



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/056

Judgment No.: UNDT/2013/121

Date: 8 October 2013

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Eric Muli, Officer-in-Charge

SLADE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Seth Levine, OSLA

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant joined the Organization on 10 February 2006 as an Information Technology Assistant on an Appointment of Limited Duration (ALD) at the FS-4/1 level under the former 300 series of the Staff Rules and Regulations. Following a series of extensions of appointment, the Applicant was granted a Fixed-Term Appointment (FTA) in accordance with the new contractual arrangements which came into effect from 1 July 2009 in accordance with General Assembly resolution 63/250. The Applicant is currently a staff member of the United Nations Stabilization Mission in the Democratic Republic of Congo (“MONUSCO”) MONUSCO at the FS-4 level.

2. On 19 April 2011, the Applicant filed an application for suspension of action of the decision to implement, on 1 July 2011, the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions (“the impugned decision”).

3. On 27 June 2011, the United Nations Field Staff Union (FSU) applied to file a “friend-of-court” brief.

4. The Respondent’s Reply was filed on 29 June 2011. On 30 June 2011, the Respondent requested leave to amend his Reply. On 1 July 2011, the Tribunal issued Order No. 064 (NBI/2011) in which it granted, *inter alia*, the FSU’s Application to file a “friend-of-court” brief and granted the Respondent leave to file an amended Reply.

## **Facts**

5. On 27 August 2010, the International Civil Service Commission (ICSC) transmitted its 36<sup>th</sup> annual report to the General Assembly setting out its decisions and recommendations, *inter alia*, on conditions service of staff in field operations.

6. Following the issuance on the ICSC’s recommendations, the Secretary-General submitted his report to the General Assembly (A/65/305/Add. 1) on

Human Resources Management reform, contractual arrangements and harmonization of conditions of service.

7. In a subsequent statement to the General Assembly, the Secretary-General confirmed the discontinuance of the Personal Transitional Allowance (PTA) and presented in more detail the cost implications for the United Nations if the ICSC's recommendations on the conditions of service for staff serving in non-family stations were approved by the General Assembly.

8. The General Assembly, in resolution A/RES/65/248 of 24 December 2010 approved the Secretary-General's recommendations based on the ICSC report which resulted in the discontinuance of the PTA among other matters. The General Assembly also requested the Secretary-General to absorb the costs of the reform from within resources without impacting on operational costs or undermining mandated activities and programmes.

9. Following the approval by the General Assembly, the Department of Field Support, Field Personnel Division ("DFS/DFD") conducted town hall meetings through video conferences with all missions including MONUSCO to inform staff of the changes.

10. On 31 January 2011 and 29 March 2011, the Applicant requested management evaluation of the impugned decision.

11. On 18 April 2011, the Management Evaluation Unit (MEU) informed the Applicant that since she had submitted the management evaluation request as part of a collaborative effort, representing thirty four (34) other staff members, the MEU's Terms of Reference did not make provision for evaluating administrative decisions based on "class action" or representative claims. In order to consider the requests for management evaluation, the MEU would require all the said staff members to submit signed individual requests, setting out the basis for their challenge to the contested decision.

12. On 19 April 2011, the Applicant filed her individual request for management evaluation and also filed an application for suspension of action of the impugned decision.

13. On 8 July 2011, the Dispute Tribunal issued Order No. 71 (NBI/2011) rejecting the Applicant's application for suspension of action of the impugned decision.

14. On 29 July 2011, the Tribunal issued its reasoned Judgment rejecting the application for not having satisfied the three conditions under article 2.2 of the Dispute Tribunal's Statute and art. 13 of the Dispute Tribunal's Rules of Procedure.

15. The Tribunal concluded that the issues raised by the Applicant could not be properly addressed in an application for suspension of action. In this regard, the Tribunal transferred the application to the general cause list to be heard on the merits pursuant to arts. 19 and 36 of the Dispute Tribunal's Rules of Procedure. In addition, the Tribunal ordered the parties to file submissions with respect to a number of questions set out in paragraph 87 of the Judgment as reproduced below:

- a. Whether the PTA is part of the terms and conditions of service of the Applicant;
- b. Whether the receipt of a Personal Transitional Allowance was a legitimate expectation for a staff member in the Applicant's position and station;
- c. Whether the impugned decision constituted a unilateral modification of the terms and conditions of the employment contract;
- d. Whether, in view of the facts in the present case, the Administration had a duty to consult staff members and/or staff associations regarding the implementation of the General Assembly resolution in issue;

- e. Whether, in view of the facts in the present case, the Administration had unlawfully ignored the protests of staff associations and individual staff members; and
- f. Whether international labour standards and the United Nation's Charter had been breached in the process of the implementation of the General Assembly resolution on the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions.

