

**111th Session**

**Judgment No. 3016**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms M.-O. D. against the United Nations Industrial Development Organization (UNIDO) on 23 February 2009 and corrected on 30 April, UNIDO's reply of 21 August, the complainant's rejoinder of 23 October 2009 and the Organization's surrejoinder of 28 January 2010;

Considering the third complaint filed by the complainant against UNIDO on 30 September 2009 and corrected on 12 November 2009, UNIDO's reply of 17 February 2010 and the letter of 8 October 2010 by which the Registrar of the Tribunal was informed that the complainant would not submit a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Lebanese national, was born in 1957. She joined UNIDO in 1979 as a shorthand typist. In 1995 she was

assigned to the position of Staff Council Secretary at level G-5 and in 2003 her post was upgraded to G-6.

On 28 April 2005 the Director of the Human Resource Management Branch (HRM) announced that the Director-General had agreed to continue the application of internal selection procedures for jobs upgraded to G-7, and that in this connection HRM had initiated dialogue with managers to identify G-6 positions, which potentially fulfilled the criteria for level G-7. The job descriptions of such positions were to be reviewed and sent to HRM by 6 May. The reclassification exercise was due to be completed by the end of May.

On 6 May 2005 the complainant's amended job description was forwarded to HRM by her supervisor. An external classifier conducted a desk audit of her post on 11 May and issued a report in which he concluded that the post should be upgraded to G-7. This report was not then shared with her. In February 2006 the complainant asked HRM to provide her with the results of the desk audit, but she was informed that this was not possible, as all recruitment and classification decisions had been suspended to allow the new Director-General to have an overview of the staffing situation. When she reiterated her request in August and October 2006, she was told that the classification review of her post had not yet been finalised and that the outcome would be communicated to her in due course.

On 29 November 2006 the complainant asked the Director-General to instruct the Administration to provide her with the results of the desk audit. On 25 January 2007 the Director of HRM, writing on behalf of the Director-General, notified the complainant that her request could not be granted. She explained that a desk audit was only one of the steps of the classification process and that the classifier's report was not forwarded to the incumbent of a post under review. She indicated that following the desk audit carried out in 2005 certain issues had to be clarified, and that a second desk audit would have to be conducted in order to finalise the classification process, the outcome of which would be communicated to her in due time. On 19 March 2007 the complainant filed an appeal with the Joint

Appeals Board (JAB) contesting the decision of 25 January not to communicate to her the report of the first desk audit and requesting that her post be classified at G-7 level as from 1 June 2005. She also claimed damages and costs.

The second desk audit was carried out in late March 2007. The second classifier recommended that the complainant's post be maintained at level G-6, noting that her duties and responsibilities had not changed since the last reclassification in 2003. On 16 April 2007 the Director of HRM informed the complainant that her post was confirmed at level G-6. The complainant wrote to the Director on 8 May requesting that a Classification Appeals Committee (CAC) be established to review the classification of her post. She also asked to whom she should address her request. Having received no reply, on 15 June she wrote to the Director-General requesting that her post be classified at G-7 as from June 2005, and that she be paid a special post allowance from that time onwards. On the same day she sent a second memorandum to the Director-General, reiterating her request that a CAC be established. On 13 August she was notified that the CAC would be established shortly and that the Director-General had decided to reject her request for a special post allowance on the grounds that she was not assigned the full functions of a post classified at a higher level than her own, as required by the relevant rules. Her attention was drawn to the Administrative Instruction of 7 May 1984 on classification procedures, according to which she had to request a clarification before the CAC could review the classification decision.

An exchange of correspondence ensued in which the complainant asserted that she had already requested clarification, whereas the Administration maintained that none of her earlier communications constituted such a request. In October 2007 the complainant filed a second appeal with the JAB, contesting the implied rejection of her request for review of the decision to maintain her post at level G-6. She explained that since the memorandum of 13 August was silent on that matter, she assumed that it amounted to an implied rejection. She later withdrew this appeal.

On 20 March 2008 the complainant asked the CAC to review the decision to maintain her post at level G-6. In its report of 18 November the CAC noted that the views of the classifiers differed as to the level of the complainant's post, but stated that it would refrain from considering the accuracy of their findings because the members of the CAC did not have the necessary competencies and qualifications to undertake a further substantive classification of the post. Consequently, the CAC merely examined whether the existing procedure for classification had been correctly followed. It considered that the classification process had taken an inordinately long time, but found no violations of the existing rules. The CAC therefore recommended maintaining the decision to classify the post at level G-6.

By a memorandum of 2 December 2008 the complainant was informed that the Director-General had decided to endorse the CAC's recommendation. On 19 December she asked him to review that decision, alleging that the members of the CAC had disqualified themselves by stating that they did not have the necessary competencies and qualifications to undertake a substantive classification of her post. On 18 February 2009 she was informed that more time was needed to finalise a reply to her request, but that she should receive it by the end of the month. On 27 February 2009 the Director of HRM notified her that it had been decided to submit her job description to two further independent classifiers for evaluation. The final decision on her request for review would be taken on that basis and, if need be, she could file a complaint directly with the Tribunal once the final decision had been made. In the meantime, however, the complainant had filed her second complaint with the Tribunal, impugning the decision of 2 December 2008.

The evaluation of the complainant's post was conducted in the first semester of 2009 by two classifiers designated by HRM. The Director of HRM notified the complainant on 2 July that they both had concluded that her duties and responsibilities corresponded to level G-6. She attached a copy of the factor evaluation sheet completed in April 2009 by one of them and the desk audit report completed in May 2009 by the other, which included a factor rating sheet. She indicated

that the Director-General had therefore decided to maintain his decision concerning the classification of her post. In her third complaint the complainant impugns the decision of 2 July 2009.

On 20 August 2009 the JAB issued its report concerning the appeal lodged on 19 March 2007. It held that the decision not to disclose the report of the first classifier to the complainant while the classification process was under way was defensible, but that the report should be made available to her in the context of the appeal proceedings, to avoid any breach of due process. It also recommended that the complainant be awarded damages for delay in the classification process, and costs, but it rejected her other claims.

Under cover of a letter dated 15 September 2009 the Secretary of the JAB forwarded to the complainant the JAB's report and the Director-General's decision thereon, dated 8 September 2009. The Director-General considered that any claim pertaining to delay in the classification process was premature, as that process was still under way when the appeal was filed. However, he decided to pay damages in the amount of 3,500 euros, on the grounds that the JAB had taken an inordinate amount of time to examine the appeal. He also noted that the recommendation to produce the report of the first classifier had become moot, since the CAC had communicated it to the complainant in March 2009 in the context of her classification appeal.

B. The complainant contests the fact that the decision to maintain her post at level G-6 is based on the new evaluation made by the third and fourth classifiers during the last classification review, and not on that of the first classifier, who had recommended that her post be graded at G-7. She submits that the new desk audit was not conducted on the basis of the conditions applicable in 2005 when she requested the reclassification of her post: her former supervisor was not present and the classifier had examined the duties and responsibilities of her post in May 2009, and not in 2005; if endorsed, her opinion should take effect from May 2009. She submits that the opinion of the classifier who submitted a factor evaluation sheet should not be given any weight because it was reached without a desk audit being conducted, and likewise did not take into account the circumstances prevailing in

2005. For the earlier period starting on 11 May 2005, the recommendation of the first classifier should, in her view, be followed and she should be paid the salary and benefits applicable to G-7 staff members, with interest.

The complainant also argues that the Organization's failure to provide reasons for not considering the first classifier's opinion amounts to an abuse of discretionary authority. She alleges unequal treatment in that the Administration, while refusing to upgrade her post as recommended by the first classifier, decided to endorse his recommendations to upgrade the posts of other staff members whose posts were audited during the same period. Since there is no evidence that the first classifier was unqualified, or acted on some wrong principle, or overlooked some material fact, or reached a clearly wrong conclusion in her case, there was no reason for departing from his recommendation to classify her post at level G-7.

Further, she objects to the excessive delay in reaching a final decision on her reclassification request. She stresses that the reclassification process lasted for more than four years. In particular, she takes the Administration to task for its failure to obtain the opinion of the second classifier within a reasonable period of time.

According to the complainant, the Organization acted in bad faith. She criticises the Administration for failing to advise her in May or June 2005 that the classification review would not be completed in due time, and for failing to reply in a timely manner to her memorandum of 8 May 2007 by which she requested that the CAC be established. She submits that she was unable to provide a detailed request for clarification because the Administration withheld relevant documents relating to the classifiers' opinions. She also alleges that she was not treated with respect since she repeatedly had to enquire as to the results of the first desk audit, which were not communicated to her until March 2009.

The complainant asks the Tribunal to set aside the impugned decisions maintaining her post at level G-6, and to order UNIDO to produce all documents considered by the CAC. She claims material damages in an amount equivalent to the difference between what she

earned from 11 May 2005 to the date of filing her complaints, and what she would have earned had she been upgraded to G-7, including with regard to her pension entitlements, as well as moral damages, exemplary damages and costs. In her second complaint she also asks the Tribunal to order that her post be classified at G-7 with effect from 11 May 2005, and in her third complaint she requests that, in the alternative, the Tribunal order a further review by a neutral classifier agreed upon by both parties.

