



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/064
(UNAT 1602)
Judgment No.: UNDT/2011/161
Date: 15 September 2011
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Anne Coutin, Officer-in-Charge

MEGHERBI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Helen Morris, OSLA

Counsel for Respondent:
Miouly Pongnon, UNON

Introduction

1. The Applicant, a retired staff member of the United Nations Environment Programme (“UNEP”), contests the decision by the Administration not to reclassify the post he occupied from the P-3 to the P-4 level.

2. He requests the Tribunal to order the Respondent to pay him compensation for the harm caused by the Administration’s delay in responding to his requests for reclassification of the post.

3. Under the transitional measures set out in United Nations General Assembly resolution 63/253, the application before the former United Nations Administrative Tribunal was transferred to the United Nations Dispute Tribunal on 1 January 2010.

Facts

4. The Applicant entered service with the United Nations in 1977 and, in 1983, was hired at the P-1 level by UNEP in Paris, France. He was promoted to P-2 in 1985 and to P-3 in 1990, each time following the reclassification of his post. He remained at the P-3 level as a Librarian until his retirement on 31 March 2005.

5. On 18 March 2003, the Applicant requested the then Director of the Division of Technology, Industry and Economics (“DTIE”) of UNEP to have his post reclassified to P-4.

6. By memorandum dated 10 May 2004, the new Director of DTIE requested the Executive Director of UNEP to have the Applicant’s post classified at the P-4 level, noting that the post in question had never been classified and that the Applicant would be retiring on 31 March 2005.

7. By two letters dated 25 October 2004 and 15 February 2005, respectively, the Applicant reminded the Executive Director that there had been no reply to the

10 May 2004 memorandum of the Director of DTIE and again requested the reclassification of his post.

8. In March 2005, the UNEP Administration requested the Applicant to provide a copy of his job description.

9. On 31 March 2005, the Applicant retired.

10. By fax dated 5 July 2005, the Director of DTIE sent the Executive Director of UNEP the Applicant's job description for approval and reclassification. She indicated, however, that she intended to submit a new job description and a new classification request for that post as she had decided not to recruit another librarian.

11. By memorandum dated 18 July 2005, an Administrative Officer from the Office of the Executive Director of UNEP sent the Chief of the Classification and Recruitment Section, Human Resources Management Service ("HRMS"), United Nations Office at Nairobi ("UNON"), documents relating to the duties performed by the Applicant and inquired whether anything could be done for him, noting that he had already retired. This memorandum was the result of a discussion of the Applicant's situation that had taken place on 16 March 2005 before the aforementioned Administrative Officer and the Chief of the Classification and Recruitment Section, during which the latter had suggested that documents showing that the Applicant was carrying out functions at the P-4 level should be sent to her. The Administrative Officer explained that the reason for the delay in transmitting the documents requested was that she had just received them from DTIE.

12. By memorandum dated 11 August 2005, the Chief of the Classification and Recruitment Section, HRMS/UNON, replied to the aforementioned memorandum. She stated that, even if the post in question were to be retroactively reclassified to the P-4 level, a vacancy notice would have to be published in Galaxy to fill the post under administrative instruction ST/AI/2002/4 on the staff selection system; since the Applicant had retired, he would not be eligible to apply

for the post and thus to be promoted retroactively. She added that if the Applicant was dissatisfied, he might be entitled to appeal the decision under staff regulation 11.1.

13. A copy of the 11 August 2005 memorandum was sent to the Applicant on 23 August 2005. On the same date, a request for classification signed by the Applicant, his supervisor and the Director of DTIE was submitted on the standard form provided for that purpose.

14. By letter dated 6 September 2005 to the Chief of the Classification and Recruitment Section, HRMS/UNON, the Applicant contested the decision not to classify his former post and requested compensation for the harm suffered.

15. Having received no reply to his letter of 6 September, by letter dated 9 October 2005, the Applicant requested the Secretary-General to review the decision contained in the 11 August 2005 memorandum.

16. By letter dated 19 October 2005, he was informed by the Administrative Law Unit of the United Nations Secretariat that his letter to the Secretary-General had been received on 18 October 2005 and that in the event that he did not receive a reply within two months, he would then have one month to file an appeal with the Joint Appeals Board.

17. On 10 November 2005, the classification procedure formally initiated on 23 August 2005 was completed. The review of the Request for Classification Action determined that the post in question was properly classified at the P-3 level. The Applicant was not informed of the outcome of the classification process until 28 April 2006, during the appeal proceedings before the Joint Appeals Board.

18. On 16 January 2006, having received no reply from the Secretary-General to his request for a review, the Applicant filed an appeal with the Joint Appeals Board.

19. On 8 February 2007, the Joint Appeals Board issued its report. It found that the appeal was inadmissible, first, because the memorandum of 11 August 2005 did not contain an administrative decision which could be the subject of an appeal, and second, because the appeal was time-barred and, in any event, should be dismissed on the merits.

20. By letter dated 15 June 2007, the Secretary-General informed the Applicant that he accepted the conclusions of the Joint Appeals Board.

