



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel, Registrar

ALY et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

François Lorient

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 6 September 2011, the Applicants Aly; Brown; Cherian; Cone; Coriette; Diaz Elizabeth; Ezaz; Gamit; Jordano; Golfarini; Hadera; Hassanin; Hto; Kaufman; Maung; McCall; Nemeth; Pava; Saffir; Samuel; Sebros; Smith; and Vocile—contest the 8 June 2011 decision of the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”), based on the recommendations of the New York General Service Classification Appeals Committee (“NYGSCAC”), to maintain the classification of their posts following the remanding of the case *Aly et al.* (Judgment No. UNDT/2010/195, rendered by Judge Kaman on 29 October 2010) to the NYGSCAC. Each of the Applicants seeks compensation equivalent to the difference in salary, allowance and other entitlements (including pension rights) between his/her current post level and the next step, retroactive to the first of the month following receipt of the Applicants’ classification request in October 2000. Each of the Applicants also seeks one year net base salary as compensation for non-pecuniary damages. Finally, the Applicants seek costs in the amount of USD20,000 for abusive procedures and violations of due process.

2. By Order No. 277 (NY/2014) dated 14 October 2014, the Tribunal granted a request from Counsel for the Applicants to have Applicants Samuel and Sebros withdrawn from the application because they had not authorized legal representation. The Tribunal also noted that following the passing of Applicants Cherian and Cone, their estates had expressed an interest in remaining as parties to this case.

Facts

3. To provide the background for this case, the facts set out in UNDT/2010/195 are summarized as follows:

- a. The Applicants worked for a number of years in the Distribution Section (formerly called the Publishing Section) in the Department for

67. The Tribunal considers that the Secretary-General's decision to uphold the JAB's recommendation that the applicants submit the cases to the CAC within ninety days of the date of the decision was both reasonable and fair.

68. The Tribunal will make the necessary order, under art 10.5(a) for specific performance of the Tribunal's Statute, that the case shall be remanded to the CAC for decision by the CAC within 180 days, on the proviso that the applicants submit the cases for review within sixty days.

7. The Applicants' request for compensation was analysed in paras. 69-73 of the Judgment and the Tribunal decided:

74. ... the Tribunal is of the view that the respondent has not provided sufficient explanation for the delays during the period between 2000 and 2004. After the joint departmental Staff/Management Working Group, via the Executive Officer of DGACM, "called for" the reclassification of the 28 job descriptions, there was no response until 2004. In the light of the totality of the evidence before it, the Tribunal finds the respondent's silence on the delays during this period to be telling. The JAB report—which is before the Tribunal as an annex to the application but without its annexes—serves as circumstantial evidence of the record of the JAB rather than any kind of binding authority.

75. In view of this report, the lack of information provided in the years between 2000 and 2004 in the facts as agreed by the parties, and the respondent's silence in explaining this specific delay, the Tribunal finds that compensation for the excessive delay in responding to the original request for reclassification is warranted, as is compensation for the breach of the applicants' procedural rights.

...

78. Bearing this in mind, the Tribunal considers USD20,000 per applicant for the excessive delay and breach of procedural rights in failing to refer the matter to the CAC as required should be awarded. It is noted that the two year cap as provided for in art. 10.5(b) of the Statute of the Dispute Tribunal does not apply as the amount awarded is per applicant.

79. The JAB awards three months' for violation of due process rights (failure of the respondent to review the cases in a timely manner) but then goes on to describe the award to be for "moral

injury”. The Tribunal notes that the applicant did not make submissions as to moral injury and does not consider an award for moral injury to be appropriate in the circumstances.

