



**Before:** Judge Thomas Laker  
**Registry:** Geneva  
**Registrar:** René M. Vargas M.

GEHR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Bettina Gerber, UNOG

## **Introduction**

1. On 7 August 2012, the Applicant, a former staff member of the United Nations Office on Drugs and Crime (“UNODC”), filed an application with the Tribunal contesting the decision “not to carry through the classification process to its conclusion”, of the post he previously encumbered.

2. He requests that the review of the classification process by the Office of Human Resources Management (“OHRM”) be declared unlawful and to be awarded compensation for lack of due process and for the undue delay in carrying out the classification process.

## **Facts**

3. The Applicant joined the UNODC in Vienna in 2002 and in 2007, he was appointed as Crime Prevention and Criminal Justice Officer, P-5, Terrorism Prevention Branch (“TPB”), Division of Treaty Affairs (“DTA”) on a fixed-term contract.

4. Following a restructuring exercise in the TPB in April 2008, the Applicant’s functional title changed to Chief, Counter-Terrorism Legal Services Section. In the fall of 2009, the Chief, TPB, and the Officer-in-Charge, DTA, announced to TPB staff that the Branch was to be reorganized. On 8 December 2009, the Applicant was informed that the post he encumbered would be abolished and that he would be reassigned to the position of Senior Legal Adviser, to be created within the Office of the Chief, TPB.

5. On 12 January 2010, the Chief, TPB, sent an email to TPB staff members, attaching the draft terms of reference for the new structure and asking for their input. The Applicant replied on 14 January 2010, suggesting that someone else should develop the terms of reference for the position of Senior Legal Adviser, since he had never aspired to the position.

6. By an email of 20 January 2010, the Officer-in-Charge, DTA, invited the Applicant to promptly express his reservations, if any, and sought confirmation

that he wished to take on the position of Senior Legal Adviser. In response to these queries, the Applicant stated that he maintained the view which he had previously conveyed in writing to the Chief, TPB, and asked whether any administrative decision had been or was to be taken concerning his role in UNODC.

7. By memorandum dated 11 February 2010, the Officer-in-Charge, DTA, sent an amended version of the chart together with the terms of reference for TPB to the Executive Director, UNODC, recommending that the new structure become effective retroactively as from 1 February 2010. He further explained in the memorandum that the implementation of the new structure would be achieved “through reassignment of existing posts together with their current incumbents ... as well as by modification of the [t]erms of [r]eference and job clarifications for posts as appropriate”.

8. On 12 February 2010, the Chief, TPB, informed TPB staff that the Executive Director, UNODC, had formally approved the new structure and the next step would be the drawing up of the terms of reference for individual positions within the structure. Shortly thereafter, she sent to the Applicant draft terms of reference for the position of Senior Legal Adviser and asked for his comments and suggestions.

9. On 22 February 2010, the Applicant submitted a request for management evaluation of the decisions of 12 February 2010 to abolish the post of Chief, Counter-Terrorism Legal Services Section, and to laterally reassign him to the position of Senior Legal Adviser. The decisions to abolish the post he encumbered and to laterally reassign him were both upheld by the Dispute Tribunal and the Appeals Tribunal (see *Gehr* UNDT/2011/142 and *Gehr* 2012-UNAT-236).

10. On 25 March 2010, draft generic job profiles for all professional positions within the new TPB structure were sent for approval to the Human Resources Management Service (“HRMS”) of the United Nations Office at Vienna (“UNOV”) and, on 3 June 2010, HRMS informed the Chief, TPB, and the Officer-in-Charge, DTA, that the generic job profile of Senior Programme Officer

(Terrorism Prevention) had been classified at the P-5 level, with retroactive effect from 1 April 2010.

11. On 16 June 2010, the Chief, TPB, sent the generic job profile of Senior Programme Officer (Terrorism Prevention) together with a new version of the draft terms of reference for the position of Senior Legal Adviser, dated 15 June 2010, to the Applicant, and asked for his comments.

12. On 15 March 2011, a classification notice for the post of Senior Legal Adviser was issued by HRMS and sent to the Applicant. The notice stated that the classification had taken effect retroactively as from 1 April 2010. The terms of reference dated 15 June 2010 as well as the generic job profile of Senior Programme Officer (Terrorism Prevention) were appended to the notice.

