



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

BASANTA RODRIGUEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a translator in the Department of General Assembly and Conference Management (“DGACM”). He contests the decision of 15 December 2011, made by the Office of Human Resources Management (“OHRM”) in the Department of Management of the United Nations Secretariat, not to apply to him, retroactively, the new “Recruitment policy for entry level language staff. Grading Guidelines” (“Guidelines”). The Applicant submits that the Guidelines differentiate arbitrarily and unlawfully between staff members who should be treated equally. The Applicant alleges that OHRM’s refusal to apply the Guidelines to him is unlawful, discriminatory and breaches his right to equal pay for equal work. The Applicant seeks to have his grade and step reviewed in accordance with the new Guidelines.

2. The Respondent filed his reply on 8 August 2012, stating that the application is not receivable as it is time-barred and does not impact on the Applicant’s terms of appointment. The Respondent also argues that the decision not to apply the new Guidelines to the Applicant was lawful because they were implemented with retroactive effect to 1 January 2010, and that the cut-off date of 1 December 2009 for retroactive application, mentioned in the Guidelines, was an oversight. The Respondent contends that the Applicant has no right to the review of his entry level grade and that he suffered no contractual breach.

3. According to the Respondent, staff rule 3.17 (concerning retroactive payments) allows staff members to seek review of entitlements and payments provided to them within a year of the payments being made. In line with this policy, the Administration determined that staff recruited within a year of the implementation of the Guidelines should be entitled to have their entry level

reviewed. However, since the Applicant was not recruited in the year prior to the implementation of the new policy, he does not fall within this category. The Respondent submits that the Guidelines were not unlawfully discriminatory and does not breach the Applicant's right to equal pay for equal work.

4. By Order No. 93 (NY/2014), dated 23 April 2014, the Respondent was directed to file a submission on the receivability of the application in light of the recent judgments of the United Nations Appeals Tribunal in *Faraj* 2013-UNAT-331 and *Neault* 2013-UNAT-345, in which the Appeals Tribunal stated that "the receipt of the management evaluation will result in setting a new deadline for seeking judicial review before the UNDT" if that receipt occurs prior to the expiration of the 90 days' time limit to file an appeal. The Respondent filed his submission on 29 April 2014, stating that in view of *Faraj* and *Neault* the application was not time-barred, but was nevertheless not receivable on its substantive merits.

Factual background

5. On 2 June 2009, the Applicant was offered a two-year probationary appointment at the P-2 level, step 5 as a Spanish translator.

6. On 9 December 2009, the Applicant was appointed to the position of Associate Spanish Translator at the P-2 level, step 5.

7. In mid-2010, DGACM expressed its concern that the remuneration packages on offer were not sufficiently competitive to attract and retain new recruits from a small and diminishing pool of qualified language professionals.

8. By email of 26 November 2010, OHRM advised DGACM by email that following a five-month review, it was ready to promulgate, formally, a revised

version entitled “Guidelines for the Recruitment and GRADING of Language staff 24 Nov 2010.doc”.

9. By email of 13 January 2011, to which was attached a document entitled “Guidelines for the Recruitment and GRADING of Language staff FINAL effective 1 January 2011.doc”, OHRM advised DGACM as follows:

Effective 1 January 2011, the new grading guidelines have been implemented. As agreed, there will [*sic*] 1-year maximum retroactive considerations, as of 1 January 2011. In order to proceed with the review, I would appreciate that your office consolidate the list of Language staff recruited from the rosters with EOD as of 1 January 2010. Section D will also amend all current offers for language staff under recruitment retroactive to January 2010.

10. On 9 December 2011, the Applicant sent an email to OHRM requesting that his entry level grade and step be reviewed following the promulgation of the Guidelines.

11. By memorandum dated 15 December 2011, OHRM responded that the Guidelines did not apply to the Applicant because it only applied to staff recruited after 1 January 2010.

12. On 25 January 2012, the Applicant submitted a request for management evaluation.

13. On 27 January 2012, the Management Evaluation Unit (“MEU”) informed the Applicant that in accordance with staff rule 11.2(d), the MEU was holding his case in abeyance pending the outcome of mediation. The Applicant was requested to provide an update on the status of the informal resolution process by 27 March 2012.

14. On 29 February 2012, the Applicant was notified that the attempts to resolve his case through mediation were unsuccessful.

15. On 2 April 2012, the MEU informed the Applicant that they were not upholding his request for a review because they found that “the contested decision comported with the 2011 Guidelines and as such, is not arbitrary or in violation of the rule of law as you contend”.

16. On 22 June 2012, the Applicant, who was then at the P-3 level, step 3, filed his application before the Dispute Tribunal. The Respondent submitted his reply on 8 August 2012.

17. On 1 April 2014, the undersigned Judge was assigned to this case.

Consideration

Receivability

18. On 29 April 2014, the Respondent conceded that the present application was not time-barred and was receivable. In the circumstances, the Tribunal need not examine the Respondent’s earlier submissions on this point. However, the Tribunal observes that in any event it would have found the present case receivable as a result of the undertakings made by the Administration, through the MEU, in the period January to April 2012.

19. The Tribunal further finds that the application is receivable because the Applicant alleges that the contested decision not to apply the Guidelines in his case was in non-compliance with the terms of his appointment.

Merits

20. The Organization may develop procedures and practices and adopt guidelines regulating various aspects of human resource management, provided that they are consistent with properly promulgated issuances, are not manifestly unreasonable, do not require formal promulgation under the Organization's existing rules and, above all, are not unlawful. Insofar as the exercise of a discretion is concerned, as long as it is not manifestly unreasonable or otherwise unlawful, it is within the Administration's discretion to decide whether the Guidelines should apply retroactively and over which period of time.

21. Whether the exercise of discretion by the Administration in this case was unlawful has to be examined in two stages. First is the question whether the Administration carried out its obligation to follow its own guidelines. If it did so, the second question is whether the guidelines are themselves unlawful in that they are, as the Applicant alleges, discriminatory and in breach of his right to equal pay for equal work.

22. The principal issue in this case is whether the cut-off period is, as submitted by the Respondent, 1 January 2010 or, as argued by the Applicant, 1 December 2009.

23. Section 5 of the Guidelines states as follows (emphasis added):

3. Grading Table for Language Staff as at **December 2010**

...

5. Effective date of implementation of these Guidelines and retroactive considerations.

Effective date of implementation will be **1 December 2010**, when the policy change is formally approved by HRPS/OHRM for implementation.

However, like all other recruited staff, staff members appointed within one year from the implementation date of the new guidelines, i.e. since **December 2009**, could be considered for a review of their entry level grade according to the new grading guidelines provided that a satisfactory record of performance is available as certified by DGACM's Executive Office.

24. The Tribunal is not persuaded by the Respondent's submission that the date of 1 December 2009 was included as a sample date or is the result of an oversight. The use of the dates three times in the document cannot possibly be considered as an oversight: sec. 3 of the Guidelines provides a "Grading Table for Language Staff as at **December 2010**" (emphasis added) and sec. 5 of the Guidelines not only states that the effective date of implementation is **1 December 2010** "when the policy change is formally approved by HRPS/OHRM for implementation" but also that "like all other recruited staff, staff members appointed within one year from the implementation date of the new guidelines, i.e. since **December 2009**, could be considered for a review of their entry level grade according to the new grading guidelines" (emphasis added).

25. The Guidelines with these dates were circulated by OHRM via email on 13 January 2011, which stated that the Guidelines are implemented "effective 1 January 2011". However, contrary to what this email stated, the Guidelines themselves clearly specified that they were to be implemented with effect from 1 December 2010, with a retroactive 12 months' cut-off date of 1 December 2009. In the circumstances of this case the Tribunal finds that the clear wording of the Guidelines cannot be superseded by an email the purpose of which was to circulate the Guidelines. Furthermore, the Respondent has sought to place reliance on the Guidelines, which clearly refer to 1 December 2010 as the date of implementation.

26. Accordingly, the implementation date of 1 December 2010 and related cut-off date of 1 December 2009 for retroactive consideration, as stated in the Guidelines, must be considered binding on the Administration.

27. The Applicant having been formally appointed on 9 December 2009, the Guidelines are consequently applicable to him. The retroactive application of the Guidelines covered recruitments made after 1 December 2009 and the Applicant's situation should have been reviewed accordingly.

28. As stated in sec. 5 of the Guidelines, "staff members appointed within one year from the implementation date of the new guidelines, i.e. since December 2009, *could* be considered for a review of their entry level grade according to the new grading guidelines *provided that a satisfactory record of performance* is available as certified by DGACM's Executive Office" (emphasis added). The Tribunal notes that the Respondent has not raised any concerns about the Applicant's performance. Accordingly, the Tribunal finds it appropriate to rescind the decision not to consider the Applicant under the Guidelines. The Applicant is entitled to be considered in accordance with the Guidelines, with any appropriate retroactive adjustments to salary and applicable benefits and entitlements.

29. Given the failure of the Administration to follow its own Guidelines, which thus renders the decision unlawful, it is not necessary to consider the question as to whether, in any event, there has been a breach of the duty to ensure that the principle of equal pay for equal work is strictly followed. This issue may fall to be examined in other cases where the decision may have been consistent with the guidelines but may nevertheless be found to be unlawful.

Judgment

30. The contested decision is rescinded.

31. Within 60 calendar days of the present Judgment, the Respondent shall consider the Applicant in accordance with the new “Recruitment policy for entry level language staff. Grading Guidelines”, with any appropriate retroactive adjustments to salary and applicable benefits and entitlements.

(Signed)

Judge Goolam Meeran

Dated this 6th day of May 2014

Entered in the Register on this 6th day of May 2014

(Signed)

Hafida Lahiouel, Registrar, New York