80. On the question of whether the applicants be compensated for the period from the date of Secretary-General’s decision in November 2008 until 9 February 2009, the date of appeal to the UN Administrative Tribunal, the Tribunal notes that counsel for the applicants requested information about the composition of the CAC in November 2008 and January 2009, to which he received no response. In their appeal to the Administrative Tribunal of 9 February 2009, the applicants requested, inter alia, the Administrative Tribunal to direct the respondent to provide the necessary clarifications concerning the functioning of the CAC prior

- a. The case to be remanded to the NYGSCAC for classification decisions on the proviso that each applicant submitted the cases for review within sixty days of the date the Judgment became executable;
 - b. For all such cases submitted in accordance with the above order, the NYGSCAC shall render decision within 180 days of the date that the Judgment became executable; and
 - c. The Respondent to pay USD20,000 to each of the Applicants within 60 days of the date the Judgment became executable.
9. Neither of the parties appealed UNDT/2010/195.
10. By letter dated 21 December 2010, the Chief, Human Resources Policy Service (“HRPS”), OHRM advised Counsel for the Applicants that the NYGSCAC was in the process of being reactivated and that the Applicants could submit their cases for review through the Committee’s Secretary.
11. By letter dated 8 February 2011, Counsel for the Applicants wrote to the Secretary of the NYGSCAC requesting that their 8 May 2004 appeals for classification submitted to the ASG/OHRM be reviewed by the NYGSCAC in accordance with UNDT/2010/195. The letter further stated:
- We would appreciate being informed of the CAC composition, procedures and of the new ST/IC reactivating the CAC ... The appellants request access to all documents which will be submitted to the CAC, and they are all available to testify on their duties and responsibilities discharged for the period under consideration.
12. By email dated 16 February 2011, a Legal Officer in the Administrative Law Section advised Counsel for the Applicants that Payroll Operations Unit had approved all payments related to UNDT/2010/195.
13. In a Note dated 4 March 2011 to the then Chef de Cabinet, Executive Office of the Secretary-General, the ASG/OHRM advised the Secretary-General of the Joint Negotiation Committee’s decision to recommend Ms. VL as chairperson of

the NYGSCAC. The ASG/OHRM also submitted to the Secretary-General the names of three staff members that OHRM recommended for appointment by the Secretary-General. Finally, the ASG/OHRM advised the Secretary-General of the names of three staff members that, on 24 February 2011, the Staff Council had nominated for membership of the NYGSCAC.

14. On 13 May 2011, the ASG/OHRM wrote to the Executive Office of the Secretary-General to advise that two of the staff members recommended by OHRM for membership of the NYGSCAC “will not be in a position to participate in the deliberations of the Committee”, and recommended two other staff members as replacements.

15. By email dated 27 May 2011, a staff member from the Office of the Deputy Secretary-General advised the ASG/OHRM (and others) that the Secretary-General had “approved” the requests of the ASG/OHRM in regard to the proposed members of the NYGSCAC.

16. On 7 June 2011, the ASG/OHRM issued ST/IC/2011/17 (Membership of the New York General Service Classification Appeals Committee).

17. On the same day, the chairperson of the NYGSCAC transmitted to the ASG/OHRM the NYGSCAC’s analysis of the cases submitted by the Applicants. The memorandum stated:

The Committee met on a number of occasions during May 2011 to consider the cases. ...

...

After undertaking a preliminary discussion on the circumstances of the cases, the documents available, and the structure of the review, the Committee proceeded with a factor-by-factor analysis of the existing job descriptions under appeal on their merits and separate from other issues within the UNDT judgment. In their evaluation, the Committee applied the General Service Job Classification Standards that were in effect at the time of the initial classification of the job descriptions.

18. The NYGSCAC did not conduct a review of the cases of three of the Applicants, finding that a classification decision had not been made in respect of two of the Applicants' job descriptions and there was therefore no initial classification to review. In respect to the case of a third Applicant, the NYGSCAC stated that "due to the fact that neither the staff member, OHRM or DGACM could not [sic] locate, nor confirm the existence of revised and completed job description, the Committee could not conduct a review of that case". The NYGSCAC found that the posts of the other Applicants had been appropriately classified, and recommended upholding the initial classification decisions.

19. On 8 June 2011, the ASG/OHRM decided to approve the NYGSCAC report.

20. By email dated 9 June 2011, a Compensation Officer within the Compensation and Classification Section, OHRM advised Counsel for the Applicants that the NYGSCAC had completed the review of the appeal of the classification decisions ordered by the Tribunal. Attached to the email was the final approved copy of the report of the NYGSCAC.

Procedural background

21. On 1 September 2011, the Applicants filed the present application contesting the post reclassification decision made by ASG/OHRM on 8 June 2011, based on the NYGSCAC recommendations of 7 June 2011.

22. The Respondent filed his reply on 23 November 2011. He submitted that

with a full and fair opportunity to submit their evidence. The Respondent further submitted that the amendment to the Dispute Tribunal's Statute is not a material change in the law, but merely represents a clarification consistent with existing general principles of law, and the jurisprudence of the Appeals Tribunal. The Applicants had been on notice of those principles and the Dispute Tribunal had provided them with ample opportunity to submit evidence in support of their claims. The Respondent requested the Tribunal to reject the Motion.

36. By Order No. 27 (NY/2015), dated 11 February 2015, the Tribunal rejected the Motion, stating:

Before the General Assembly decided to amend the Dispute Tribunal's Statute, the parties agreed that this case could be decided on the papers, they provided the Tribunal with all the relevant evidence (documents, including uncontested affidavits) and the debates were closed on 11 December 2014 when they filed their closing submissions. The Tribunal considers that no additional evidence (witnesses) is required in the present case and the Motion and the Complement to the Motion are to be rejected.

Applicants' submissions

37. The Applicants' principal contentions may be summarized as follows:

- a. The legality of new appointments to the NYGSCAC made in 2011 is highly questionable due to the fact that the Staff Council was dissolved at the time of the appointments;
- b. Some of the new NYGSCAC members had a conflict of interest in respect of the Applicants, in particular the new chairperson, who was heavily involved in a task force that assessed the Applicants' posts at an earlier stage of the dispute. The chairperson was effectively reviewing her own previous work and decisions;

c. The NYGSCAC members were unqualified—none of the members had expertise on classification matters or the standards of the International Civil Service Commission (“ICSC”);

d. The NYGSCAC members ignored the “ICSC Guidelines and Benchmark Grade Profile aligned to [General Service] Master Standard for classification purposes” in their deliberations;

e. The NYGSCAC did not hear the Applicants or call them as witnesses and consequently the findings of the June 2011 report are “replete with inaccuracies, hearsay, subjective perceptions and remarks which are foreign to the Applicants’ discharge of duties”;

f. The NYGSCAC had discriminated against the Applicants and failed to accord them equal treatment with other staff members, namely 12 colleagues who were discharging the same functions as the Applicants and were reclassified to a higher level by the Administration in 2003-2004;

g. The NYGSCAC did not fully disclose the parameters, benchmarks and guidelines on which it based its findings, making it difficult for the Applicants to argue their own case;

h. The Applicants have been denied due process. The NYGSCAC heard the Administration but not the Applicants and OHRM failed to provide NYGSCAC members with earlier reports and studies on the Applicants’ post reclassification.

38. The Applicants seek the following relief:

a. Compensation to each Applicant “equivalent to and calculated by the difference in their salary, allowances and other entitlements between the current post level and the next step, and ‘retroactive to the first of the month following receipt of the Applicants’ classification request in October 2000’...;

such compensation to include loss of Applicants' pension rights" (emphasis in original);

b. Compensation in the amount of one year net base salary for non-pecuniary damages as a result of "due process violations, pain, stress, delays, humiliation and distress resulting from more than 12 years of protracted negotiations, dilatory tactics, dysfunctional and non-operational CAC, as well as abusive procedures at the JAB, UNAT, UNDT, and CAC";

c. Costs in the amount of USD20,000 "for abusive procedures and violations of due process at the NYGSCAC and at UNDT".

Respondent's submissions

39. The Respondent's principal contentions may be summarized as follows:

a. The scope of the application, and issue before the Tribunal, is limited to a judicial review of the recommendation of the NYGSCAC dated 7 June 2011 and the 8 June 2011 decision of the ASG/OHRM to accept the recommendation;

b. To the extent that the Applicants' claims overlap with issues that they previously submitted to the JAB and the Dispute Tribunal, they are subject to *res judicata* and cannot be raised before the Dispute Tribunal in the present case;

c. The Applicants' claim related to abusive procedures before the Dispute Tribunal in UNDT/2010/195 is not receivable. If the Applicants were dissatisfied with respect to the Tribunal's handling of that first case they should have appealed within the statutory time frame;

d. Claims related to the composition of the NYGSCAC are not administrative decisions subject to appeal. The appointment of the members of the NYGSCAC was a decision of general application and did not affect

the Applicants' terms of appointment

properly before the Tribunal. The Respondent has provided no legal basis to support his contention that the mandate of the NYGSCAC is too narrow to allow consideration of this principle;

b. The Applicants do not appeal the “handling of” or any aspects of Judgment No. UNDT/2010/195. Reference to the Judgment was intended to recall the abusive context in which the Applicants’ reclassification requests were delayed;

c. The Applicants agree that Judgment No. UNDT/2010/195 is *res judicata*. As a result, all its important findings are binding on the Respondent;

d. The Applicants are not “appealing” the Secretary-General’s decision on the composition of the NYGSCAC. However, as a matter of natural justice, ethics, and human rights, they have a right to raise serious issues of bias and conflict of interest at any time;

e. The waiver of the requirement to submit a request for review of an administrative decision to the Management Evaluation Unit covers all legal components ancillary to the NYGSCAC deliberations, including the decision of the ASG/OHRM and any errors or omissions by the NYGSCAC.

Consideration

Applicable law

42. Staff rule 11.2 from ST/SGB/2011/1, which came into effect on 1 January 2011, stated:

A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General ... is not required to request a management evaluation.

43. ST/AI/1998/9 (System for the classification of posts) provides in relevant parts:

Section 1

Request for the classification or reclassification of a post

1.1 Requests for the classification or

a post, the same effective date as that of the original decision, as defined in section 4.1 above.

Section 7

Classification Appeals Committees

Establishment

7.1 Classification Appeals Committees to examine classification appeals and advise [the ASG/OHRM] ... shall be established as follows:

...

(b) A [NYGSCAC] for:

(i) Appeals concerning posts classified in the General Service and related categories at Headquarters and in small and medium-sized duty stations ...

(ii) Appeals concerning all posts in the General Service and related categories when the classification of the post at a Professional level is being requested;

...

Membership

...

7.3 The [NYGSCAC] shall comprise:

(a) A chairperson appointed by the Secretary-General on recommendation of the Joint Advisory Committee at Headquarters;

(b) Two or more members appointed by the Secretary-General;

(c) An equal number of members designated by the staff representative body at Headquarters.

Receivability and the scope of the case

Receivability

44. Under staff rule 11.2(b) and sec 6.14 of ST/AI/1998/9, staff members appealing against a decision of the Classification Appeals Committees are not required to submit their claim for management evaluation before filing an appeal before the Dispute Tribunal. Section 6.14 of ST/AI/1998/9 clearly states that

the ASG/OHRM shall take the final decision on an appeal to the Classification Appeals Committee, and “any further recourse against the decision shall be submitted to the United Nations Administrative Tribunal”. As previously established by the Dispute Tribunal in *Fuentes* UNDT/2010/064, affirmed by the Appeals Tribunal in *Fuentes* 2011-UNAT-105, “ST/AI/1998/9 was intended to create a special procedure to challenge a refusal to classify a post”.

45. The Tribunal recalls that on 17 March 2009, the General Assembly adopted Resolution 63/253 “Administration of justice at the United Nations” and decided to abolish the United Nations Administrative Tribunal as of 31 December 2009 and to create a new formal system of justice comprised of the UNDT and the UNAT, which came into effect on 1 July 2009. All the cases pending before the former Administrative Tribunal were transferred to the Dispute Tribunal and consequently, after 1 July 2009 an appeal against a non-reclassification decision could be filed before this Tribunal.

46. The contested decision was made by the ASG/OHRM on 8 June 2011 and was notified to the Applicants on 9 June 2011. The present application, which, in accordance with staff rule 11.2(b) and sec. 6.14 of ST/AI/1998/9, is exempted from the requirement to request management evaluation, was filed before the Tribunal on 6 September 2011, within 90 days of the receipt by the Applicants of the administrative decision, in accordance with art. 7(1)(c) of the Dispute Tribunal’s Rules of Procedure.

Scope of the case

48.

presumably recommended by the Staff Council. The Applicants state that the Staff Council' was dissolved on 31 January 2011 and the newly elected Staff Council began its mandate only in July 2011, after its June election. The Applicants challenged the legality of the appointments to the NYGSCAC, its composition, and the existence of a valid quorum for its May deliberations.

52. The Applicants also submit that the new chairperson of the NYGSCAC, Ms. VL, was in a conflict of interest because she was heavily involved in the Task Force at earlier stages of the dispute concerning the Applicants' reclassifications and job descriptions and she was not in the position to review her own previous work and decisions. They also submit that if they had been notified of her appointment in a timely manner, they would have requested that the chairperson be replaced and that, despite the fact that the NYGSCAC is a specialized internal justice body, none of the new members have expertise or ICSC training on classification.

53. The Tribunal notes that ST/IC/2011/17 (Membership of the New York General Service Classification Appeals Committee) was issued by the ASG/OHRM on 7 June 2011, on the same day that the NYGSCAC issued its report. The Applicants' right to be informed of the composition of the NYGSCAC in a timely manner was not respected. Moreover, the NYGSCAC, as an appellate body, must have impartial members to ensure the fairness of the review and the appellants must have the possibility to request the replacement of any member, including the chairperson, if any of them are incompatible.

54. According to the Report of the Staff/Management Task Force on the Distribution Section dated 14 December 1998, Ms. VL, the chairperson of the NYGSCAC, was one of five staff members nominated by the Department of General Assembly Affairs and Conference Services (five members of the Task Force were also recommended by staff) to "review the working conditions, management issues and practices, work processes and structure of the Distribution Section". The Applicants consider that, as a result of her involvement in the Task Force,

Ms. VL was subject to a conflict of interest and that they should have had an opportunity to recuse her.

55. Section 7.3 from ST/AI/1998/9 states as follows (emphasis added):

The New York General Service Classification Appeals Committee *shall* comprise:

- (a) A chairperson *appointed* by the Secretary-General on recommendation of the Joint Advisory Committee at Headquarters;
- (b) Two or more members *appointed* by the Secretary-General;
- (c) An equal number of members designated by the staff representative body at Headquarters.

56. The Tribunal considers that, in accordance with sec. 7.3, the membership of the NYGSCAC panel is mandatory and the chairperson, together with the two members from the Administration, must be appointed by the Secretary-General. The record shows that the members—the original nominees and the two replacements—were proposed by OHRM on 4 March 2011 and 13 May 2011, respectively. The Secretary-General approved

therefore concludes that the chairperson of the NYGSCAC and the members recommended by the Administration were not appointed by the Secretary-General in accordance with sec. 7.3 of ST/AI/1998/9.

The NYGSCAC proceedings and report

58. Section 6.7 from ST/AI/1998/9 (System for the classification of posts) contains specific and mandatory procedural steps to be followed before the CAC:

- a. The Secretary of the Appeals Committee “shall transmit” a copy of the report of the reviewing service or section to the appellant for comments;
- b. The appellant must submit his/her comments to the Secretary of the Appeals Committee within three weeks;
- c. The appellant’s comments “will be provided” by the Secretary to OHRM or the human resources service or section concerned, as appropriate, for their observations;
- d. The observations of OHRM “must be submitted” within two weeks.

59. The Tribunal considers that this mandatory provision establishes the fundamental due process rights and obligations of the parties before the CAC, in particular:

- a. The appellant’s right to receive a copy of the report made by the reviewing service;
 - b. The appellant’s right to prepare comments and the correlative obligation to file them within three weeks;
 - c. The right of OHRM to receive a copy of the Appellant’s comments;
- and

on this report; and OHRM's response/observations to the Applicants' comments to the reviewing report, which are necessary for the entire activity of the NYGSCAC.

64. In accordance with sec. 6.13 of ST/AI/1998/9, the NYGSCAC's report is the official record of the proceedings in the appeal ("shall constitute") and must ("shall") contain a summary of the case and a reasoned recommendation concerning the disposition of the appeal.

65. The Tribunal, after carefully reviewing the NYGSCAC report from 7 June 2011, notes that the only references to the procedure are the following:

3. The Committee met on a number of occasions during May 2011 to consider the cases. Present at those meetings were the Chair, and Committee members, Mr. ER (DM), Mr. HSK (DM) and Ms. AP (OCHA) representing the administration; and Mr. CJ (DM), Mr HHN (DGACM), and Mr. PO (DM) representing the staff. The Committee reviewed the submissions and discussed the cases at length. Ms. EM provided technical and administrative support as the Secretary.

4. After undertaking a preliminary discussion on the circumstances of the cases, the documents available, and the structure of the review, the Committee proceeded with a factor-by-factor analysis of the existing job descriptions under appeal on their merits and separate from other issues within the UNDT judgment. In their evaluation, the Committee applied the General Service Job Classification Standards that were in effect at the time of the initial classification of the job descriptions.

66. The Tribunal finds that there is no mention in the report, and therefore no evidence on the NYGSCAC record, of the following matters:

a. If the NYGSCAC, before starting its review, was provided by the Secretary with these three mandatory documents: the report of

reasoned recommendations concerning the disposition of the appeals (sec. 6.13 of ST/AI/1998/9).

72. In the present case, the Applicants raised the following grounds of appeal before the NYGSCAC (emphasis in original):

1. The [job descriptions] and classification received in March 2004 did not correspond to earlier analysis and agreements reached between staff and management, as reflected in the 23/12/98 report on the *Staff/Management Task Force on the Distribution Section*, and its recommendations on the reclassification process. Nor does it comply with the 2000 report of the *Work Group* chaired by the AC (created pursuant to recommendation 7 of the above *Task Force*).
2. The C. Work Group had prepared an extensive revision of the appellants' Job Descriptions, which upgraded their functions and levels. We attach as a sample

77. The Tribunal, after reviewing the content of the decision taken on 8 June 2011 by the ASG/OHRM, finds that the only decision taken by the ASG/OHRM was to approve the NYGSCAC report from 7 June 2011 (page 20 of the report has a special section—“Decision of the Assistant Secretary-General for Human Resources Management”—with two check boxes “approved” and “not approved”). The Tribunal therefore finds that instead of making her own final, reasoned decision on the appeal, as required by sec. 6.14 of ST/AI/1998/9, the ASG/OHRM only approved the NYGSCAC report.

Conclusion

78. The Tribunal concludes that the review by the NYGSCAC was flawed due to irregularities relating to the announcement of its composition and the appointment of its members, and the fact that the procedure set out in sec. 6.7 of ST/AI/1998/9 does not appear to have been followed prior to the NYGSCAC considering the Applicants’ cases. These deficiencies were not identified or addressed by the ASG/OHRM in her final review. She also did not produce a final, reasoned decision.

79. The Tribunal considers that it is not its role to exercise a 35ri8.6(.)Tj/T68 1 Tf4.2825 0 TD()Tj/

The Tribunal orders that the entire process is to be completed within 90 days of the publication of this judgment.

81. The Tribunal underlines that the following steps are to be followed by the Administration:

- a. In accordance with the mandatory provisions of sec. 7.6 (Terms of office) of ST/AI/1998/9, the chairpersons of the Commission on Human Rights (2002-2005) and the High Commissioner for Human Rights (2005-2010).