C. In its replies UNIDO submits that the complainant's second complaint is irreceivable since the final decision concerning the reclassification of the complainant's post was taken on 2 July 2009 following a further desk audit, and she impugns that decision in her third complaint.

The Organization indicates that a decision on reclassification is discretionary and that the complainant has no right to a reclassification of her post. In accordance with Administrative Instruction UNIDO/ADM/PS.52 of 7 May 1984, several desk audits may be conducted to ensure that a post is accurately described, and to review the duties and responsibilities assigned. In its view, the second desk audit was an appropriate measure, since HRM had reservations as to the accuracy of her job description, and indeed the first classifier advised that it should be redone. Moreover, the decision to accept the conclusions of the third and fourth classifiers who reviewed her duties and responsibilities in April and May 2009 was justified by the fact that the first classifier's recommendation was based on a material error. Indeed, the latter had misapplied the Classification Standards for the General Service Category in Vienna of July 1993, which provide that a range of scores may be given for supervisory activities, depending on the number of employees supervised. Since the complainant did not supervise any staff members, the classifier was mistaken in allocating points under that heading. Concerning the evaluation performed by the classifier who submitted only a factor evaluation sheet, the defendant points out that desk audits are not compulsory. It asserts that the material conditions prevailing in 2005 were considered by the third and fourth classifiers, who examined the

complainant's job description and the Classification Standards in force in 2005. The issue of whether they considered the complainant's situation in 2005 or in 2009 was irrelevant, since she has not shown that her conditions of employment were modified after 2005. It adds that if the complainant wanted her first supervisor to be present during the third desk audit she could have invited him to attend, or asked HRM to do so.

It submits that the complainant has failed to demonstrate that her duties and responsibilities justified upgrading her post. Several experts were involved in reviewing her duties, and all but one of them reached the conclusion that her post was correctly classified at G-6. It considers that a new classification review is not necessary, since the complainant has not shown that the classifiers who conducted the last evaluation of her post in 2009 were mistaken.

The defendant explains that the delay in the classification review process was due to the fact that there were a number of successive and overlapping procedures. In any event, it is not unusual for a classification review to extend over several years, and the complainant was informed of the outcome within a reasonable period of time.

UNIDO denies any bad faith on its part. It asserts that it showed respect for the complainant, stressing that it answered her queries, provided her with detailed instructions on the procedures to be followed, offered her a meeting with the Director of HRM and authorised her to file a complaint directly with the Tribunal. Lastly, it submits that the complainant was provided with a copy of the first classifier's report at the appropriate time, that is to say when she requested it during the classification appeal proceedings.

D. In her rejoinder on the second complaint the complainant contends that her complaint shows a cause of action and hence is receivable. She explains that the Director-General decided to set aside the decision of 2 December 2008 on the grounds that the CAC had committed errors, but he did not grant her material and moral damages. The Organization then appointed new classifiers to review the classification of her post. The complainant indicates that she filed her complaint directly with the

Tribunal because of UNIDO's failure to take a decision on her classification appeal within a reasonable period of time.

E. In its surrejoinder on the second complaint the Organization maintains that the complaint is irreceivable. It stresses that a staff member is not allowed to file a complaint directly with the Tribunal with respect to classification appeals; the internal means of redress must first be exhausted. It otherwise maintains its position on the merits.

### CONSIDERATIONS

1. As the second and third complaints relate to the same proceedings, raise the same issues of fact and law, and substantially seek the same redress, the Tribunal joins them to form the subject of a single ruling. Having reviewed the written submissions and found them sufficient, the Tribunal disallows the complainant's requests for an oral hearing.

2. In the second complaint, the complainant impugns the decision, dated 2 December 2008, by which she was informed that the Director-General had decided, on 21 November 2008, to endorse the CAC's recommendation of 18 November 2008 not to upgrade her post from G-6 to G-7. By a decision of 2 July 2009 she was informed of the Director-General's decision to maintain her post at level G-6, following a further evaluation of her post conducted by two independent classifiers who recommended that the post be classified at level G-6. As the decision of 2 July 2009 – which is the subject of the third complaint – was based on the result of a new assessment, it supersedes the decision of 2 December 2008, effectively removing the grounds for complaint in that part. Therefore, the Tribunal will only consider the subsidiary claims regarding breach of good faith and

mutual trust, and excessive delay, together with the almost identical claims presented in the third complaint, and will dismiss the claim to annul the decision of 2 December 2008 as moot and therefore inadmissible. The claim regarding breach of due process derives from the alleged flaws in the CAC procedure, which were effectively remedied by the replacement of the decision of 2 December 2008. As such, the Tribunal needs only to consider the CAC procedure insofar as it may have contributed to the delay in issuing a final decision on the classification of the complainant's post.