16. On 22 September 2011, the Applicant filed the present Application on the merits. The Respondent filed his Reply to the Application on 24 October 2011.

17. The Tribunal decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing was not required in determining this case and that it would rely on the parties' pleadings and written submissions.

#### **Applicant's case**

18. The Applicant's case is summarized below.

19. On 30 April 2009, pursuant to General Assembly resolution 63/250, the Applicant was served with a memorandum informing her of the changes to her contractual status. Having held an appointment of limited duration ("ALD") under a 300-series appointment and having satisfied the relevant criteria, she was granted a one year fixed term contract effective 1 July 2009. The Applicant submits that this memorandum, of 30 April 2009, is explicitly part of the terms of the Applicant's contract. It required her signature and a signature on behalf of the ASG/OHRM. It was duly signed by both parties on 8 May 2009.

20. Paragraph 3 of the memorandum stated that:

A Personal Transition Allowance will be paid to mission staff reappointed under a new fixed-term contract where the monthly amount of the after 30-day MSA rate for their regular duty station payable on 30 June 2009 is more than the sum of the post-adjustment, mobility and hardship allowance and rental subsidy. The Personal Transition Allowance will be adjusted by any increase

in the amount of post adjustment, mobility and hardship allowance and rental subsidy and will be gradually phased out in the attached note.

The implementation and phasing-out schedule of the PTA contained in that memorandum mirrors that contained in an OHRM pamphlet entitled “Human Resources Reform – what’s in it for me”, sent to the Applicant on 9 February 2009. Both documents state that the PTA is to be phased out according to the following schedule:

- First Year (i.e. 1 July 2009 – 30 June 2010): 100%
- Second Year (1 July 2010- 30 June 2011): 100%
- Third Year (1 July 2011-30 June 2012): 70%
- Fourth Year (1 July 2012-30 June 2013): 40 %

21. The same phasing-out schedule is repeated in the guidance manual entitled “United Nations Contractual Reform – Transitional Measures and Implementation in Family and Non-Family Missions” dated 26 May 2009.

22. The 30 April 2009 memorandum signed by the Applicant and the Administration on 8 May 2011, is a document that explicitly incorporates the terms of the PTA and the schedule for its phasing out into the terms and conditions of the Applicant’s contract.

23. The Applicant received a Letter of Appointment (LOA) in respect of a new fixed-term contract in July 2009. Due to concern over its terms, the Applicant did not, in fact, sign the LOA until 7 December 2009.

24. Paragraph 2 of the LOA, headed “Allowances”, stipulates - “The salary shown does not include any allowances to which you may be entitled”.

25. A Personnel Action (PA) was generated as a result of the offer of a fixed-term appointment. The effective date of the PA was 1 July 2009. The PA is certified as having been finalized on 26 June 2009 and approved, by Margaret Dahlo, on 7 July 2009 (the date the LOA was signed on behalf of the ASG/OHRM). The PA lists, under Entitlements, PTA at USD2,016.43 monthly, with an expiry date of 30 June 2013.

26. A further LOA was signed on behalf of the ASG/OHRM on 29 June 2010 and by the Applicant on 14 July 2010. The PTA is calculated on the PA as USD1, 690.98 monthly. The expiry date of the PTA was 30 June 2013.

27. At the start of a third year following the contractual reforms, another LOA, in the same terms for all material purposes, was signed on behalf of the ASG/OHRM on 4 July 2011 and by the Applicant on 13 September 2011. The Applicant wrote below her signature “signed with reservations”. The Applicant submitted that she felt compelled to sign her contracts, as failure to do so would have led to her becoming constructively separated from the Organization. She submitted that she was in an unequal bargaining position. Forced acquiescence with unilaterally imposed terms, explicit or implied, in breach of previous commitments by the Organization is not the same as informed consent.

28. The PA generated in respect of the July 2011 LOA made no reference to PTA. Staff Rules and Regulations are incorporated, by reference, into all United Nations employment contracts.

29. The Applicant submitted that the payment and terms of the PTA were incontrovertibly part of her contract of employment and that this is readily apparent from the signed letter of 30 April 2009. Given that the terms in that letter provided for a four-year implementation schedule for PTA, the Applicant was entitled to rely on the existence of those terms when signing subsequent contracts.

30. Whilst the entitlement to PTA and its subsequent variation flow from General Assembly legislation, all contractual matters within the United Nations system are also the products of statute. The Applicant was appealing against the decision of the Administration to unilaterally alter her contract. Whilst the same decision may have been taken in respect of numerous other staff members, the Applicant is concerned solely with her private-law rights vis-à-vis her contract of employment.

31. The PTA’s implementation was planned over a four-year period because, in so doing, the Administration could ensure that its purpose was fulfilled – namely, to fairly compensate the sudden change in status brought about by the

2009 reforms. Whilst other terms and conditions may have been subject to change, express or implied, the implementation of the PTA was made the subject of a separate, binding contractual agreement that could only be repealed with the consent of both parties.

32. The Applicant submitted that all contractual issues within the United Nations are framed within the context of the Organization's legislative architecture. Whilst the Applicant was not challenging the validity of any General Assembly resolution, the Secretary General is responsible for ensuring that the implementation of the same does not violate the express terms of a staff members' contract.

33. The Applicant submitted also that her entitlement to PTA was an acquired right, or a legitimate expectation. In 2009, when her status changed from a 300-series appointee to a fixed-term appointee, she acquired a legitimate expectation that the PTA would be administered over a four-year period. The signing of subsequent contracts did nothing to extinguish the right acquired by the Applicant in 2009.

34. It was again submitted on behalf of the Applicant that it would be disingenuous of the Administration to argue that her expectation and the acquired right engendered by it, were extinguished by the act of signing a contract subsequent to A/65/248 and that the principle of equal bargaining could not simply be ridden over roughshod in this way. The Administration was essentially presenting the Applicant with *a fait accompli* – accept the unilateral variation of terms of employment, or leave the Organization. That the situation arose as a result of a legislative instrument does not automatically place the consequences outside the scope of the contractual relationship nor does the fact that subsequent contracts were signed, in 2010 and 2011, extinguish the rights acquired under the 2009 contract.

35. Whilst the Applicant has only limited knowledge of the consultative process (or absence thereof) that was undertaken Organization-wide, she submitted that she was only informed of the putative changes in December 2010. Thereafter, her attempts at discussing the changes to her contract were rebuffed.

36. United Nations' jurisprudence has long recognized that, as a standard-bearer for human rights, it should, in its own administration, set an example. In *Mwangi*<sup>1</sup>, the Administrative Tribunal noted that the United Nations, "as an exemplary employer, should be held to higher standards". In *Araim*<sup>2</sup> the Administrative Tribunal held that "the Organization has to respect and follow its procedures in keeping with what the world expects of the United Nations".

37. The loss of PTA has affected the Applicant disproportionately, as she is a single person with no dependants. Article 23(2) of the Universal Declaration of Human Rights provides that "everyone, without any discrimination, has the right to equal pay for equal work". International conventions such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Labour Organisation's Equal Remuneration Convention 100 have developed this principle to address gender discrimination.

38. For the above reasons, the Applicant submitted that the decision to withdraw her PTA was one unilaterally taken by the Secretary-General in breach of an explicit term of her contract. The appropriate remedy is the reinstatement of the PTA pursuant to the terms, in respect of the Applicant, as set out in the document signed on 8 May 2009 or, in the alternative, compensation in the same amount.

### **Respondent's case**

39. The Respondent's case is summarized below:

40. The transition from the MSA system to the United Nations common system resulted in a loss of income for some staff. To mitigate the impact of any loss of income, a PTA was paid to some international staff from 1 July 2009, including the Applicant who, due to the reforms approved by the General Assembly, incurred a loss of income between the amount of MSA received before the conversion and the amount of post adjustment, mobility allowance, hardship

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<sup>1</sup> UNAdT/1125 (2003).

<sup>2</sup> UNAdT/1022 (2001).

allowance, non-removal allowance and rental subsidy/rental deduction payable as of 1 July 2009.

41. By memorandum dated 30 April 2009, the Applicant was informed that, following the implementation of the new conditions of service as of 1 July 2009, she would be paid a PTA in order to offset any loss of income as a result of the introduction of the new conditions of service, and that such PTA payments would be gradually phased out over time.

42. The Applicant was paid the PTA for a two-year period, from 1 July 2009 to 30 June 2011. From 1 July 2009 to 30 June 2010, she received a PTA of USD2,016.43 per month. From 1 July 2010 to 30 June 2011, she received a PTA of USD1,690.98 per month.

43. By its resolution 65/248, the General Assembly approved the payment of an additional hardship allowance as of 1 July 2011 for staff serving in non-family duty stations. This allowance superseded the purpose of MSA payment (which was intended to compensate staff for maintaining a dual household) and the PTA, thereafter.

44. The purpose of the MSA, although only applied by the United Nations Secretariat and not the other organizations of the United Nations common system, was to provide some form of compensation for the maintenance of a second household when staff members were assigned to a duty station where the presence of dependants was not allowed.

45. In order to harmonise and simplify the varying practices and compensation packages paid to staff members paid at non-family duty stations, but also with a view to extending compensation to staff members without dependants in recognition of the additional costs related to service in particularly difficult duty stations, the General Assembly approved the replacement of existing compensation packages, by the introduction on 1 July 2011, of an additional element in the current mobility, hardship and non-removal allowance scheme.

46. As from 1 July 2011, the Applicant was no longer paid a PTA as a consequence of General Assembly resolution 65/248. However, during her one-year FTA, from 1 July 2010 to 30 June 2011, the Applicant was entitled to receive an additional hardship allowance of USD6,380, which is recorded in her Personnel Action Form (PA) as “Non-family Hardship element of Mobility and Hardship A”.

47. The Respondent submitted, contrary to the Applicant’s claim, that the PTA did not constitute an intrinsic part of the terms and conditions of her FTA as of 8 May 2009. Further, the Applicant’s prior agreement was not required before the discontinuance of the PTA. In addition, the Administration consulted with staff representatives regarding the implementation of General Assembly resolution 63/250. The record also shows that the Administration communicated with staff on the discontinuance of the PTA.

48. The Applicant contends that the memorandum dated 30 April 2009, signed by her on 8 May 2009, is the only signed document that explicitly incorporates the terms of the PTA and the schedule for its phasing out into the terms and conditions of her contract. The Respondent contends that the legal effect of the memorandum as described by the Applicant is incorrect. The memorandum did not change the Applicant’s terms or conditions of service, either expressly or by implication.

49. Through the memorandum, the Applicant was informed of the new contractual arrangements and conditions of service approved by the General Assembly in its resolution 63/250. She was also informed that she would be paid a PTA in order to offset any loss of income as a result of the introduction of the new conditions of service and that such PTA payments would be gradually phased out over time, estimated to be by 30 June 2013.

50. The memorandum was also sent to the Applicant’s supervisor for the purpose of obtaining a recommendation of the new contract type, if any, to be granted to the Applicant. It provided guidance to the Applicant’s supervisor to formulate his recommendation and ensured that the Applicant was informed of her supervisor’s recommendation for a new appointment. The memorandum was

subject to approval by the Chief Civilian Personnel Officer (CPPO). It did not, in and of itself, constitute a contract or an agreement regarding the Applicant's terms and conditions, but a *recommendation* from the Applicant's supervisor to grant her a new FTA for one year, including a confirmation that she had been informed of such recommendation.

51. The Applicant's LOA for her one-year FTA for the period from 1 July 2009 to 30 June 2010, stipulated that the offer of a FTA was "in accordance with the terms and conditions specified below, and subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments that may be made from time to time to such Staff Regulations and such Staff Rules." With respect to allowances, the LOA stated that "[t]he salary shown does not include any allowances to which you may be entitled".

52. The allowances to which the Applicant was entitled from 1 July 2009 to 30 July 2010 were set out in her PA. The section of the PA entitled "Standard Amounts/Remarks", included a monthly PTA of USD2, 016.43. The PA stated that "the standard amounts listed above are subject to review and adjustment; they are based on data available at the time this personnel action was approved, and are computed at the rate in effect at that time"

53. The Applicant's LOA for her FTA for the period from 1 July 2010 to 30 June 2011, was essentially in the same terms as for the previous year, save for necessary changes to her assessable salary, level and date of appointment. The Applicant's PA included a monthly PTA of USD1, 690.98.

54. Staff Rule 4.1 provides that "[t]he letter of appointment issued to every staff member contains expressly or by reference all the terms and conditions of employment. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment." The Applicant's LOAs for the two-year period in which she had the right to receive the PTA (from 1 July 2009 to 30 June 2011), do not, in any terms, refer to the PTA or the memorandum to the Applicant dated 30 April 2009.

55. The Applicant's right to receive the PTA accrued to her, and other staff, as a consequence of the Organization's unilateral decision to pay the transitional allowance, from 1 July 2009 to 30 June 2011, to compensate some international staff in non-family duty stations whose income was reduced as a consequence of the harmonization of conditions of service as from 1 July 2009.

56. There is no basis for implying into the Applicant's terms and conditions of appointment a right to receive the PTA until 30 June 2013, in view of the purpose of the memorandum dated 30 April 2009, as described above. Furthermore, the harmonization of conditions of service for staff in the field was an on going matter under consideration by the ICSC and the General Assembly.

57. The terms and conditions of the Applicant's appointment, as of 1 July 2011, reflected the further harmonization of conditions of service approved by the General Assembly in resolution 65/248, including the introduction of an additional hardship allowance and discontinuance of the PTA. Accordingly, the terms and conditions of the Applicant's appointment did not include any right to be paid the PTA beyond the two-year period from 1 July 2009 to 30 June 2011.

58. The discontinuations of the PTA did not constitute a unilateral modification of the terms and conditions of the Applicant's contract. The PTA represented a transitional allowance paid to specific staff members and did not form part of a remuneration package in the offer of appointment and subsequent LOA issued to staff under the Staff Rules and Regulations.

59. The Applicant was informed as early as 30 April 2009 that she would receive a PTA which would be gradually phased out. The Applicant signed the memorandum of 30 April 2009 on 8 May 2009, acknowledging that she had been informed of the new contractual arrangements for international staff members in special missions and agreed to transition to a fixed-term appointment on 1 July 2009.

60. As explained to the Applicant, the PTA was a temporary transitional allowance used to compensate staff for any loss of income as a result of their

transition to their new contractual status of 1 July 2009. Accordingly, the Applicant was duly informed that the PTA would eventually be discontinued.

61. Similarly, the Applicant's consent was not required before a decision could be made on whether the PTA should be discontinued. Paragraph 5 of the memorandum dated 30 April 2009 states that the staff member signs to "indicate that [she had been] informed of the recommendation of [her] section chief" to the reappointment from an ALD to a new FTA for one year effective 1 July 2009.

62. The Applicant's LOA, did not include any allowances, which were expressly subject to the Staff Regulations and Staff Rules and their amendments. As already submitted above, the Applicant's right to receive the PTA did not extend beyond the expiry of her FTA on 30 June 2011. As such, the Applicant's contention that General Assembly resolution 65/248 cannot "trump" her contractual right to receive the PTA to 30 June 2013 in the absence of an explicit acceptance is without merit.

63. The Applicant argued that her entitlement to the PTA was an acquired right, and that the signing of her contracts after the change of her contractual status to a FTA did nothing to extinguish the right acquired in 2009. The Respondent submits that the Applicant's contentions are without merit. The principle of respect for acquired rights did not apply in the present case. The Applicant's right to receive the PTA under her terms and conditions of appointment ceased upon the expiry of her FTA on 30 June 2011. The terms and conditions of her appointment did not include any right to receive the PTA thereafter, to 30 June 2013. Therefore, the discontinuance of the PTA as from 1 July 2011 did not change any of her rights.

64. Effective 1 July 2009, the Applicant received a PTA because she met the established criteria for such payments. Not all staff members were eligible to receive a PTA. For example, staff appointed or assigned to a non-family mission effective on or after 1 July 2009 or locally recruited staff members, among others. Given that the Applicant was informed of the temporary nature of the PTA, the Administration did not create a legitimate expectation that the PTA would continue beyond its two-year duration from 1 July 2009 to 30 June 2011. The

memorandum to the Applicant of 30 April 2009 did not create a legitimate expectation that the Applicant would receive the PTA until 30 June 2013, as the terms and conditions of her appointment did not include such a right. Further, the on going consideration by the General Assembly of the issue of harmonization of conditions of service in the field was inconsistent with any expectation that the PTA would continue for any fixed period.

65. The Administration consulted with relevant staff unions regarding the implementation of General Assembly resolution 63/250. The FSU was represented by the United Nations International Civil Servants' Federation (UNISERV), which was a member of the ICSC's Working Group on harmonization of conditions of service in non-family duty stations. As indicated in paragraph 48 of the Working Group's report, the discontinuance of the PTA was discussed in its meeting in May 2010. In addition, the discontinuance of the PTA, in connection with the implementation of harmonized conditions of service, was further discussed in July 2010 with staff representatives during the seventy-first session of ICSC. UNISERV, representing FSU, participated in the meetings of the ICSC held over the course of six days.

66. Further, during the meeting of the Field Joint Negotiation Committee (FJNC), held from 27 to 28 April 2011, the FSU was consulted on the guidelines for implementation of General Assembly resolution 65/248. Those guidelines, in paragraphs 71 and 72, include information on the expiry of the PTA in connection with the implementation of the harmonized conditions of service. Therefore, the staff unions had every opportunity to present their cases to the ICSC and Administration, which they did.

67. There is no requirement for the Secretary-General to consult individually with each staff member who may be affected by a general change in policy or conditions of service; nor would it be reasonable or possible for him to do so. However, the Administration engaged in extensive efforts to inform affected staff members of the discontinuance of the PTA, as described below. On 20 January 2011, a presentation by Deputy Secretary-General and Under-Secretary-General for Management at a global town-hall meeting informed staff

that the PTA would be discontinued. As recorded in the webcast of the meeting, the Deputy Secretary-General clearly stated that the PTA would be discontinued come 1 July 2009 and there would be a short-term impact on some staff.

68. Various iSeek articles were posted, announcing the adoption of General Assembly resolution 65/247 on human resources issues and that the PTA would be discontinued.

69. The Applicant's contention that the discontinuance of the PTA violates international human rights or labour standards is without merit. Under the United Nations common system, salaries vary according to whether the staff member concerned has dependents, given the associated costs that come with having dependants. Further, there are allowances to which only staff members with dependants are entitled (for example, education grant), or which vary according to whether the staff member concerned has dependants (for example, rental subsidy). As the salary and allowances to which any staff member is entitled depends upon whether he or she has dependents, the impact of the withdrawal of the PTA on the Applicant is of no consequence.

70. In view of the foregoing, the Respondent respectfully requests the Dispute Tribunal to reject the Application.

### **Legal Issues**

71. The Tribunal considers that the legal issues arising in this case can be framed under the following questions:

- a. Whether the PTA is part of the terms and conditions of service of the Applicant;
- b. Whether the Applicant had a legitimate expectation that the PTA would be paid as stipulated in the Respondent's 30 April 2009 memorandum;
- c. Whether General Assembly resolution A/RES65/248 affected the continuation of the PTA; and

- d. Whether international labour standards and the United Nation's Charter have been breached in the process of the implementation of the General Assembly resolution on the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions.

### **Consideration**

#### ***Was the PTA part of the terms and conditions of service of the Applicant?***

72. The Applicant submitted that the 30 April 2009 document, signed by her and the Administration on 8 May 2011, explicitly incorporated the terms of the PTA and the schedule for its phasing out into the terms and conditions of the Applicant's contract. The Applicant also submitted that the decision to withdraw her PTA was one unilaterally taken by the Secretary General in breach of an explicit term of her contract.

73. On this score, the Respondent made the following submissions:
- a. as from 1 July 2011, the Applicant was no longer paid a PTA as a consequence of General Assembly resolution 65/248;
  - b. during her one-year fixed-term appointment from 1 July 2010 to 30 June 2011, the Applicant was entitled to receive an additional hardship allowance of USD6,380, which was recorded in her Personnel Action Form (PA) as "Non-family Hardship element of Mobility and Hardship A";
  - c. contrary to the Applicant's claim, the PTA did not constitute an intrinsic part of the terms and conditions of her fixed-term appointment as of 8 May 2009;
  - d. the Applicant's prior agreement was not required before the discontinuance of the PTA;
  - e. the Administration consulted with staff representatives regarding the implementation of General Assembly resolution 63/250 and that the record also shows that the Administration communicated with staff on the discontinuance of the PTA.;

- f. the memorandum dated 30 April 2009 was subject to approval by the CPPO, it did not, in and of itself, constitute a contract or an agreement regarding the Applicant's terms and conditions, but a *recommendation* from the Applicant's supervisor to grant her a new fixed-term appointment;
- g. there is no basis for implying into the Applicant's terms and conditions of appointment a right to receive the PTA until 30 June 2013; and
- h. the discontinuation of the PTA does not constitute a unilateral modification of the terms and conditions of the Applicant's contract.

74. Article 2.1(a) of the Tribunal's Statute defines the contract of employment, as including:

all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

75. Article 101 of the United Nations Charter and staff regulation 4.1. confer upon the Secretary-General the power of appointment of staff members. These provisions stipulate that the act whereby the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or by an official acting on his behalf. However, the Appeals Tribunal in *Sprauten* 2011-UNAT-111 held that the employment contract is formed, before issuance of the letter of appointment, by an unconditional agreement between the parties on the conditions for the appointment of a staff member, if all the conditions of the offer are met by the candidate.

76. In the present case, a document stipulating new contractual arrangements as from 1 July 2009, in line with the General Assembly resolution 63/250, for international staff holding 300 series mission appointments in special missions was circulated to affected staff. The Applicant received the document which, in her case, was dated 30 April 2009. The said document set out the terms of the new contractual arrangements which reforms were aimed at harmonizing the conditions of service within the United Nations Secretariat. One of issues in the

new arrangement was that an allowance known as Mission Subsistence Allowance (MSA) usually made to all mission staff would be discontinued.

77. Since discontinuance of the MSA would result in a loss of income for some staff, another allowance, the PTA, was to be paid to such staff to mitigate the loss. The PTA however, was to be gradually phased out over a four-year period, that is, by 30 June 2013. This phasing-out was clearly set out as 100% for the first and second years, 70% for the third year and 40% for the last year of payment. While the Respondent paid the PTA in the first two years of the four-year phasing-out period, he discontinued the payments in the third and fourth years.

78. The first part of the 30 April 2009 memorandum also provided for Section Chiefs to recommend staff for either fixed term appointments of one year or for less than a year. Staff members were required to sign the memorandum as indication that they had been informed of their recommendation by the Section Chief. The Applicant signed hers on 8 May 2009.

79. As to whether the PTA formed part of the terms and conditions of the Applicant's employment contract, the Tribunal agrees with the submissions of the Respondent that the 30 April 2009 memorandum did not, strictly speaking, incorporate the PTA into the Applicant's contract by virtue of the fact that both the Applicant and her Section Chief signed the memorandum. This is because the signatures on the said memorandum were not required as evidencing a binding agreement.

***Did the Applicant have a legitimate expectation that the PTA would be paid as stipulated in the Respondent's 30 April 2009 memorandum?***

80. The question arises as to whether a legitimate expectation had been created by the information contained in the 30 April 2009 memorandum. The same information about a four-year period for the phasing out of the PTA had been clarified, elaborated and published by the Respondent on 26 May 2009 in another document titled "United Nations Contractual Reform; Transitional Measures and Implementation in Family and Non-Family Missions" and also in a

UN Human Resources document titled “Human Resources Reform – what’s in it for me?”.

81. The Tribunal finds that even though the PTA was not part of the terms and conditions of the Applicant’s contract of employment, a legitimate expectation that the Organization would honour proposals made by it could be inferred in the circumstances barring further policy decisions by the General Assembly.

***Did General Assembly resolution A/RES65/248 affect the continuation of the PTA?***

82. The Respondent, however, also argued that the PTA was discontinued as a result of the General Assembly resolution 65/248 of 24 December 2010. At para. 6 of the resolution, the General Assembly had, among other things, considered the report (A/65/30) and also approved the recommendations of the International Civil Service Commission on the harmonization of the conditions of service of the staff of the United Nations Common system serving in non-family duty stations as contained in its annual report for 2010.