13. On 31 March 2011, the Applicant requested management evaluation of the classification decision of 15 March 2011, as well as of the decision of his First Reporting Officer to use, for the Applicant's performance appraisal 2010-2011, terms of reference "which [we]re different from those submitted for the purpose of classification and from those [he] had received on 12 February 2010".

14. By letter dated 13 May 2011, the Applicant was informed that, based on a review of his request of 31 March 2011, the Secretary-General had concluded that the classification decision had been made in accordance with the relevant provisions, that it was not tainted by improper motivations, and that the use of the terms of reference to develop the work plan for his 2010-2011 performance appraisal comported with the applicable rules.

15. On 15 May 2011, the Applicant filed with the Tribunal an application contesting the classification exercise of 15 March 2011 in relation to the post of Senior Legal Adviser. On 18 October 2011, the Tribunal issued its decision on the classification exercise in Judgment *Gehr* UNDT/2011/178. In that Judgement, the Tribunal found that at the time of the classification of the Applicant's post, UNOV did not have a valid delegation of authority to classify the Applicant's post. It further found, *in arguendo*, that even if UNODC/UNOV had the delegation of authority, the classification process did not comply with the relevant

provisions governing the classification of posts. The Tribunal held that the classification decision was vitiated by lack of authority and rescinded the UNODC/UNOV classification decision of 15 March 2011. Neither party appealed this Judgment.

16. On 5 November 2011, the Applicant filed an application for interpretation of Judgment *Gehr* UNDT/2011/178, requesting the Tribunal to explain the implications of the Judgment to his functional title, duties and responsibilities, in view of the fact that the classification decision had been rescinded. In response, the Respondent informed the Tribunal that since the issuance of Judgment *Gehr* UNDT/2011/178, OHRM had undertaken the review of the classification decision and that at the time of the request for interpretation, the review was still ongoing.

17. In its Judgment on application for interpretation, *Gehr* UNDT/2012/106 dated 13 July 2012, the Tribunal found that the purpose of an application for interpretation is to obtain clarification of the decision itself and not to seek further justification of the grounds for a decision. It therefore held that the Applicant's request for interpretation was not receivable on grounds that the operative part of the Judgment he sought to be interpreted was neither ambiguous nor misleading as to its practical implications.

18. On 25 July 2012, the Applicant requested management evaluation of "the decision not to carry through the classification process to its conclusion". On 6 August 2012, he received a response from the MEU, finding his request not receivable.

19. On 7 August 2012 the Applicant filed the present application, contending that at the time of filing his application, the decision to carry through with the classification process had not be complied with. The Respondent's reply was received on 7 September 2012.

20. On 4 November 2012, the Applicant filed a motion for recusal of the undersigned judge and by Order No. 92 (NBI/2013), issued on 2 May 2013, the then President of the Dispute Tribunal rejected the application for recusal.

21. The Tribunal, by Order No. 170 (GVA/2013), issued on 4 November 2013, ordered the parties to file any objections to having a judgment being rendered without holding an oral hearing. The parties did not object.

**Parties' submissions**

22. The Applicant submits that:

- a. Since Judgment *Gehr* UNDT/2011/178 was issued, on 18 October 2011 and to the time of filing his application, the Respondent had failed in his obligation to complete the classification process;
- b. In spite of the Respondent's submission on 19 November 2011 on the request for interpretation, that the Office of Human Resources Policy Service, OHRM, was undertaking a review of the classification decision which was still on-going, no decision had yet been made;
- c. The Respondent is indirectly denying him the right to challenge the classification process by delaying the process of reviewing the classification decision;
- d. He has a legitimate interest in the outcome of the present case because he needs to present the functional title of his former position in a legal manner, for future employers; and
- e. He is entitled to compensation for psychological distress caused by the inordinate delay of the Respondent in failing to meet his obligation considering the unlawful way in which the classification exercise of his post was carried out and by the delay in classifying his post and lack of communication regarding the same yet he has a legitimate interest in the outcome.

23. The Applicant requests the Tribunal to:

- a. Declare the review of the classification process by OHRM unlawful; and

b. Award him compensation for lack of due process and the undue delay in carrying through the classification process.

24. The Respondent submits that:

a. The application is not receivable, because it has not been submitted in a timely manner and since the Applicant has not demonstrated that he has any legal interest since he filed the case seven months after his separation from the Organization;

b. The Tribunal's Judgment *Gehr* UNDT/2011/178 of 18 October 2011, in which the Tribunal rescinded the classification decision, did not order the Administration to undertake any further corrective measures;

c. The Tribunal neither ordered the Administration to conduct a new classification exercise nor to right any wrongs allegedly suffered by the Applicant. Consequently the Respondent was not under a specific obligation to take any particular predetermined actions as a result of said Judgment;

d. He undertook an initiative to address the implications of the Tribunal's Judgement by contacting the Compensation and Classification Section within the Human Resources Policy Service, OHRM;

e. On 14 August 2012, UNOV/UNODC received a memorandum from the Chief, Compensation and Classification Section, confirming that the classification exercises conducted by UNOV/UNODC in April 2010 in relation to the Applicant's post correspond to the P-5 level, as had been concluded by UNOV in 2010;

f. The Applicant has not suffered any harm since he continued to be paid and upon his separation received entitlements at the P-5 level;

g. Any inaction or delay by the Administration with respect to the classification exercise would not have any effect on the Applicant's rights to a post he formerly encumbered or as a former staff member; and

h. The purpose of classification is not to set functional titles and terms of reference but rather to determine the correct grade and level of a post commensurate with the functions and responsibilities affiliated with the post.

## Consideration

### *Legitimate interest in the outcome of the case*

25. The Tribunal recalls that art. 2.1 of its Statute reads:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary- General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

26. This provision expressly refers to an “administrative decision”, which means that the pre-requisite for an application to be considered by this Tribunal is that the decision that is being challenged constitutes an “administrative decision” under the provisions of the Tribunal’s Statute.

27. In that context, the United Nations Appeals Tribunal recently recalled, in its Judgement *Al Surkhi et al.* 2013-UNAT-304, the definition of an “administrative decision”, quoting the former Administrative Tribunal, which held in *Andronov* (Judgment No. 1157 (2003)) that:

It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences.



Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. (Emphasis added)

28. In the present case, the Tribunal finds that the contested decision—in the Applicant’s words “not to carry through the classification process to its conclusion”—does not produce direct legal consequences in relation to the Applicant’s terms of appointment.

29. The classification exercise conducted by UNOV/UNODC was an unlawful process and while the Applicant encumbered the post he had the right to challenge the classification exercise, which he did, and as a result the classification was rescinded. This Tribunal found in Judgment *Gehr* UNDT/2011/178 that the Administration classified generic job profiles before it classified individual posts, which was contrary to the classification procedures and the Administration’s action did not have a legal basis.

30. However, the Tribunal notes that the Applicant was separated from the Organization on 31 December 2011, while encumbering the post in question. In Judgment *Gehr* UNDT/2013/166, the Tribunal found that the decision not to renew the Applicant’s appointment after 31 December 2011 did not violate his rights. Given that the Applicant has no option of returning to the post he formerly encumbered, any decision regarding the classification of that post may not impact his rights. There exists no direct legal consequence between any classification decision and his terms of appointment; therefore the application is not receivable.

31. Apart from that unavoidable finding, the Tribunal would like to reiterate that in Judgment *Gehr* UNDT/2011/178, the classification exercise of the Applicant’s post was rescinded on grounds that UNOV/UNODC did not have delegation of authority to conduct the classification exercise and even if it did, the classification process and implementation of that decision were marred by irregularities.

32. The Tribunal emphasizes that once a decision has been rescinded—and there is no amount set in lieu of rescission as compensation to the Applicant—the Administration has two options, either to restart the process that has been rescinded or to appeal the Judgment. To comply with one of these two options is a specific obligation incumbent upon the Administration. In this case, the Administration did not file an appeal.

33. The Tribunal notes with concern that the Administration failed to restart the classification process in due time. This was improper and could even be regarded as an indication of disrespect for the Jurisdiction of the Tribunal.

### **Conclusion**

34. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 11<sup>th</sup> day of December 2013

Entered in the Register on this 11<sup>th</sup> day of December 2013

*(Signed)*

René M. Vargas M., Registrar, Geneva