3. The joined grounds for complaint that the Tribunal now considers are: (a) the third desk audit did not consider conditions at the material time; (b) the Organization did not offer any reason for rejecting the original desk audit report of 11 May 2005, which recommended classifying the complainant's post at level G-7; (c) there was an egregious delay in finalising the post classification exercise which began on 6 May 2005 and ended with the decision of 2 July 2009; and (d) the complainant was not treated with respect and consideration.

4. The complainant's claims are set out under B, above, *in fine*.

5. The complainant argues that her former supervisor was not present at the desk audit of 6 May 2009, that the classifier who submitted a factor evaluation sheet did not conduct a desk audit, and that none of the classifiers considered the conditions that pertained at the material time, i.e. in May 2005. She states that as the Organization had offered no reason for rejecting the first classification recommendation of 11 May 2005, all subsequent classification reviews were unjustified, and therefore the decision of 2 July 2009 is flawed and must be set aside. These arguments are unfounded. The Organization was clear, in an e-mail of 26 March 2009, that it was willing to assist the complainant in making an appointment with her previous supervisor and the classifiers. As there is no rule requiring a supervisor's presence at a desk audit, and as the complainant did not request the Organization to set up the meeting and did not contact her

previous supervisor directly, no reviewable error arises from the fact that the complainant's previous supervisor was absent during the desk audit.

6. Furthermore, as listed in the factor rating sheet and in the desk audit report, as well as in the factor evaluation sheet, the classifiers proceeded by reference to the complainant's job description of 2005 and also to the Classification Standards for the General Service Category in Vienna, as approved by the International Civil Service Commission, in force in 2005. The complainant has not shown that either her duties or the applicable rules changed between 2005 and 2009; it is therefore immaterial that during the third desk audit the classifier also inquired as to her current role, duties and responsibilities. Moreover, according to the provisions of Administrative Instruction UNIDO/ADM/PS.52, desk audits are not mandatory. Therefore, the fact that one of the classifiers did not carry out a desk audit cannot be considered a flaw in the procedure.

7. The classification of posts involves the exercise of value judgements as to the nature and extent of the duties and responsibilities of the posts. Accordingly, the Tribunal will not substitute its own assessment or direct a new assessment unless certain grounds are established. Consistent precedent has it that "the Tribunal will not interfere with the decision [...] unless it was taken without authority or shows some procedural or formal flaw or a mistake of fact or of law, or overlooks some material fact, or is an abuse of authority, or draws a clearly mistaken conclusion from the facts" (see Judgment 1281, under 2). None of these grounds is established in relation to the decision of 2 July 2009.

8. It is necessary to refer to the rejection of the first classification review recommendation contained in the desk audit note of 11 May 2005. As earlier mentioned, the complainant contends that, as no reasons were given for its rejection, it should have been implemented. That argument must be rejected. In this case it was decided to hold a meeting on 7 November 2005 with the classifier,

following the desk audit, to clarify certain aspects of the complainant's job description, namely decision-making, difficulty of work and the complainant's function as alternate Secretary of the Joint Advisory Committee. Following that meeting, as the Organization still considered the first desk audit report to be inconclusive it sought a second opinion on the matter from an official of the International Atomic Energy Agency, who assessed the post – without conducting a desk audit – at level G-5, with the possibility of upgrading it to G-6 depending on the amount of time the incumbent spent on certain activities. Considering the disparity in the results, it was reasonable that the Organization consulted another independent classifier to conduct a new desk audit of the complainant's post. In light of the above, the Tribunal finds that the decision not to follow the recommendation of 11 May 2005 was not arbitrary and was a reasonable exercise of the Director-General's discretionary authority. It should be noted that a desk audit is only one element of the post classification exercise, and therefore it cannot be considered improper that the complainant was not notified immediately of the results of the first desk audit, since the classification exercise was still in progress.

9. However, the complainant's claim for egregious delay is founded. More than four years passed from the start of the post classification exercise to when the final decision was made, and that is excessive. Considering that it took from 11 May 2005 to January 2007 for the Director-General to decide to have a second desk audit, and that the decision notified to the complainant on 2 December 2008 was subsequently replaced, the Tribunal will award moral damages for the delay in the amount of 8,000 euros.

10. The Tribunal is of the opinion that the complainant has not proven that the Organization has acted in bad faith or has not respected her dignity; her claims in that respect must therefore be dismissed. Furthermore, there are no grounds to sustain the claim for exemplary damages, which must also be dismissed. As the complainant succeeds in part, she is entitled to an award of costs in the amount of 3,000 euros.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant 8,000 euros in moral damages.
2. It shall also pay her 3,000 euros in costs.
3. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 13 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet