grounds of abolition of post.

On 1 February 1984, the Applicant was assigned to the Office of the Special Representative of the Secretary-General for the Law of the Sea and her post was charged to temporary assistance funds. The assignment was successively extended for fixed-term periods while OPS sought to find her a permanent placement until 31 December 1984.

In the meantime, the Applicant had expressed interest in a temporary assignment to ESCWA [Economic and Social Commission for Western Asia], Baghdad, to assist in the Commission's training and staff development programme. She was interviewed and found suitable for the post by the Deputy Chief of Administration of ESCWA when he visited Headquarters in August 1984. In a memorandum dated 21 September 1984, the Director of Personnel Administration, OPS, confirmed to the Chief, General Recruitment Section, OPS, that it had still not been possible to identify a suitable position for the Applicant at Headquarters. In addition, noting that it would be "unjustifiably harsh to impose termination on grounds of abolition of post" in the Applicant's case, when permanent positions had been found for other UNITAR staff similarly situated, he recommended that the Applicant be assigned to ESCWA for one year as a temporary solution to the problem of her placement. The Applicant was informed by the Chief, General Recruitment Section, OPS, that a post could not be blocked to absorb her return to New York, but she

nonetheless accepted the ESCWA offer and was assigned to Baghdad on 1 January 1985. Her assignment has been subsequently extended several times.

The Joint Appeals Board (JAB) adopted its report on 2 July 1987. Its conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 31. The Panel concludes that the provisions of staff rule 109.1 had been observed with regard to the abolition of the post encumbered by the appellant in UNITAR.
>
> 32. The Panel notes that the appellant remains in service assigned to ESCWA while retaining her permanent contract with the United Nations Secretariat. The Panel recommends that the Office of Human Resources Management review well in advance of 31 December 1987 the appellant's request for a proper placement within the Secretariat.
>
> 33. The Panel also concludes that it could find no basis for the appellant's contention as to the non-implementation of a promotion."

On 10 August 1987, the Assistant Secretary-General for Human Resources Management[1] informed the Applicant that:

> "...
>
> The Secretary-General, having re-examined your case in the light of the report, has decided to accept its recommendation that your request for placement be reviewed by the Office of Human Resources Management well in advance of the expiry of your present assignment to ESCWA.
>
> ..."

On 19 August 1988, the Applicant filed with the Tribunal the application referred to above.

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[1] Successor OPS

Whereas the Applicant's principal contentions are:

1. The former Executive Director of UNITAR made a proper decision to promote the Applicant and the promotion should have been implemented.

2. The new Executive Director's recommendation not to implement the promotion was irrelevant.

3. The decision to abolish the Applicant's post was taken in order to avoid implementing the Applicant's promotion.

Whereas the Respondent's principal contentions are:

1. As long as the Applicant remains employed in the Secretariat, she has no basis for objecting to the abolition of a post that she had previously occupied.

2. In respect of the Applicant, the provisions of staff rule 109.1 were fully observed in connection with abolition of her previous UNITAR post.

3. The JAB did not fail to consider relevant evidentiary documents because none were submitted to it.

4. The Applicant may not, without the Respondent's agreement, for the first time raise in the Tribunal a claim that she failed to raise effectively in the JAB by introducing in the former, evidence that she could have but failed to submit in the latter.

The Tribunal, having deliberated from 19 October to 9 November 1989, now pronounces the following judgement:

I. The Applicant in her pleas before the Tribunal raises two issues; one concerns the abolition of her post, and the other relates to the non-implementation of her promotion from the G-5 to the P-2 level.

II. With regard to the abolition of her post, the Applicant

contends that:

(i) It was not in conformity with the Staff Rules;

(ii) It was done in bad faith, to avoid implementing the decision by the former Executive Director to promote the Applicant from the G-5 to the P-2 level.

The Tribunal notes that the applicable provisions governing the abolition of posts are contained in staff regulation 9.1 and staff rule 109.1 (c).

III. The Tribunal will consider whether these two provisions were properly applied in this case. According to staff regulation 9.1, the Secretary-General or his delegated authority has the power to terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed if the necessities of the service require abolition of the post or reduction of staff.

The discretionary power to abolish a post in accordance with staff regulation 9.1, is qualified by the condition that such abolition is required by the necessities of the service. In his letter of 29 September 1983, informing the Applicant of the abolition of her post, the Executive Director explained the reasons for his decision as follows:

> "This decision is in keeping with my pledge to the Board of Trustees of UNITAR that I would do everything in my power to ensure that the Institute lives within its means.
>
> As you know, I presented to the Board of Trustees in April 1983 a financial situation of the Institute which was desperate, and I am struggling to obtain from the General Assembly additional resources to bail out the Institute in 1983. Even if I succeed, I cannot continue to rely on such a measure on the part of the General Assembly in the future. It is therefore essential that appropriate arrangements be made now to avoid a recurrence of such a situation."

IV. The Applicant, on her part, claims that the decision to

abolish her post was taken for extraneous reasons; to avoid the implementation of her promotion.

V. The Tribunal disagrees with the Applicant in this respect for the following reasons:

1. The decision to abolish her post was not specifically directed at her, but was a decision of a general nature involving other staff members.

2. The Executive Director was not acting on his own, but was keeping a pledge to the Board of Trustees of UNITAR to do everything in his power to ensure that the Institute lived within its means.

3. Without prejudging at this stage the substance of the Applicant's claim to promotion, the Tribunal notes the following:

The Executive Director, in his letter of 4 January 1983 to the Applicant, did not cancel the promotion, but only suspended it until he had the opportunity to examine the case in the light of the views expressed on the matter by the UNITAR Board of Trustees as well as the UNITAR Appointment and Promotion Board (APB). It was on 3 March 1983, that the APB declined to recommend the Applicant's promotion from the General Service to the Professional category. So, if the real and ultimate intent of the Executive Director was to prevent the Applicant from being promoted, the APB recommendation would have given him a pretext to do so. He would not have had any reason related to promotion to wait until 29 September 1983 to abolish the post.

Therefore, the Tribunal considers that the Applicant's contention that the Executive Director took the decision to abolish her post in bad faith and for extraneous reasons must fail.

VI. With regard to the other applicable text, staff rule 109.1 (c), the Tribunal notes that in his letter of 29 September 1983,

informing the Applicant of the abolition of her post, the Executive Director referred to negotiations with the United Nations to absorb staff members affected by the above decision by the U.N. Secretariat.

VII. In reviewing the conduct of the Administration towards the Applicant after the decision to abolish her post, the Tribunal notes that the Applicant's rights under staff rule 109.1 (c) were respected. This for the following reasons:

1. Although the abolition of her post was effective 31 December 1983, the Administration has made successful efforts to employ the Applicant.

2. Since the Applicant was locally recruited, the Organization was not obliged to search for an assignment outside her duty station of New York (staff rule 109.1 (c) (ii) (a)), but, nevertheless, it found a temporary solution by detailing her to ESCWA, Baghdad.

3. The Director of Personnel Administration has also confirmed that it is not the intention of the Administration to terminate her appointment in view of the fact that her other UNITAR colleagues, whose posts in UNITAR were abolished, were given permanent U.N. positions.

4. In his letter dated 10 August 1987, the Assistant Secretary-General for Human Resources Management conveyed to the Applicant the decision by the Secretary-General to accept the Joint Appeals Board (JAB) recommendation that her request for placement be reviewed by the Office of Human Resources Management well in advance of the expiry of her present assignment to ESCWA.

VIII. In view of the foregoing, the Tribunal finds that staff regulation 9.1 (a) and staff rule 109.1 (c) were fairly and properly applied to the Applicant, and her contrary contention in this

respect is without foundation.

IX. The Applicant also claims that she should be promoted from the G-5 to the P-2 level, and that the JAB wrongfully refused to consider evidentiary documents relevant to her promotion. The Respondent, on his part, raises the issue of the receivability of the Applicant's plea concerning promotion on the ground that it was not properly before the JAB and therefore it is not now properly before the Tribunal. The Respondent suggests that the Tribunal apply the provisions of paragraph 2 of article 9 of its Statute and remand the claim relating to the Applicant's promotion for consideration by the JAB. He invokes in this respect paragraph 1 of article 7 of the Tribunal's Statute and the jurisprudence of the Tribunal in Judgement No. 299, Moser (1982).

The question to be addressed by the Tribunal is, therefore, the receivability of the appeal concerning the Applicant's promotion. Paragraph 1 of article 7 of the Tribunal's Statute, states:

> "An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal."

X. In this regard the Tribunal also takes note of the following facts:

(a) The issue of promotion had not been raised in the Applicant's original letter to the Secretary-General which only requested review of the administrative decision to abolish her post.

(b) The procedure before the JAB was initiated by a letter dated 14 November 1983, only referring to the issue of the abolition of the post.

(c) At the very end of counsel's observations dated 24 June 1987, on the Respondent's reply to the Applicant's statement of appeal before the JAB, the question of promotion was raised in the following way:

> "There is also outstanding, in the opinion of counsel, the matter of non-implementation of the appellant's promotion to the P-2 level, for which she was recommended by the former Executive Director of UNITAR, before the question arose of the alleged administrative power of the new Director to terminate permanent staff members already on board."

XI. The JAB commented on the issue of promotion by expressing its reservation about introducing a new and extraneous element which had not been included in the statement of appeal of 14 November 1983. The JAB, finding no evidence whatsoever that the Applicant had ever been promoted to the P-2 level, rejected her counsel's statement on promotion as appearing to be without foundation. The JAB concluded that it could find no basis for the Applicant's contention regarding the non-implementation of a promotion.

XII. The Tribunal notes that, in her plea before the Tribunal, the Applicant presented documentary evidence of her promotion. At the same time, the Applicant claims that the JAB wrongfully refused to consider the evidentiary documents which were relevant to her case. This assertion by the Applicant is contradicted by the Respondent who certifies that the JAB's file is devoid of any indication that the Applicant or her counsel submitted to the Board any documentation relevant to the issue of her promotion. After reviewing the JAB's file, the Tribunal comes to the same conclusion reached by the Respondent. Therefore, the Applicant's plea that the JAB wrongfully refused to consider evidentiary documents concerning her promotion is without foundation.

XIII. It seems to the Tribunal, that until the submission by her

counsel of observations on the Respondent's answer on 24 June 1987, the Applicant's case before the JAB was concerned with the issue of the abolition of her post. Perhaps Judgement No. 390, Walter, rendered by the Tribunal on 5 June 1987, prompted the observations regarding her promotion. The Tribunal recalls its disapproval of attempts to raise new issues which have not been properly put before the JAB by an applicant. See Judgements No. 446, San Jose (1989), and No. 449, Janitschek (1989).

XIV. Although the JAB commented on the issue of promotion, nevertheless, it did not have a fair chance to consider properly and adjudge that issue. Accordingly, the Tribunal concludes that, by reason of article 7 of the Tribunal's Statute, the issue of promotion is not receivable.

XV. The Tribunal notes, however, a communication to it from the Respondent dated 23 October 1989, representing that, with respect to the Applicant, the Respondent intends to act in accordance with the Walter Judgement and indicating that it is attempting in good faith to locate a professional post in which to place the Applicant. In view of this, the Tribunal sees no reason at this time for any further action by it, and therefore declines to remand the case to the JAB, as suggested in the Respondent's answer to the application before the Tribunal.

XVI. For the foregoing reasons, the application:

(a) is rejected with regard to the Applicant's plea concerning the abolition of her post; and

(b) is not receivable with regard to her plea concerning non-implementation of her promotion.

(Signatures)

Roger PINTO
First Vice-President, presiding

Jerome ACKERMAN
Second Vice-President

Ahmed OSMAN
Member

New York, 9 November 1989

R. Maria VICIEN-MILBURN
Executive Secretary