83. Paragraph 243 of the Commission’s report to the General Assembly (A/65/30) contains the recommendations made and approved in Resolution 65/248. With respect to staff assigned to non-family duty stations, it was decided that a change be made to the existing hardship allowance whereby such staff “would receive an additional allowance in recognition of the fact that such service represents an increased level of financial and psychological hardship in terms of involuntary separation from families and the additional cost related to such service.”

84. It was also recommended that such a change be implemented six calendar months after a decision by the General Assembly. While the report was dated 30 August 2010, the recommendations contained therein were approved by the General Assembly on 24 December 2010. Implementation in the form of removal of the PTA and its replacement with an additional hardship allowance started on 1 July 2011. It is the implementation of the recommendations adopted by the General Assembly that served to terminate the proposed payment of the PTA to

the Applicant in varying degrees for the remaining two years – July 2011 to June 2013.

85. Separate recommendations had been made for staff in non-family duty stations who were receiving the Extended Monthly Security Evacuation Allowance (EMSEA), assigned under the Special Operations Approach (SOA) or receiving the Special Operations Living Allowance (SOLA). These categories would be harmonized after five years of approval by the General Assembly and the allowances discontinued.

***Were international labour standards and the United Nation's Charter breached in the process of the implementation of the General Assembly resolution on the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions?***

86. The Applicant had further submitted that:

- a. the loss of PTA has affected her disproportionately, as she is a single person with no dependants;
- b. article 23.2 of the Universal Declaration of Human Rights provides that everyone, without any discrimination, has the right to equal pay for equal work;
- c. international conventions such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Labour Organisation's Equal Remuneration Convention 100 have developed this principle to address gender discrimination.

87. The Applicant being a single person with no dependants cannot successfully submit that losing the PTA has affected her disproportionately because the additional hardship allowance she currently receives is lower than that of her colleagues who have dependants.

88. There is a need to address briefly the principle of equal work for equal pay which is often raised before the Tribunal. The matter of the payment of

certain allowances to staff resulting in one staff member taking home more money than his colleague on the same grade does not necessarily amount to unequal incomes.

89. Certain allowances granted by the Organization to its staff are predicated on the existence of certain conditions. For instance, a staff member with school age children may receive education grant while it is not expected that another with adult and perhaps income-earning children will receive the same grant. Similarly, staff with dependant spouses may receive an allowance that unmarried ones would not receive. Whatever differences exist in the take-home pay of staff members as urged upon the Tribunal in this case are not based on any form of discrimination, gender or otherwise. The submission of inequality in the payment for work of equal value fails in this case.

90. Article 101 of the Charter stipulates that staff of the United Nations secretariat shall be appointed by the Secretary-General under regulations established by the General Assembly. In resolution A/RES/65/248 of 24 December 2010, the General Assembly approved the recommendations of the ICSC which resulted in the discontinuance of the PTA among other matters.

91. Having reviewed the parties' submissions on this score, the Tribunal finds and holds that no international labour standards or the United Nation's Charter were breached in the process of the implementation of the General Assembly resolution on the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions.

### **Findings**

92. The following is a summary of the Tribunal's findings in this case:

- a. The 30 April 2009 memorandum did not, strictly speaking, incorporate the PTA into the Applicant's employment contract.
- b. Even though the Tribunal finds that the PTA was not part of the terms and conditions of the Applicant's contract of employment, a legitimate expectation that the Organization would honour

proposals made by it could be inferred in the circumstances, barring further policy decisions by the General Assembly.

- c. The implementation of the recommendations adopted by the General Assembly had served to terminate the proposed payment of the PTA to the Applicant in varying degrees for the remaining two years – July 2011 to June 2013.
- d. No international labour standards or the United Nation’s Charter were breached in the process of the implementation of the General Assembly resolution on the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions.

### **Judgment**

93. In view of its findings above, the Application is dismissed in its entirety.

*Signed*

Judge Nkemdilim Izuako

Dated this 8<sup>th</sup> day of October 2013

Entered in the Register on this 8<sup>th</sup> day of October 2013

*Signed*

Eric Muli, Officer-in-Charge, Nairobi Registry