UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/056
Judgment No.: UNDT/2013/137
Date: 1 November 2013
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

MUNUVE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Abbas Alihussein Esmail, Advocate

Counsel for the Respondent:
Katya Melluish, UNON

Introduction

1. The Applicant is a former staff member of the United Nations Office at Nairobi ("UNON") who was separated from service on 31 August 2012 on account of his retirement. Prior to this, he had been serving as a Stock Clerk at the G-3 level, step 7 in the Mail, Pouch and Archives Unit, Facilities Management and Travel Service ("MPAU/FMTS") within UNON.

2. By an Application dated 25 October 2012 the Applicant contested and sought compensation for:

a. The failure by UNON to grant him adequate Special Post Allowance (SPA) for higher level duties he claims to have performed between 2006 and 2010.

b. Various claims of workplace discrimination against him by UNON.

3. The Respondent filed a Reply to the Application on 13 December 2012 in which it was argued that:

a. The Applicant's case is time barred and that the subject matter of the case is not receivable.

b. The claims raised in the Application had previously been settled by agreement between the parties.

c. The Applicant had been adequately compensated through SPA and that at no time was he entitled to the grant of SPA beyond the sums that had already been paid out to him.

Facts

4. The Applicant first joined the United Nations as a Registration Clerk at the G-3 level, step 1 in 1974 working with the United Nations Environmental Programme (UNEP). He resigned on 28 February 1988 by which time he had

risen through the ranks to the position of Junior Administrative Clerk at the GS-8 level Step 3.

5. In the year 2002, the Applicant sought re-employment with UNON. On 24 January 2002, he addressed a letter to Ms. Yeshiareg Mekonneni, Chief, Staff Administration in UNON stating, "further to my application for employment, this is to inform you that I am willing to work as a Messenger or Clerk and accept whatever goes on in that position."

6. Subsequently, the Applicant was re-employed by the Organization on 11 February 2002 as a messenger at the GS-1 level, step 10 to work in the Support Services Section (SSS) of the Division of Administrative Services (DAS), UNON.

7. Starting 21 March 2002, the Applicant's post was reclassified from GS-1 to GS-2 level and he continued serving as a messenger at that level.

8. While at the GS-2 level in 2005, the Applicant was selected to temporarily serve as a Stores Assistant in the UNON Stores for a G-4 level post which was vacant at the time. He commenced duties for this post on 1 October 2005. For his service on that post, the Applicant was granted SPA from 8 December 2005 to 28 February 2006 at the G-3 level.

9. On 1 March 2006 the Applicant was asked to continue working in the UNON stores at the G-2 level performing duties of a Stores Assistant and he subsequently requested Mr. Jaime K. Sassi, an Associate Human Resources Officer in the Staff Administration Section that the Office of Human Resources Management (OHRM) further review the step allotted for his SPA. He also made inquiries on the review of his personal grade essentially questioning why it had not been restored like that of other staff members who had been equally re-employed.

10. OHRM responded on 20 March 2006, through Mr. Sassi informing the Applicant that the original calculation of the G-3, step 5 for his SPA would be upheld since SPA could only paid at one level above a staff member's level and

that therefore the SPA was appropriate despite the Stores Assistant Post having been a G-5 level post.

11. Regarding a query from the Applicant relating to his current grade and step *vis-à-vis* that of other staff members who had also been re-employed, he was informed that upon tendering his resignation from UNEP effective 1 March 1988 when he was at the G-8 level, he had lost all his rights to his previous position and level. He was also informed that while his step had been reviewed to G-1 step 10 and later to G-2 Step 10, that did not mean that every further promotion given to him would be at the step 10 level as that had only been an exceptional measure. In the event of a future promotion to a higher level, Mr.Sassi informed him that his case "would be duly revised at that time."

12. On 23 June 2006 the management of the Building Management and Transportation Unit (BMTU) stores in which the Applicant worked, was transferred from the Procurement, Travel and Shipping Section (PTSS) to MPAU/FMTS. After the transfer of the stores from PTSS to MPAU/FMTS, the Applicant's post remained classified at the G-2 level and he was assigned the role of managing the store and overseeing the receipt and distribution of stock items in the store.

13. On 23 June 2006, Ms. Vibeke Glavind, Chief Support Services Service, addressed an email to Ms. Josie Villamin, Chief, PTSS informing her that the Applicant would be re-assigned on a temporary basis to manage the new MPAU/FMTS stores pending the recruitment of a staff member to manage that store.

14. On 19 December 2006, the Applicant was issued with, and he signed, a Letter of Appointment, extending his appointment at MPAU/FMTS for a fixed term of two years with the functional title of Messenger at the GS-2 step 10 level.

15. On 7 January 2007, a Request Form for Classification of the Applicant's post to the GS-4 level was issued. (Post Number UXB41875TL-L039). This reclassification request was rejected.

16. Subsequently, the same post at the GS-4 level (Stock Clerk) was advertised for competitive recruitment and the Applicant was amongst the candidates that took part.

17. While this recruitment exercise was ongoing, the Applicant continued serving alone in the MPAU/FMTS stores until 20 May 2007. On 21 May 2007, the post of Stock Clerk, G-4 was filled by Mr. John Wahome. After the recruitment of Mr. Wahome, the Applicant continued to work in the stores with him.

18. Mr. Wahome resigned on 9 November 2009 and the Applicant continued to serve in the MPAU/FMTS stores alone.

19. On 8 February 2010, a re-classification notice was prepared in respect of post number UXB/41875TL-L044. The functional title of the post was indicated as Stock Clerk at the GS-3 level. The Applicant was selected for this post and as a result he was promoted effective 1 May 2010 to the G-3, step 6 level.

20. On 1 September 2010 another staff member, Mr. Ambrose Kaptilak assumed the position of stock clerk at the G-4 level, which had been vacated by Mr. Wahome.

21. On 11 May 2010, Mr. Daniel Chen, Chief of MPAU/FMTS, wrote to Ms. Cynthia Gonzalez, Associate Human Resources Officer, on behalf of the Applicant requesting a review of his step to which Ms. Gonzalez replied that OHRM was looking into the matter.

22. Thereafter on 10 November 2010, Ms. Gonzalez wrote to the Applicant requesting written confirmation from his supervisors that he performed duties at the G-6 level from March 2006.

23. On varied days between 10 November and 15 November 2010, the Applicant's supervisors including Mr. Daniel Chen, Ms. Maria Ntalami, Warehouse Supervisor and Mr. Spenser K. Theuri, Administrative Assistant, all wrote to Ms. Gonzalez informing her that the Applicant had been handling Stock Clerk duties. Mr. Chen further stated that in February 2010, MPAU/FMTS had

submitted a reclassification request to upgrade his post from G-2 Messenger to G-3 Store Clerk.

24. On 28 April 2011 Ms. Gonzalez wrote to the Applicant stating that:

> Unfortunately there was no reclassification request to upgrade your post to the GS-3 level before February 2010, upon which you competed and got your subsequent promotion effective April 2010.

25. On 11 May 2011, the Applicant wrote to Ms. Deborah Ernst, Chief Staff Administration Section, UNON, for assistance on his claim that he ought to have been paid SPA at the GS-3 level since 2006.

26. On 11 June 2011, the Applicant was retroactively paid SPA at the G-3 level for the period 8 February 2010 to 30 April 2010.

27. On 20 June 2011 Ms. Ernst advised the Applicant that it was not possible to effect SPA starting as far back as 2006 as there was no reclassification request since 2010 and that from 8 February 2010, a retroactive SPA had already been effected.

28. On 5 January 2012, Seth Levine Esq., OSLA Counsel acting for the Applicant addressed a letter to UNON requesting that UNON commensurately remunerate the Applicant for the level of work that he had been performing since March 2006. Mr. Levine submitted that the Applicant ought to have been compensated for work done at a higher level than his official grade since March 2006. He also argued in the letter that the Applicant should have received SPA for performing work at the G-4 level for the periods of:

a. March 2006 to February 2010: the period when the Applicant performed work at the G-3 level until when his post was reclassified in 2010.

b. Period when he assumed G-4 duties from 23 June 2006 to 21 May 2007.

c. Period when he assumed G-4 duties from 9 November 2009 to 1 September 2010.

29. Subsequently, the Applicant, through the assistance of OSLA negotiated a settlement with the Respondent in respect of his claims for compensation. As a result of these negotiations, on 20 March 2012, the Applicant was informed that he would be granted SPA at the GS-4 level effective 1 May 2010 to 31 August 2010 and at the GS-3 level from 10 November 2009 to 7 February 2010.

30. The Applicant was retroactively paid SPA in 2012 for the period of 10 November 2009 to 31 August 2010 when he served alone in the MPAU/FMTS Store after the resignation of Mr. Wahome and before the recruitment of Mr. Kaptilak.

31. On 31 August 2012, the Applicant retired from service of the Organization after reaching the mandatory retirement age.

32. He filed the present Application on 25 October 2012 claiming that he should have been awarded higher compensation for higher-level duties undertaken during the period 2006 to 2010.

33. On 27 March 2013, the Tribunal, in considering the preliminary issue of receivability issued judgment No. UNDT/2013/060 in which it found and held that the Applicant's claim was receivable.

34. On 18 September 2013, a substantive hearing was held on the merits of the Application.

Applicant's case

35. The Applicant's case as deduced from his pleadings, his testimony and documentary evidence on the record is as follows:

36. UNON had failed to grant adequate compensation for higher-level duties that he performed between 2006 and 2010. For instance, the Applicant was not paid SPA for the period between 1 March 2006 to 23 July 2006 when he continued to perform the duties of Stores Assistant. He had a legitimate expectation that he would be paid SPA for the entire period that he performed higher-level duties and not just for certain periods.

37. The Respondent consistently denied, failed and neglected to acknowledge that the Applicant was continuously performing higher-level duties as a stores clerk.

38. The Applicant was performing the same functions as Mr. Wahome in the MPAU/FMTS stores but Mr. Wahome's post was classified higher than the Applicant's. This inequality in classification fundamentally breached the universally accepted principle of equal pay for equal work of equal value.

39. In 2007, when the initial reclassification request for his post was rejected, the Applicant could not have challenged the classification of his post under ST/A1/1998/9 since he was not aware that a classification notice for his post existed due to the fact that he had been excluded from the process.

40. Exclusion of the Applicant from the process leading to the reclassification of his post in 2010 was in breach of the principles of natural justice and the right to be heard. He never saw the reclassification nor confirmed the duties he was performing. His exclusion was done to downgrade his post and to create the erroneous humiliating impression that the duties, which he had been performing were inferior to those classified under the G-4 post.

41. The Applicant has consistently been referred to as a messenger despite having performed higher-level duties of a stores clerk since 2006. His e-PAS records dating back to 2006 indicated that his functional title was 'messenger' despite his duties being that of a stores clerk. Even after the reclassification of his post in 2010, the Applicant's functional title remained as 'messenger' despite the post now having been reclassified to 'Stores Clerk' thus causing him mental and emotional stress, humiliation and embarrassment.

42. The Applicant's supervisor, Ms. Wendy Noble consistently displayed a hostile attitude towards him including by making false allegations to block his promotion in 2007 and intimidating him.

43. For the above reasons, the Applicant sought the following remedies from the Tribunal:

a. Compensation for the failure to pay him SPA for the periods of 1 March 2006 to 23 July 2006; and 24 July 2006 to 26 January 2009 when he performed higher-level duties.

b. Compensation for emotional and mental stress, humiliation and embarrassment caused by denying him promotion to the G-4 level despite him having been the most qualified for the post due to his long experience in the stores.

c. Compensation for the period of 1 September 2010 to 31 August 2010 after his post was reclassified without his involvement at the downgraded G-3 level yet he occupied a post classified at the G-5 level.

d. Compensation for discrimination, victimization, humiliation and non-disclosure of the reclassification request of 2007.

e. Compensation for failure to promote him based on untrue, inaccurate and factually incorrect comments, without giving him the chance to respond.

f. Compensation for the denial of the right to equal pay for equal work of equal value performed between October 2005 and 31 August 2012.

g. Compensation for discrimination, humiliation, degrading and unfair treatment occasioned by the consistent reference of the Applicant as a messenger despite his functional title and duties being that of a stores clerk.

Respondent's case

44. The Respondent's case is as follows:

45. The Application is an abuse of process.

46. The case is time barred, the subject matter is not receivable and that the matter has previously been resolved by settlement between the parties.

47. The Applicant is estopped in equity from pursuing the claims by virtue of the informal settlement that had been reached between him through his OSLA Counsel, Seth Levine Esq. and the Respondent in consideration for which it had been agreed that that the Applicant would not pursue any claims against the Respondent through the internal justice system.

48. In so far as certain claims in the Applicant's case go beyond the decision of 20 March 2012, these are not receivable *rationae temporis.* The Applicant pins his present Application on the decision of 20 March 2012, which he challenged to the Management Evaluation Unit (MEU), therefore including in his Application claims dating as far back as six years ago amounts to an abuse of process.

49. Regarding the granting or non-granting of SPA, any challenge arising prior to 10 November 2009 is out of time.

50. Given that the Applicant filed his Application on 25 October 2012, and in light of the three-year time limit for filing applications, it is not possible for the Applicant to institute claims in relation to administrative decisions for which he had notice of earlier than 26 October 2009.

51. The Applicant was properly remunerated for the work that he performed and at no time was he entitled to the grant of SPA beyond that which has already been paid out to him.

52. That part of the Application seeking to challenge the classification of the Applicant's post is not receivable. Prior to challenging the classification of his post before the Tribunal, the Applicant ought to have first availed himself to the Appeals procedure outlined in ST/AI/1998/9 (System for the classification of posts). Having failed to do so, his claims on the classification of his post are not receivable *rationae materiae*.

53. Also, the Applicant's claim insofar as it refers to the classification of his post, is without merit. At no time was his post wrongly classified.

54. The Respondent's prayer before the Tribunal in light of the above is that the Applicant's case be dismissed in its entirety.

Legal Issues

55. The Tribunal has framed the legal issues arising out of this case as follows:

a. Whether the Applicant's claims are receivable;

b. Whether the subject matter of classification as submitted by the Applicant can be entertained by the Tribunal;

c. Whether the Applicant's claims for SPA between 2006 and 2010 are receivable and whether they can be entertained by the Tribunal;

d. Applicant's claims on workplace discrimination and humiliation.

Consideration

Whether the Applicant's claims are receivable;

56. In Judgment No. UNDT/NBI/2013/060, the Tribunal considered the issue of receivability of this case on the singular question of whether or not a formal mediation agreement existed between the parties capable of rendering the matter inadmissible by virtue of art. 8.2 of its Statute. The Tribunal found that the dispute between the parties had not been resolved through mediation and held that the Applicant's claim contesting the failure to grant him adequate compensation for higher-level duties was receivable.

57. Before embarking on the substantive determination of the claims raised in the Application, certain other preliminary questions must be resolved.

58. Article 8.1(c) of the Statute of the Dispute Tribunal is categorical that an Application shall be receivable if an Applicant has previously submitted the contested administrative decision for management evaluation where required. In a case such as this, given that it is a non-disciplinary matter, all claims submitted to the Tribunal for substantive determination must have first been submitted for management evaluation.

59. In the Applicant's request for management evaluation, he made claims for review in respect of the payment of his SPA and to a lesser extent, with respect to the classification of his post. Evidently, only these two claims are properly lodged before the Tribunal in light of art. 8.1 of its Statute. The rest of the Applicant's claims, specifically regarding alleged hostility from his supervisor and referral to him as a messenger as opposed to Stock Clerk cannot be entertained by reason of not having been submitted for review by the MEU.

60. Further, the allegation of hostility against the Applicant by his supervisor is also time barred. It was alleged to have arose in in 2007 and art. 8.4 of the Statute categorically precludes the Tribunal from receiving any complaints against administrative decisions that are over 3 years old.

61. The Statute does not allow the institution of applications for claimants that have slept on their rights. Most of the Applicant's claims are clearly time barred. He only brought claims after his formal retirement from the Organization in 2012. It is an equitable principle that delay defeats equity and the Applicant cannot make belated claims. Justice for both parties demands that where a claimant has been sluggish in enforcing his rights, he must be estopped from pursuing time-barred claims.

62. Conclusively therefore, the only two claims that can lawfully be considered are the issues on SPA payment and classification since they were submitted to MEU for review.

Whether the subject matter of classification as submitted by the Applicant can be entertained by the Tribunal;

63. It was the Applicant's case that in 2007, unknown to him, a reclassification request was made and rejected in respect to his post based on erroneous reasons. He asserted that he never had the chance to challenge the reclassification at the time since he did not know of its existence until after his retirement. The Respondent's case on this issue was that the Applicant's claims as regards the classification of his post were not receivable given that the correct

channel for challenging these claims would have been through the appeals procedure outlined in ST/AI/1998/9.

64. Section 5 of ST/AI/1998/9 provides the following as regards the channels of appeal for classification decisions:

> The decision on the classification level of a post may be appealed by the head of the organizational unit in which the post is located, and/or the incumbent of the post at the time of its classification, on the ground that the classification standards were incorrectly applied, and resulting in the classification of the post at the wrong level.

65. Section 6 of the same Administrative Instruction provides for the specific procedures to be followed in lodging such an appeal. At section 6.3, it states categorically and with finality that such appeals must be submitted within 60 days from the date on which the classification decision is received.

66. The Respondent argued, and the Tribunal accepts his argument, that the Applicant did not submit an appeal within 60 days as required by law, and neither did he submit it at any time thereafter through the mechanism provided in ST/AI/1998/9. It was a mandatory requirement for the Applicant to first channel his reclassification complaints through the appeals procedure set out in ST/AI/1998/9. Having failed to do so the Applicant missed an essential first step in the process and therefore the Tribunal cannot entertain the matter.

67. Through A/RES/62/228 (Administration of Justice at the United Nations), the General Assembly ingrained the principle that administrative remedies need to be exhausted first before the institution of formal proceedings. Prior to litigation, such administrative channels need be exhausted as a means to afford the administration an opportunity to address and remedy the situation complained against.

68. Further, the Applicant's complaint against the 2007 reclassification is time barred in addition to not having been first subjected to the requisite internal administrative review procedure. In an attempt to explain his failure to address this claim within the requisite time, the Applicant submitted that it was not his

fault since he only learnt of the reclassification request after his retirement, the administration not having included him in the process.

69. The Tribunal, on assessing the documentary evidence on record as well as the facts of the case, finds this assertion by the Applicant to be markedly misleading. On 7 January 2007, a classification notice was prepared for post number UXB/41875-TLL-039 (Stock Clerk), which at the time was encumbered by the Applicant. After the request for reclassification of the Applicant's post to the G-4 level was rejected, a vacancy announcement for the same post at the G-4 level was created and interviews subsequently conducted, the Applicant even took part in the interviews along with other candidates but was unsuccessful. By the time the post was advertised and the Applicant himself attended an interview for it though unsuccessfully, he knew that this was in respect of post number UXB/41875-TLL-039 for which he claimed that the administration rejected a classification request without informing him. The Tribunal thus finds the reasons given by the Applicant to be untrue and holds that the reclassification claim in respect of the 2007 request is neither receivable in time nor on subject matter.

70. It was also part of the Applicant's case that another reclassification of his post in 2010, from G-2 to G-3 was done without his involvement in the process and thus in breach of principles of natural justice and the right to be heard. He submitted that his exclusion from the process leading to the reclassification of his post was done in order to downgrade his post and to create the erroneous and humiliating impression that the duties, which he was performing were inferior to those classified under the G-4 post. To this the Respondent maintained that, the Applicant should have first utilized the appeals procedure in ST/AI/1998/9 as outlined above.

71. Firstly, just as has been discussed with the 2007 reclassification, the complaint about the 2010 reclassification is improperly before the Tribunal for not having been first appealed through ST/A1/1998/9.

72. Secondly and most instructively, the law on promotion only allows promotion at one level above ones present level. Former staff rule 103.9(a)

provided that on promotion, a staff member shall be placed at the lowest step in the level to which he or she has been promoted.

73. Being a staff member at the G-2 level, the Applicant could only be promoted to the next level, which was at G-3. Under no circumstances could he be promoted straight away from G2 to G4. Also, the Applicant's claims that his exclusion from the process leading to his post's reclassification did not afford him opportunity to be heard in line with the principles of natural justice are unfounded. Considerations of the right to be heard under the principles of natural justice become relevant when one is facing an accusation of wrong-doing and not just in any administrative process.

74. In light of the above, the claims on reclassification cannot be further entertained by the Tribunal for failure to first exhaust the requisite administrative remedies.

Whether the Applicant's claims for SPA between 2006 and 2010 are receivable and whether they can be entertained by the Tribunal;

75. It was the Applicant's case that UNON failed to grant him adequate Special Post Allowance for higher-level duties that he claimed to have performed between 2006 and 2010.

76. The Respondent's position on this was that any challenge arising prior to 10 November 2009 regarding the payment or non-payment of SPA is out of time. The Respondent also asserted that at all material times in the course of his employment, the Applicant was properly remunerated for the work that he performed and that at no time was he entitled to the grant of SPA beyond that which had already been paid out to him.

77. Through the assistance of then OSLA Counsel Seth Levine Esq. the Applicant negotiated a settlement with the Respondent in respect of his SPA claims. As a result of these negotiations, in 2012, UNON retroactively paid the Applicant SPA:

a. at the GS-3 level for the period from 10 November 2009 to 7 February 2010; and

b. at the GS-4 level for the period of 1 May 2010 to 31 August 2010.

78. After these payments had been made to him, the Applicant claimed that these were insufficient and that he ought to have been paid SPA for the entire period of 2006 to 2010.

79. The Applicant made claims of SPA payments for periods starting as far back as 2006. As already stated, the Tribunal cannot consider any claims that arose at any time prior to October 2009 as these are time-barred in light of art. 8.4 of its Statute. This leaves for consideration only the question whether between October 2009 and the end of 2010 there were any SPA entitlements for which the Applicant was not paid and which are now owed him by UNON.

80. Section 2 of ST/AI/1999/17 (Special Post Allowance) provides that staff members are expected to assume the duties of higher-level posts temporarily, as a normal part of their work and without extra compensation. It also alludes that in exceptional cases, when the assumption of higher level duties exceeds three months, SPA may be paid.

81. Instructively also, section 3.2 of ST/AI/1999/17 discourages the placement of staff members on SPA posts for periods longer than three months instead advocating for recruitment of staff to fill the vacant posts on a permanent basis.

82. These legal provisions, as well as the entire purport of ST/AI/1999/17, taken together show that SPA is not an automatic entitlement for staff members occupying higher-level posts temporarily. It is paid at the discretion of the Secretary-General and only after three months have lapsed since a staff member took up higher-level duties. It is expected of all staff members that from time to time, they may be called upon to take up higher-level duties without the payment

of SPA. Where it is granted, SPA may only be paid at one level higher than the personal level of the staff member assigned to higher-level functions. [1]

83. From the facts of this case, it is clear that when Mr. Wahome resigned on 9 November 2009, the Applicant served alone in the MPAU/FMTS stores until 1 September 2010 when Mr. Kiptilak was recruited to fill Mr. Wahome's vacated post. Evidently therefore as per the rules, the Applicant may have been entitled to SPA for the period after Mr. Wahome's resignation and before Mr. Kiptilak's recruitment. The relevant question thus becomes whether or not he was paid SPA for this period by UNON.

84. Following OSLA's intervention in the Applicant's case in 2012, UNON paid the Applicant SPA at the GS-3 level for the period starting 10 November 2009, which was the day after Mr. Wahome's resignation to 7 February 2010 at the GS-3 level. He was also paid SPA at the GS-4 level for the period of 1 May 2010 to 31 August 2010, a day before Mr. Kiptilak was recruited to fill the higher level post.

85. An essential condition for the grant of SPA is that the post occupied by the claimant be vacant or temporarily vacant. As such, in the Applicant's case the moment that Mr. Kiptilak was recruited, the post he temporarily occupied and for which he was entitled to SPA ceased to be vacant. There was no longer any rationale for him to be paid SPA when this higher-level post had been filled. Under section 8 of ST/AI/1999/17, SPA will be discontinued from the date on which the staff member ceases to perform the full functions of the higher-level post.

86. The SPA is computed in the same manner as in the case of a promotion, under former staff rule 103.9[2] meaning that one can only earn SPA at one level above his or her own personal level. Even if the post that one is temporarily filling is classified at several levels higher than a staff member's usual post, SPA will only be paid at the next level above the staff member's. In the Applicant's case, for the period he was paid SPA at the GS-3 level, his personal grade was at the

[1] See *Cieniewicz (UNDT/2011/048); 2012-UNAT-232.*
[2] Section 9

GS-2 level. Subsequently, he was promoted to the GS-3 level starting May 2010 after which the payment of his SPA was calculated at the GS-4 level. His argument that since the post he was filling was a GS-4 post he ought to have been paid SPA for the entire period at the GS-4 level is therefore without merit.

87. In fact for this period, UNON paid the Applicant full SPA starting from when Mr. Wahome resigned even though former staff rules 103.11(a) and (b) provided that where applicable SPA is only paid from the beginning of the fourth month of service at a higher level. The records show that UNON Administration exercised its discretion and granted the Applicant full SPA for the entire period between November 2009 and August 2010 except for the months of March and April.

88. Having been paid for most of the period between 2009 and 2010 when he worked alone in the stores after Mr. Wahome's resignation, the Applicant has no further legitimate SPA claims against UNON.

Applicant's claims on workplace discrimination and humiliation

89. The Applicant has put together several convoluted claims under the umbrella of discriminatory practice on the part of the Organization. These included the allegation that remuneration of his colleagues at higher levels than him was discriminatory and in breach of the principle of equal pay for equal work.

90. While it has already been determined that these are not receivable for failure to have been submitted to MEU for review, the Tribunal deems it important to address the element of discrimination as alleged due to its serious nature.

91. The Applicant voluntarily resigned from the service of the Organization as far back as 1988 at which time he was a senior General Service staff in the position of Administrative Clerk at the GS-8 step 3 level. Fourteen years later, he sought re-employment and was selected as a messenger at the GS-1 level, a position way below that which he occupied during his initial employment term prior to his resignation.

92. He accepted that offer of employment and even indicated that he was "willing to work as a messenger and accept whatever goes on in that position." A contract of employment is personal between the employee in each case and the employer. The terms of one's employment as stipulated in the letter of appointment or contract of employment is binding *in personam* between staff member and the organization and one cannot seek to imply the terms of another's contract into his or her own.

93. When Mr. Wahome was recruited in 2007, he was appointed at the G-4 level. At the time the Applicant had been promoted from G-1 to G-2. Instructively, both the Applicant and Mr. Wahome had competed for the G-4 post in 2007 but Mr. Wahome was successful over the Applicant. The same happened in 2010 when Mr. Kiptilak was recruited to fill Mr. Wahome's post following the latter's resignation.

94. The differentiation in classification between the Applicant and his colleagues arose out of a competitive selection exercise and was not shown to be discriminatory in any way. It is therefore unconscionable for the Applicant to turn back and claim that the fact that Messrs. John Wahome and Ambrose Kaptilak were classified at higher levels than him was evidence of discrimination.

95. The Applicant sought to urge the Tribunal that the difference in the classification between himself and his colleagues at the stores breached the principle of equal pay for equal work, however, the foregoing shows that this was certainly not the case.

96. During the hearing, the Tribunal noted that the Applicant's case revealed a history of dissatisfaction dating back in time owing to the fact that after his resignation he was to be re-employed at a much lower level. The summary of the Applicant's case on this point was that he was initially employed with the United Nations in 1974, resigned in 1988 at the G-8 level only to be re-employed in 2002 as a Messenger at the GS-1 level.

97. When one resigns at a senior position, seeks employment later and accepts a lower level contract, one has no expectation that the organization would re-

employ him/her at his/her old position. After he resigned, the Applicant lost all rights to his former level and classification and his terms of employment after 2002 were governed strictly by his letters of appointment during this period, which were completely unrelated to his 1988 employment record.

Conclusion

98. The Application has no merit and is dismissed in its entirety.

(*Signed*)

Judge Nkemdilim Izuako

Dated this 1st day of November 2013

Entered in the Register on this 1st day of November 2013

(*Signed*)

Abena Kwakye-Berko, Acting Registrar, Nairobi