21. After requesting and receiving four extensions of the time limit, the Applicant filed an application with the former Administrative Tribunal on 12 June 2008.

22. On 11 December 2008, after requesting and being granted two extensions of time by the Administrative Tribunal, the Respondent submitted his answer, in which he merely contested the receivability of the application. The Applicant submitted observations on 31 July 2009.

23. The case, on which the Administrative Tribunal had been unable to rule before its abolishment on 31 December 2009, was transferred to the United Nations Dispute Tribunal on 1 January 2010.

24. By Order No. 67 (GVA/2011) of 10 May 2011, the Tribunal instructed the Respondent to submit a reply on the merits of the case by 31 May 2011. Counsel for the Respondent did not respond until 3 June 2011, when she sent an email explaining to the Tribunal that she had not been appointed until 2 June 2011 and that a reply on the merits would be submitted by 7 June. On 7 June 2011, however, Counsel for the Respondent requested an extension until 21 June 2011 to submit a reply on the merits. The Tribunal having granted the extension, the Respondent submitted his reply on 21 June. The Applicant submitted comments on 27 July 2011 after seeking and being granted two extensions of time.

25. By letter dated 8 August 2011, the Tribunal asked both parties whether they wished to have a hearing in the case. The Applicant replied in the affirmative on 15 August; Counsel for the Respondent did not reply.

26. By Order No. 124 (GVA/2011) of 17 August 2011, the Tribunal set the hearing for 12 September 2011. By the day of the hearing, despite four emails sent by the Registry on 17 August, 30 August, 1 September and 6 September 2011, no reply had been received from Counsel for the Respondent regarding her attendance.

27. On 12 September 2011, only the Applicant and his Counsel appeared, in person, at the hearing, which was therefore held in the absence of Counsel for the Respondent.

Parties' contentions

28. The Applicant's contentions are:

a. Notwithstanding the Administration's contentions, his application is receivable. It is not time-barred and the impugned decision is indeed an administrative decision that is subject to appeal;

b. Despite his many requests for reclassification of his post, beginning in 1994, those requests were not considered within the proper time limits and for many years he received no response to his requests. This is a serious violation of his rights and evidence of discrimination against him;

c. A report by the Office of Internal Oversight Services dated 26 November 1997 and a judgment of the former Administrative Tribunal establish that the Paris office of UNEP was mismanaged and that this mismanagement continued until 2004;

d. It was not until March 2005, one month before his retirement and 11 months after the 10 May 2004 memorandum, that the Paris office of

UNEP informed him orally that headquarters had requested a job description for his post;

e. Administrative instruction ST/AI/1998/9 on the system for the classification of posts was violated;

f. The Administration improperly refused to consider his request for reclassification on the pretext that he would be retiring soon;

g. The Applicant was deprived of the right to appeal the decision to refuse to classify at the P-4 level the post he occupied; thus, he was also deprived of the opportunity to apply for that post before his retirement.

29. The Respondent's contentions are:

a. The impugned decision, which is contained in the 11 August 2005 memorandum sent by the Chief of the Classification and Recruitment Section, HRMS/UNON, to the Office of the Executive Director of UNEP, is not an administrative decision that can be appealed, but an explanation of the applicability of section 4.2 of ST/AI/2002/4 to the Applicant's case. The application is therefore not receivable;

b. The application is also not receivable because it is time-barred since the Applicant himself acknowledges that he requested the reclassification of his post in 1994 and 1996. In submitting his request for review on 9 October 2005, the Applicant failed to act within the time limit set out in former staff rule 111.2 and there is no exceptional circumstance that warrants a waiver of that time limit;

c. The application is also not receivable because the Applicant failed to exhaust the procedures set out in section 6 of ST/AI/1998/9 for appeals of decisions on the classification of posts;

d. On the merits, the Applicant's request for reclassification did not meet the criteria set out in ST/AI/1998/9 in that it was not submitted

pursuant to a restructuring of DTIE. Nevertheless, the Respondent demonstrated his good faith to the Applicant by conducting the classification exercise;

e. ST/AI/1998/9 provides that a decision on the classification of a post may be appealed on the ground that the classification standards were incorrectly applied. However, the Applicant is merely contesting the outcome of the classification procedure. The Tribunal cannot substitute its own assessment for that of the Classification and Recruitment Section, which found in November 2005 that the post was correctly classified at the P-3 level;

f. Even if the request for classification at the P-4 level had been approved, no budgetary post at the P-4 level was available in the UNEP budget; therefore, the reclassification would not have taken effect until it had been approved by the General Assembly during the budget process.

Consideration

30. The Tribunal notes that despite all its attempts to ensure that Counsel for the Respondent was present at the hearing, she did not respond to the Tribunal's correspondence and therefore did not appear at the hearing held on 12 September 2011. Since the Respondent's absence from the hearing does not preclude a ruling in the case, the Tribunal hereby delivers its judgment.

Request for reclassification

31. The Applicant contests, first, the Administration's decision not to reclassify the post he occupied from the P-3 to the P-4 level.

32. While it is not necessary to rule on the receivability of the application with respect to the merits of the decision not to reclassify the post, section 1 of ST/AI/1998/9 (System for the classification of posts) provides that:

Request for the classification or reclassification of a post

1.1 Requests for the classification or reclassification of a post shall be made by the Executive Officer, the head of administration at offices away from Headquarters, or other appropriate official in the following cases:

(a) When a post is newly established or has not previously been classified;

(b) When the duties and responsibilities of the post have changed substantially as a result of a restructuring within an office and/or a General Assembly resolution;

(c) Prior to the issuance of a vacancy announcement, when a substantive change in the functions of a post has occurred since the previous classification;

(d) When required by a classification review or audit of a post or related posts, as determined by the classification or human resources officer concerned.

...

1.3 Incumbents who consider that the duties and responsibilities of their posts have been substantially affected by a restructuring within the office and/or a General Assembly resolution may request the Office of Human Resources Management or the local human resources office to review the matter for appropriate action under section 1.1 (d).

33. The provisions cited above set out the only cases in which the Administration may, on its own initiative or at the behest of the staff member concerned, initiate a reclassification procedure.

34. The case file shows that the Applicant, who was promoted in 1990 to a P-3 post of Librarian following the reclassification of the post, remained in that post until 31 March 2005, when he retired. While the Applicant claims that the work he performed throughout the time he occupied the post in question in no way resembled the duties of a Librarian, the office to which the post was attached did

not undergo any restructuring. In any event, therefore, the provisions cited above did not allow for reclassification of the Applicant's post.

35. The Applicant thus has no grounds for contesting the decision not to reclassify his post.

Request for compensation

36. The Applicant has also submitted to the Tribunal that the Administration is liable for the delay in responding to his requests for reclassification, which he claims to have submitted beginning in 1994. However, he has not filed any documents which establish that he made such requests prior to 18 March 2003.

37. It is necessary first to rule on the receivability of his request for compensation in respect of its timeliness.

38. By letter dated 6 September 2005 to the Chief of the Classification and Recruitment Section, HRMS/UNON, the Applicant requested, *inter alia*, compensation for the harm caused by the Administration's silence as to his request for reclassification and, by letter dated 9 October 2005, he requested the Secretary-General to review the decision not to reclassify the post.

39. Having received no reply to his request of 9 October 2005 from the Secretary-General, the Applicant filed an appeal with the Joint Appeals Board on 16 January 2006. By letter dated 15 June 2007, the Secretary-General informed the Applicant that he accepted the conclusions of the Joint Appeals Board, which had found his appeal to be inadmissible, and the Applicant, after requesting and being granted four extensions of time, filed an application with the former Administrative Tribunal on 12 June 2008 requesting, *inter alia*, compensation for harm suffered. This Tribunal finds therefore that the Applicant met the time limits both for requesting a review and for filing applications with the Joint Appeals Board and the former Administrative Tribunal. This Tribunal thus considers that the Applicant's request for compensation is receivable.

40. Since it was ruled above that the text of administrative instruction ST/AI/1998/9 on requests for classification or reclassification of posts did not allow for approval of the Applicant's request for reclassification, the Tribunal must rule on the question of whether there was an excessive delay in the Administration's response to the request.

41. It cannot be disputed that the first request for reclassification, submitted by the Applicant to the then Director of DTIE and contained in the case file, is dated 18 March 2003 and that it was not until 10 May 2004 that the new Director of DTIE sent a memorandum to the Executive Director of UNEP requesting reclassification of the Applicant's post to the P-4 level and noting that the Applicant would be retiring on 31 March 2005.

42. By two letters dated 25 October 2004 and 15 February 2005, respectively, the Applicant reminded the Executive Director that there had been no reply to the 10 May 2004 memorandum from the Director of DTIE and again requested the reclassification of his post.

43. It was not until 28 April 2006, during the appeal proceedings before the Joint Appeals Board and after his retirement on 31 March 2005, that he learned that the reclassification procedure had been concluded on 10 November 2005 with a decision to maintain his post at the P-3 level.

44. Thus, over three years passed before the Applicant received an official decision not to reclassify his post to the P-4 level and before the Administration saw fit to inform him officially that the decision had been made. The Tribunal finds that such a delay constitutes an error on the part of the Administration which entails its liability because, even though the decision taken was justifiably in the negative, it caused moral injury to the Applicant, mainly arising from the fact that he retired from service without having received a response to his request for reclassification. In the circumstances, the Tribunal finds that, on that count, the Applicant should be granted compensation in the amount of EUR2,000.

Conclusion

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

- a. The Respondent is ordered to pay the Applicant compensation in the amount of EUR2,000;
- b. The aforementioned compensation shall bear interest at the United States Prime Rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the United States Prime Rate 60 days from the date this Judgment becomes executable;
- c. All other claims are dismissed.

(Signed)

Judge Jean-François Cousin

Dated this 15th day of September 2011

Entered in the Register on this 15th day of September 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry