

The Administrative Tribunal,

Considering the complaint filed by Mr E. K. against the United Nations Industrial Development Organization (UNIDO) on 9 March 2005 and corrected on 15 June, the Organization's reply of 22 September, the complainant's rejoinder of 3 November 2005 and UNIDO's surrejoinder of 13 February 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch national born in 1957, joined UNIDO in March 1989 as an Associate Industrial Development Officer at P-2 level. He was promoted to P-3 level in April 1992 and to P-4 level in January 1996. With effect from 1 March 1999 he was assigned to the field as UNIDO Representative in Iran.

By a memorandum of 4 October 1999 the complainant requested a retroactive promotion to P-5 level, on the grounds that other UNIDO Representatives assigned to the field before or after him had received a promotion related to their field assignment and that "all UNIDO Representatives [were] assigned at minimum the P-5 grade". His request was supported by his supervisor – the Director of the Asia and the Pacific Bureau – who on 7 October 1999 sent a memorandum to the Managing Director of the Field Operations and Administration Division, stating that it was "normal practice" for headquarters staff to be promoted by one grade for the duration of their field assignment and that all UNIDO Representatives were at P-5 or L-5.\* On 21 March 2000 the complainant was informed that the Director-General had approved the "conversion to the L-5 level during [his] assignment as UNIDO Representative in Iran with effect from 1 March 2000". On 16 April 2000 he wrote to the Director-General requesting that the conversion in question be made retroactive to the date of his assignment to Iran, namely 1 March 1999. Having received no reply within the 60-day period specified in the Staff Rules, he filed an internal appeal with the Joint Appeals Board on 13 July 2000, challenging the effective date of promotion.

In the meantime, the complainant had been informed, by a fax dated 4 July 2000, that the Director-General had decided to reassign him to UNIDO headquarters with immediate effect. On 17 July he was asked to return to Vienna by 21 July 2000.

In its report issued on 8 November 2004, the Joint Appeals Board recommended that "the conversion of the [complainant's] assignment as UNIDO Representative in Iran to level L-5 take effect retroactively, from 1 July 1999, consistent with those colleagues fielded around the same time", and that "all records be duly adjusted and that all salaries and financial entitlements be paid with accrued interest".

By a memorandum of 2 December 2004, notified to the complainant on 10 December, the Director-General rejected the Board's recommendation, considering that its implementation would be inconsistent with UNIDO's internal law, especially as set forth in Administrative Circular UNIDO/FOA/HRM/Ac.1 of 12 July 1999, which concerned the effective date of promotions. He indicated that he had, however, asked the Human Resource Management Branch (HRM) to discuss the matter with the complainant "with a view to finding a mutually acceptable solution". That is the impugned decision.

On 15 December 2004 the Director of HRM offered the complainant an amount of 3,000 United States dollars, corresponding to "the cost of implementing the recommendation of the [Joint Appeals Board] in monetary terms", in full and final settlement of the case. By a memorandum of 14 February 2005 the same Director informed the complainant that if the Administration did not hear from him with "an unconditional acceptance of [its] offer" by 25 February 2005, he could consider the offer withdrawn. Having received no reply by that date, the Organization subsequently withdrew its offer.

B. The complainant submits that it is not contested that he was entitled to be promoted to L-5 following his assignment as UNIDO Representative in Iran. In support of this assertion he draws attention to the statement made by his supervisor in the memorandum of 7 October 1999, according to which it had been “normal practice” for headquarters staff to be “promoted by one grade for the duration of their field assignments”. The complainant also refers to the conclusions of the Joint Appeals Board, which found that “there were inconsistencies in the application of Staff Rule 102.01 concerning job classification as well as the relevant provisions in [the] Director-General’s Administrative Instruction No. 8 of 14 May 1998” concerning staff career development, and that there was “lack of goodwill on the part of the Organization to remedy in a timely manner the unequal treatment of the [complainant]”.

He contends that the Administrative Circular of 12 July 1999, on the basis on which the Director-General rejected the Board’s recommendation, is “irrelevant and not applicable”. Indeed, nobody had suggested that the effective date for the promotion at stake should not be the first day of a month, as required by that Circular. Moreover, since he was assigned as UNIDO Representative as of 1 March 1999, the application of the Circular dated 12 July 1999 would constitute a “patent breach of the principle of non-retroactivity”. He further alleges that the effective date of his transfer to Iran being 1 March 1999, he rightly claimed promotion with retroactive effect from that date.

The complainant asserts that two colleagues assigned to the field as UNIDO Representatives at about the same time as him were granted a conversion to L-5 as of 1 July 1999, whereas his conversion to L-5 only took effect as from 1 March 2000. He alleges that in his case no “excluding factor” has been identified for not having his grade level converted from the date when he took up his assignment in Iran. He adds that there would be no breach of the principle of equal treatment if the Tribunal were to decide that the effective date of his promotion to L-5 was 1 March 1999, since he is not in the same situation in fact and in law as his two colleagues mentioned above, who did not submit an appeal.

Lastly, the complainant submits that the Organization “displayed and still displays” lack of goodwill towards him, whereas he tried “to moderate rather than escalate the conflict”. In this respect he points out that he appealed first to the Joint Appeals Board, although he could have gone directly to the Tribunal since his “initial letter of appeal” to the Director-General had remained unanswered.

The complainant asks the Tribunal to set aside the impugned decision and “draw all legal consequences from such a rescission”; decide that the effective date of his promotion to L-5 was 1 March 1999; and order the Organization duly to adjust all related records and pay him his “related salaries and financial entitlements”, with the interest due. He also claims moral damages and costs.

C. In its reply the Organization contends that at the time of the complainant’s assignment as UNIDO Representative in Iran there was no policy or practice which guaranteed staff assigned to field offices a higher grade for the duration of their assignments. It explains that, due to budgetary constraints for 1998-99, the Director-General decided in May 1998 that staff members assigned to the field should hold the same grade level as at headquarters. It further asserts that the complainant was not the only staff member to be assigned to the field at the same level as that held in headquarters.

UNIDO denies that the classification of the post in Iran was not properly done and that it was voluntarily delayed by the Organization. The job description for the post in Iran was finalised on 9 October 1998, but the post “could not be formally classified before 9 September 1999”. On that date it was classified at the P-5 level. UNIDO asserts that accordingly the complainant could not have claimed “a promotion to the P-5 level” prior to 9 September 1999. It also points out that the terms and conditions of his assignment as UNIDO Representative in Iran show that at the time of assignment he did not request a higher grade level than the P-4 level offered by the Organization. He requested a promotion to a higher grade level only on 4 October 1999, more than seven months after he was posted to Iran.

Contrary to the complainant’s contentions, the Organization asserts that the Circular of 12 July 1999 was applicable, since the complainant’s promotion, which he requested on 4 October 1999 was granted on 21 March 2000. Indeed it considers that the effective date of a promotion is based on the date “a decision as to a promotion is made”.

UNIDO rebuts the allegations of unequal treatment and asserts that the Director-General’s decision to promote staff members falls within his discretionary authority. It submits that the staff members who were promoted upon

assignment to the field were “in different situations” from the complainant, particularly in respect of their grade seniority. It adds that two of the UNIDO Representatives referred to by the complainant were promoted approximately six months after their assignment to the field and without retroactive effect.

The Organization points out that, while the Director-General rejected the Joint Appeals Board’s recommendation, he requested that the HRM discuss the matter with the complainant in order to find “a mutually acceptable solution”. It submits that the complainant “stalled the discussions” because he disagreed with the amount offered by UNIDO to settle the case.

Lastly, it rejects the complainant’s claim for moral damages as being legally unsound and unsubstantiated. It argues that the complainant had no right to promotion, therefore he cannot claim moral or material damages on the basis of a right that does not exist.

D. In his rejoinder the complainant reiterates his pleas. He submits that UNIDO acted arbitrarily and that, in the absence of any announcement of a change in the practice whereby staff members assigned to field offices were guaranteed a higher grade for the duration of their assignment, his reliance on the said practice was legally justified. He adds that by a memorandum of 4 February 1999 to the Managing Director of the Field Operations and Administration Division he expressed his concern at many outstanding issues, in particular the grade level of his post. Concerning his claim for moral damages, he submits that he is entitled to request that the Organization “abide by its own rules” in accordance with the *patere legem quam ipse fecisti* principle.

E. In its surrejoinder the defendant maintains its position. It adds that the memorandum of 4 February 1999 could not be construed as a request for a higher grade level, and that in any case he agreed to be assigned to Iran at P-4 level. It further denies that the Director-General acted arbitrarily.

## CONSIDERATIONS

1. The complainant, a UNIDO staff member at level P-4, was assigned, following his application therefor, effective 1 March 1999, to Teheran, in Iran. It was clearly stated in the appointment documents that he was to be assigned at the P-4 level, which was the same grade he held at headquarters in Vienna.

2. On 4 October 1999, more than seven months after assignment to Iran, the complainant requested in a memorandum to be promoted to the P-5 level on the grounds that at the time he applied for a field assignment “it was custom to increase the grade of staff rotating to the field”. The complainant also referred to other staff members who received a promotion when assigned to the field, although their particular situations differed from the complainant’s, notably in terms of their seniority.

3. The complainant explained that “it is my understanding that all UNIDO Representatives are assigned at minimum the P-5 grade”. The complainant’s supervisor supported the request for promotion.

4. By letter dated 21 March 2000, from the Divisional Personnel Officer in the Entitlements and Social Security Section, the complainant was informed that the conversion of his P-4 level to the level L-5 had been approved by the Director-General for the duration of his assignment in Iran, with effect from 1 March 2000.

5. By memorandum to the Director-General dated 16 April 2000, the complainant requested that the conversion be made retroactive to the date of his assignment to Iran, 1 March 1999. Since the Director-General did not reply to this request, the complainant submitted an appeal on 13 July 2000 to the Joint Appeals Board.

6. Independently of the appeals procedure, the complainant returned to Vienna on 21 July 2000, following a decision of the Director-General to reassign him to headquarters in his former post of Industrial Development Officer.

7. On 8 November 2004 the Joint Appeals Board issued a report and recommended that “the conversion of the [complainant’s] assignment as UNIDO Representative in Iran to level L-5 take effect retroactively, from 1 July 1999, consistent with those colleagues fielded around the same time”, that “all related records be duly adjusted and that all salaries and financial entitlements be paid with accrued interest accordingly”.

8. By a memorandum of 2 December 2004, the Director-General rejected the Board’s recommendation. That

is the impugned decision.

9. The complainant submits that UNIDO's practice concerning the assignment of representatives to the field entitled him to promotion to a higher grade level upon his appointment to Iran, that is to say from 1 March 1999, and not 1 March 2000.

10. The Organization submits that there was no practice that the complainant could rely on to justify an assignment to the field at the P-5 level. The complainant was fully aware that by accepting the assignment to Iran, he would be assigned at the P-4 level. In December 1997 there was a major budget reduction, followed by policy changes. Staff were notified by Administrative Instruction No. 8 of 14 May 1998 that all job descriptions would be reviewed and that postings would remain at the same level.

11. As for the complainant's claims that the date for a retroactive promotion should be 1 March 1999, the Organization states that the effective date of a promotion is based on the date a decision as to a promotion is made and not on the date that a staff member assumes the responsibilities of a higher level post. Furthermore, the complainant does not have a right to promotion; therefore, he cannot claim moral or material damages on the basis of a right that does not exist.

12. There is really no issue that it was customary for the Organization to promote UNIDO Representatives to the P-5/L-5 level if they were not already at that level. The Joint Appeals Board detailed cases of the complainant's colleagues who had received such promotions/conversions after being appointed to the field and, even more significantly, that was what happened in the complainant's case as well. The real issue is not whether he should have been promoted but rather when such promotion should have taken effect. It is significant that the complainant did not request a higher salary level than P-4 at the time of his assignment to Iran and it had been made clear to him in writing that he would be paid only at the P-4 level. The complainant requested the promotion to a higher grade level only on 4 October 1999, more than seven months after he was posted to Iran.

13. As to the date of promotion, the file does not reveal any uniform practice on the part of the Organization to promote UNIDO Representatives immediately upon their being posted; on the contrary, the cases noted by the Joint Appeals Board (and the latter's recommendation) show that there was usually a lapse of several months between appointment and promotion.

14. In the complainant's case, the post he was assigned to in Iran was classified as P-5 as of 9 September 1999. That was the last obstacle to the complainant receiving the promotion to which his transfer to the field should have entitled him. However, apparently because the budget did not provide funds for the post until January 2000, he was not in fact promoted until 1 March 2000. The lack of budgetary provision is not a reason which can be validly invoked by an international organisation to deny a staff member a promotion to which he or she would otherwise have a right and to deny him or her the salary which is commensurate with the duties of the post occupied. The Tribunal will order that the Organization backdate the complainant's promotion to the date of the classification of his post to P-5 and pay him all arrears of salary and allowances from that date, together with interest.

15. While the complainant makes a claim for moral damages and costs, his own conduct in the internal procedure disentitles him. The file reveals an offer from the Organization to settle the matter prior to the filing of the complaint for a cash sum of 3,000 United States dollars. That sum was said by the defendant to be "the cost of implementing the recommendation of the [Joint Appeals Board] in monetary terms" and the complainant does not contradict that statement. The amount of that offer does not appear to vary markedly from what he will receive under the present judgment which is slightly less favourable to him than the Joint Appeals Board's recommendation. The Tribunal encourages parties to settle their claims and will make no award of moral damages or costs where a reasonable settlement offer has been rejected.

## DECISION

For the above reasons,

1. The impugned decision is set aside.

2. UNIDO shall pay the complainant all arrears of salary and allowances that he would have received if he had been promoted to level L-5 on the date of the classification of his post, together with interest at 8 per cent.

3. All other claims are dismissed.

In witness of this judgment, adopted on 5 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

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\* Upon assignment to Iran the complainant belonged to the “L” category of staff.