UNITED NATIONS DISPUTE T

Introduction

1. The Applicant contests the Administration's decision of 16 January 2012 refusing to grant him retroactive payment of Special Post Allowance ("SPA") for the entire period of time during which he was performing duties at a higher level. An assessment of the lawfulness of the impugned decision necessarily involves an examination both of the history and circumstances concerning the classification of his post and the consequences flowing from the failure on the part of the Administration, over a period in excess of 10 years, to send to the Applicant formal notification of the fact that the post he encumbered had been classified at a higher level. As a consequence of this failure, the Applicant claims that he suffered economic loss in excess of the two years of SPA granted to him upon the recommendation of the Management Evaluation Unit ("MEU"), as well as loss of chance and opportunity for promotion.

Facts

2. In June 1997, the Applicant took up his duties as a G-3 level Clerk in the Department of Peacekeeping Operations ("DPKO"). On 25 August 1999, he was promoted to the G-4 level on the same post, to take effect formally on 1 June 2000.

3. On 11 January 2000, the Applicant made a request for the classification of his post.

4. On 25 January 2000, the post was classified at the G-5 level. In accordance with sec. 2.4 of ST/AI/1998/9 (System for the classification of posts), the Administration was required to provide the Applicant with a copy of the notice of the classification results. In breach of its statutory duty, it failed to do so.

9. The Applicant seeks rescission of the decision not to grant him retroactive SPA for the full period that he had been performing duties which had been graded at the G-5 level. As a remedy, he requests that his placement be at the G-5 level retroactive from the date the classification should have been implemented.

c. If there were, what justiciable consequences flowed from those procedural errors?

d. Whether the contested decision was a proper exercise of administrative discretion?

e. What compensation, if any, should be awarded taking into account the payment of two years SPA al

and obligations of staff). He also sought compensation for loss of opportunity and a chance to be considered for promotion, which would have been afforded to him had the post been advertised in a timely manner.

15. Such clarification is consistent with the particulars provided by the Applicant in his request for management evaluation, dated 1 March 2012, where the Applicant stated in relation to the rights he alleged were violated that: (a) he was denied retroactive payment of SPA; (b) the post had never been advertised so as to allow him to apply; and (c) the Administration was applying the rules to suit its own convenience (request for management evaluation, p. 2). Such clarification is also consistent with his application to the Dispn(/201e)-pibunalJ12 0 0.(9(No)-0001 Tc20301 Tw[(applic(

prior to requesting retroactive payment and prior to bringing this [a]pplication before the Tribunal" (reply, para. 30).

19. What the Respondent failed to recognize, by this submission, is that a request for SPA cannot be made in circumstances where the Respondent has failed to notify the staff member by sending her/him a copy of the assessment as required by sec. 2.4 of ST/AI/1998/9 (System for the classification of posts). The Respondent conceded that the Applicant was not provided with a copy of the classification decision of 25 January 2000. However, he argues that the Applicant knew, through a telephone call from an unknown and unidentified staff member from the DPKO Executive Office, that the post has been reclassified at the G-5 level. Insofar as this argument is advancing the proposition that notwithstanding the failure to give the Applicant a copy of the assessment report, the Applicant nonetheless had constructive knowledge of the classification decision, as submitted by the Respondent in his closing submission on 7 August 2014, it lacks merit for the reasons set out in paras 31-38 below and merely seeks to take advantage of the Organization's failure to follow its own procedures (*Wu* 2010-UNAT-042).

20. The Respondent's reliance on *Mbatha* UNDT/2011/096 and Order No. 139 (NY/2011) in *Hassanin* is misplaced. Quite apart from the fact that neither is binding on the Tribunal, they also are not on point and are of no assistance in resolving this issue.

21. The Appeals Tribunal held in *Schook* 2010-UNAT-013 (para.6) that:

> Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. Therefore, a written decision is necessary if the time-limits are to be correctly calculated, a factor UNDT failed to consider. Schook never received any written notification that his contract had expired and would not be renewed. He did not receive a "notification of the decision in writing", required by Rule 111.2 (a).

22. The Tribunal finds that the Applicant was not provided with a copy of the classification result, in accordance with sec. 2.4 of ST/AI/1998/9. In the circumstances, he was not in possession of the required formal notification so as to put him in a position to seek the appropriate remedy.

23. The Appeals Tribunal found in *Tabari* 2010-UNAT-030 that exceptional circumstances may require that time limits be waived, especially when it is not possible to determine, from the records, the applicable time limit. There is no evidence of what transpired from the moment the Applicant raised the issue informally with his management until he finally made a formal written request to the DPKO Executive Office and OHRM. The overall tenure of the Applicant's evidence was to the effect that he wished to resolve the matter amicably so as to avoid litigation. When this attempt failed, it would appear that, in desperation, he finally decided to make a formal request for review followed by an application to the Tribunal. The Tribunal observes that the Administration did not raise the issue of time bar in its decision of 16 January 2012 nor did the Respondent raise any issue regarding the applicable time-limits in his reply before the Tribunal. The Tribunal considers that the Applicant acted timeously once he discovered the decisive fact that the post he was encumbering was assessed at the G-5 level. The Tribunal finds that the Applicant exhausted the internal processes in an attempt to secure resolution without a judicial determination.

24. Further and in any event, contrary to the Respondent's assertion, the Applicant did make a request for retroactive payment of SPA on 8 September 2011. Even if the Respondent is correct in asserting that the correct procedure was not followed, it does not ne

grant him SPA. This is the decision the Applicant is now contesting. Management evaluation was requested on 1 March 2012. On 16 April 2012, the MEU notified the Applicant of its decision. The application was subsequently filed in accordance with art. 7 of the Dispute Tribunal's Rules of Procedure. At no time did the Respondent assert that the application was time-barred.

25. Furthermore, the Applicant's claim is not limited solely to the refusal of SPA payment from 16 June 1997 to 16 April 2010. Such a limitation would disregard key issues in this case as indicated in paras. 14 and 15 above. A fundamental breach on the part of the Respondent was the failure to provide the Applicant with a copy of the classification decision, in accordance with sec. 2.4 of ST/AI/1998/9. The post at the G-5 level should have been advertised within a reasonable period of time after its classification, so as to confer upon him the right to apply for it given that sufficient time may have elapsed since his promotion to the G-4 level. A further issue related to a breach of the principle of equal pay for equal work in that for over 10 years the Applicant had been performing higher graded duties without being paid the corresponding rate for the job.

26. It cannot reasonably be argued that if it is proven that a staff member has been paid less than the proper rate for the job, it would be regarded by the Administration as being a lawful exercise of managerial prerogative and consistent with the duty of integrity imposed on all staff under art. 101.3 of the Charter of the United Nations. The Tribunal finds that the contested decision is alleged to be in non-compliance with the Applicant's terms of appointment. The application is receivable.

Whether there were procedural errors which breached the Applicant's rights following the classification of the post at the G-5 level and, if there were, what justiciable consequences flowed from those procedural errors?

27. Staff regulation 2.1 states:

> In conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required.

28. Section 2.4 of ST/AI/1998/9 provides (emphasis added):

> A notice of the classification results, including the final ratings and/or comments on the basis of which the decision was taken, shall be sent to the requesting executive or administrative office, which will keep it in its records *and provide a copy to the incumbent of the post*.

29. Section 4.3 of ST/AI/1998/9 provides (emphasis added):

> Staff members whose posts are classified at a level above their current personal grade level in the same category *may be considered for promotion in accordance with established procedures, including issuance of a vacancy announcement*, where applicable.

30. The Tribunal finds that the Respondent's failure to provide the Applicant, as the incumbent of the post, with a copy of the classification decision deprived him of the opportunity to exercise his right to request payment of SPA while performing duties classified at a higher level and to be given an opportunity to compete for

35. The Respondent did not call any evidence nor did he identify the person who apparently called the Applicant. More importantly, what exactly the Applicant was told via the telephone has not been established. There is no evidence, other than the Applicant's statements, that he received a phone call from the DPKO Executive Office.

36. Having heard the Applicant and having considered the totality of the evidence, the Tribunal concludes that the Respondent's contention lacks merit. The Respondent disregarded the Applicant's evidence that he had been informed, without any further explanation, that the information would be placed "on his file" and that he had legitimately believed in December 2000 that his post was classified at the G-4 level following his conversation with his supervisor. The fact that Mr. Sokol stated he did not recall this conversation does not render the Applicant's evidence less reliable. The Applicant was not provided with a copy of the classification result. In the absence of administrative action to either correct the level of the post or to recruit on the higher classified post, the Applicant could not be criticised for having accepted in good faith what he had been told by his supervisor, namely that the post had been classified at the G-4 level.

37. It is entirely understandable to the Tribunal that a staff member in the Applicant's position would place more reliance on what his supervisor told him than on a telephone call fromas e

advantage of the Organization's failure to follow its own procedures. In this case, the Respondent is seeking to cast upon the Applicant blame for the consequences of the Administration's failure to abide by staff regulation 2.1 and ST/AI/1998/9.

39. Additionally, the Tribunal finds no merit in the Respondent's submission that the Applicant would, in any event, not have been eligible to compete for the G-5 post, had it been properly advertised following its classification at that level. The Respondent submitted that the Applicant was encumbering a G-3 level post in January 2000 and that he would have needed to remain at the G-4 level for a minimum of two years before being eligible to apply for a G-5 post. This argument overlooks the fact that the Applicant's promotion to the G-4 level in August 1999 would have taken effect immediately if the Applicant was not encumbering an unclassified post. The Respondent's argument also overlooks the significant fact that even if one accepted the Respondent's argument, the Applicant was eligible to apply for the G-5 level post from June 2002 to 22 June 2012 when it was eventually advertised after the Applicant filed his claim. The Tribunal finds that the Applicant suffered an actual loss of a chance to be considered for this post at the G-5 level over at least those 10 years.

40. The Respondent's attempt to demonstrate, through the testimony of Ms. Maharramova, that the post had been inappropriately classified at the G-5 level in January 2000 is misplaced. Ms. Maharramova testified that the classification exercise that she carried out, in relation to the Applicant's duties as defined in his classification request of 11 January 2000, was constrained by the information provided by the Respondent. No discussion was held with anyone, including the Applicant, in assessing the level and content of his duties. Further, Ms. Maharramova acknowledged, not without some degree of embarrassment, that her review did not comply with all the requirements of ST/AI/1998/9, particularly sec. 2.3 which provides that "[t]he classification analysis shall be conducted

independently by two classification or human resources officers". She confirmed that she was not responding to a formal classification request but merely expressing an opinion which was requested of her on the basis of the limited information made available to her by the Respondent. It is unfortunate that she was placed in this position. The Tribunal finds that Ms. Maharramova's opinion was not arrived at by

that the G-5 level post would be advertised so that he could request SPA in accordance with the rules and apply for a promotion to a higher grade. The violation prevented him from doing so.

Whether the contested decision was a proper exercise of administrative discretion?

44. Staff rule 3.10 (SPA) of ST/SGB/2001/1 dated 1 January 2011 (in terms similar to previous staff rules on this matter) states (emphasis added):

> (a) Staff members shall be expected to assume *temporarily*, as a normal part of their customary work and *without extra compensation*, the duties and responsibilities of higher level posts.
>
> (b) Without prejudice to the principle that promotion under staff rule 4.15 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member holding a fixed-term or continuing appointment who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months *may, in exceptional cases, be granted* a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level.
>
> …
>
> (d) The amount of the special post allowance shall be equivalent to the salary increase (including post adjustment and dependency allowances, if any) which the staff member would have received had the staff member been promoted to the next higher level.

45. ST/AI/1999/17 (SPA), dated 23 December 1999 which took effect on 1 January 2000, further regulates payment of SPA. Section 4 (Eligibility) of ST/AI/1999/17 provides that (emphasis added):

> Staff members who have been temporarily assigned to the functions of a higher-level post in accordance with the provisions of section 3 above *shall be eligible to be considered* for an SPA when they meet all of the following conditions:
>
> (a) They have at least one year of continuous service under the 100 series of the Staff Rules;

(b) They have discharged for a period exceeding three months the full functions of a post which has been (i) classified, and (ii) budgeted at a higher level than their own level. Such period may be part of the one year requir

Those duties are further reflected in the Applicant's performance appraisals from 1999 onwards. The Applicant's performance appraisals, signed off by Mr. Sokol and subsequently by Ms. Bejasa-Omega, show that, since 1999, the Applicant was generally rated as "fully meets performance expectations". When Mr. Hanoch became the Applicant's Second Reporting Officer in 2009 ("SRO"), the Applicant was rated as "frequently exceeds performance expectations" by his First Reporting Officer ("FRO"), Mr. Lecrann, and Mr. Hanoch concurred with this appraisal. During the 2010-2011 performance cycle, the Applicant was rated as "successfully meets expectations". The Applicant received a similar rating for the period 2011-2012. The record shows that the Applicant remained on the same post since 2000.

51. Mr. Hanoch testified that, in his view, the Applicant did not perform duties at a higher level. The Tribunal notes that Mr. Hanoch took up his functions as the Applicant's supervisor only in 2009. He did not provide a satisfactory explanation of the grounds upon which he formed the view that, prior to 2009, the Applicant had not been performing duties at the G-5 level notwithstanding the clear documentary evidence (see para. 55 below), corroborated by oral testimony from Mr. Sokol, of the duties performed by the Applicant at the material time. It was that very job that was classified at the G-5 level.

52. The Tribunal fails to understand how the contested decision could rationally and legitimately have been based on Mr. Hanoch's opinion, howsoever it was arrived at, when a lawfully and properly conducted assessment of the actual duties performed by the Applicant rated them at the G-5 level.

53. Additionally, neither the Applicant's FRO for 7 years, from 2002 to 2009, nor the Applicant's FRO for the performance appraisal period of 2009 to 2012, were called to testify in support of the Respondent's contention that the Applicant was not performing the full functions of the post. Yet, the Respondent called Mr. Hanoch whose evidence was self-serving and directed at justifying the assessment

> 16 June 1997, was reclassified to Records Assistant G-5 effective 25 January 2000. The Executive Officer, only upon submission of the case by Mr. Hosang, realized that unfortunately the post was never advertised (neither through the staff selection system nor temporary vacancy announcement). The substantive office has been advised that a Job Opening needs to be posted as soon as possible.
>
> The staff member has been performing satisfactorily on the reclassified post for over ten years, as shown in the attached ePAS records. Notwithstanding that the substantive office and the Executive Office bear the responsibility of not having taken recruitment actions, we are of the opinion that the staff member cannot be penalized for the staffing table oversight. It is also our understanding that the staff member intends to submit the case to the [Dispute] Tribunal, in case of lack of action from this office.
>
> In the light of the above, it requested exceptional approval of retroactive SPA from 25 January 2000 until conclusion of the selection process for the prospective Job Opening in Inspira.

56. It is clear from this communication that the DPKO Executive Office considered that the Applicant's case was exceptional within the meaning of staff rule 3.10(b) and that he was performing duties at the G-5 level. However, this recommendation was not accepted by the Administration resulting in the decision of 16 January 2012 refusing the Applicant SPA.

57. The Tribunal finds that the impugned decision disregarded relevant evidence that the Applicant has been performing satisfactorily on the reclassified post for over 10 years, from 2000 to 2011. The Administration also failed to consider fully and properly whether the Applicant was eligible, under sec. 4 of ST/AI/1999/17, to retroactive payment of SPA from 19 June 1997 to 8 September 2011. In fact, no reference at all was made to ST/AI/1999/17 and the Administration unlawfully restricted the Applicant's request to a period of two years. The Administration further failed to note the violation of staff rule 3.10 whereby if the Applicant was expected to assume *temporarily*, as a normal part of his customary work and *without extra compensation*, the duties and responsibilities of a higher level post, he was certainly not expected to do so for over 10 years.

manner after having been informed at the end of January 2000 that the post had been reclassified. Instead, he willfully renewed his fixed-term appointment at the G-4 level. He is therefore bound

a) Staff regulation 2.1;

b) Staff rule 3.10;

c) ST/AI/1998/9;

d) ST/AI/1999/17;

e) The principle of equal pay for equal work.

68. The Administration agreed to consider the Applicant's claim, following management evaluation, to rectify the situation, created by its own oversight, by the payment of two years SPA from the G-4 level to the G-5 level. Such payment is tantamount to a concession that the Applicant was in fact discharging the full functions of the G-5 post, within the meaning of sec. 4 (Eligibility) of ST/AI/1999/17. However, this compensation falls short of the prejudice suffered by the Applicant over an extensive period of time, since 25 January 2000.

69. The classification request, signed by the Applicant, concerned post QSA-02861TOL041. The classification decision of 25 January 2000 identified the Applicant as the incumbent of post QSA-02861TOL041 and classified it at the G-5 level. The Applicant's Personnel Action, dated 1 July 2011, shows that the Applicant remained the incumbent of this post. During the hearing on 23 July 2014, the Applicant confirmed that he was still encumbering this post. The Tribunal rejected the evidence of Mr. Hanoch and Ms. Maharramova. It is clearly established that the Applicant satisfactorily performed on this post since 25 January 2000. The failure to make proper recompense, as initially suggested by the DPKO Executive Office, is tantamount to condoning the exploitation of a staff member. The Administration had the opportunity to put matters right but deliberately failed to do so. Such exploitation cannot, by any stretch of the imagination, be in

accordance with the principles and values of integrity under art. 101.3 of the Charter of the United Nations and staff regulation 1.2(b).

70. It cannot reasonably be supposed that it was ever contemplated by the General Assembly that there could conceivably be a situation where a staff member would have been deprived of appropriate remuneration for the work he performed over such an extensive period of time. The two years' net base salary limit under art. 10.5(b) of the Dispute Tribunal's Statute could not possibly have contemplated the circumstances of this case nor was it ever intended by the General Assembly to condone or justify the exploitation of staff members. The cap on compensation for harm, which shall normally not exceed the equivalent of two years' net base salary of the applicant, does not apply where the violation of a staff member's rights are as egregious as in the present case. The facts and circumstances of this case are truly exceptional. Whether it was through administrative oversight is not material. What matters is: (a) the fact that for a period in excess of 10 years, the Applicant remained at the G-4 level salary whilst performing duties at the G-5 level and (b) the fact that when the Administration was put on notice of the situation on 8 September 2011, it further violated the Applicant's right by failing to fully and properly consider his request. Mr. Trojanoviü, of the DPKO Executive Office, made a sensible proposal which ought to have been followed. Instead, the Administration failed to investigate properly the merits of the Applicant's request and placed disproportionate weight on the views expressed by Mr. Hanoch. It is unfortunate that the recommendation initially made by DPKO Executive Office on 24 October 2011 was rejected by the Administration, resulting in the decision dated 16 January 2012.

71. The Tribunal is unable to quantify the precise total loss to the Applicant of non-payment of SPA and/or failure to give effect to the principle of equal pay for equal work. However, should this total amount exceed the two years cap in art. 10.5(b) of the Tribunal's Statute, the Tribunal finds, for the above-mentioned

reasons, that the exceptional circumstances of this case warrant exceeding the award of two years' net base salary of the Applicant. The Tribunal grants the Applicant an award of compensation being the difference in salary between his earnings at the G-4 level and the G-5 level from 25 January 2000 to the date of conclusion of the selection process for the job opening advertising the post on 22 June 2012, as initially recommended by the DPKO Executive Office on 24 October 2011.

72. The Tribunal further considers that it is appropriate to award to the Applicant the sum of USD 1,000 for loss of a chance of being considered for promotion to the post at the G-5 level within a reasonable period after 25 January 2000 when the post was classified.

73. The Tribunal's duty is to ensure that the Applicant is placed in the position he would have been had the Administration complied with its contractual obligation (*Warren* 2010-UNAT-059; *Iannelli* 2010-UNAT-093). The Applicant's attempts at resolving this matter has met only with partial success and the two-year SPA paid to him has not fully compensated him for his losses. Moreover, as a general service staff member not in receipt of legal assistance within the Organization, he was left with no alternative but to seek the assistance of external Counsel. It is not known whether Counsel for the Applicant provided his service on a *pro bono* basis and, if so, what arrangements had been agreed with him as reimbursement of costs necessarily incurred by representing the Applicant. The Tribunal considers that the Applicant must also be compensated for those costs and/or expenses. The award of compensation for the costs/expenses incurred is limited to USD 1,000, subject to the Applicant providing the necessary proof to the Respondent.

Abuse of process

74. Article 10.6 of the Tribunal's Statute states:

> Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

75. The Respondent brought a witness before the Tribunal in order to discredit a lawful classification exercise conducted in January 2000, in circumstances where he failed to appeal the result of that exercise. More troubling is the fact that this witness' evidence was that she was not requested to carry out a proper assessment in accordance with ST/AI/1998/9 but merely to express her opinion on the basis of the limited information provided. This is corroborated by the email request of 18 July 2014 sent to her five days before the hearing. The Tribunal finds that she was called for the sole purpose of bolstering the views and opinions expressed by Mr. Hanoch, which formed the primary basis upon which the impugned decision was based (see paras. 52-53 above). The witness was placed in an impossible and extremely embarrassing position having to admit that what was presented as her "expert opinion" was in fact an opinion that was not arrived at through a proper assessment in accordance with ST/AI/1998/9. It is clear to the Tribunal that Ms. Maharramova did not intend that her evidence could or should be used to displace, in effect, the lawfully conducted assessment made in January 2000. Her evidence served no useful purpose and the Tribunal is left with the inescapable inference that, by calling her as a witness, the Respondent was seeking to divert the Tribunal's attention away from the administrative and procedural errors identified and to obfuscate the real issues in the case.

76. Whilst it is perfectly proper for parties to prosecute their respective claims or defences assiduously, they are obliged to work within proper parameters of legitimacy and propriety if they are to avoid incurring the risk of being found to have

acted in a manner amounting to a manifest abuse of process. The managers responsible for instructing Counsel should have known better than to have placed both Counsel for the Respondent and the witness, Ms. Maharramova, in an embarrassing and untenable position.

77. The presentation of evidence, that is based on fundamental procedural and factual flaws and is aimed at discrediting a properly and lawfully conducted classification exercise conducted more than a decade ago and which was not appealed, amounts to an abuse of process for which the Tribunal considers it appropriate to make an award of costs against the Respondent in the sum of USD 3,000.

Conclusion

78. The application is granted and thditi8 decade ago and w20ence, th25 TA13.14 nt,72500

(c) The sum of USD 1,000 for any costs/expenses incurred by the Applicant in relation to these proceedings, subject to the Applicant providing the necessary proof to the Respondent.

80. Payment of compensation is due within 60 days of the date that this Judgment becomes executable. If the total sum is not paid within that period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

81. The Respondent is ordered to pay costs in the sum of USD 3,000 for abuse of process.

(*Signed*)

Judge Goolam Meeran

Dated this 4th day of February 2015

Entered in the Register on this 4th day of February 2015

(*Signed)*

Morten Albert Michelsen, Officer-in-Charge, Registrar, New York