



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LEFEBVRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Katya Melliush, UNON

Introduction

1. The Applicant is an Administrative Assistant at the United Nations Environment Programme's (UNEP) Secretariat of the Convention on Biological Diversity (SCBD).

2. In her Application dated 27 November 2012, she is contesting the decision to downgrade her level without classification following a renumbering exercise at the Montreal duty station. She alleges that she was never informed officially by the United Nations Office at Nairobi (UNON) upon accepting the offer at the General Service (GS)-7 level at the Montreal duty station, that her post would be subjected to downgrading.

3. The Respondent filed a Reply on 28 December 2012 in which it is asserted that the Applicant has misrepresented the facts and that her claims are moot and/or premature, rendering her Application without merit.

4. On 3 June 2014, by Order No. 144 (NBI/2014), the Parties were informed that the Tribunal had 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.

Facts

5. The following facts are based on the Parties' written pleadings and submissions.

6. The Applicant joined the Organization on 11 December 1999 as a Human Resources Assistant at the GS-4 level at the Economic and Social Commission for Western Asia (ESCWA). After a series of promotions, the Applicant was at the GS-6 level in Beirut.

7. In early August 2006, the Applicant was successful in her application for a position as an Administrative Assistant in the SCBD at the G-7 step eight level. As taking up the new position entailed her resignation from ESCWA and relocation from Jordan to Canada at her own expense, she requested to be

advanced the cost of air travel for herself and her family. Via an email dated 10 August 2006, the Chief, Human Resources Management Section (HRMS) for ESCWA informed the Applicant that in response to her request, the Executive Secretary of the SCBD had decided, on an exceptional basis, that the SCBD would advance her the cost of air travel from Amman to Canada for herself and her family on the understanding that she would refund the costs in installments to be agreed upon between her and ECSWA. According to the Executive Secretary, the exceptional advance was as a result of the crisis in Lebanon at the time.

8. The Applicant was offered a fixed-term appointment as Administrative Assistant in the SCBD at the G-7 step eight level on 22 August 2006. On 10 February 2011, her appointment was converted to a permanent appointment.

9. In March 2010, the International Civil Service Commission (ICSC) promulgated a new seven-level job classification standard for GS and related categories within the United Nations Common System organizations.

10. On 16 March 2012, Joerg Weich, then Chief, Recruitment and Planning Section, HRMS/UNON, was informed by Linda Comeau-Stuart, a Human Resources Officer at the International Civil Aviation Organization (ICAO), that ICAO was moving ahead with the implementation of a new seven-level GS classification standard and the seven-level salary structure on 1 April 2012 and that a renumbering exercise would be conducted to align to the seven-level structure. As per the classification guidelines, the Applicant's post would be renumbered from G-7 to G-6.

11. On 23 March 2012, Suleiman Elmi, then Chief, HRMS/UNON informed all SCBD staff of the introduction of the Global Classification Standard (GCS) for GS positions at the Montreal Duty station explaining that the nine-level GS scale would be renumbered to reflect seven levels and to ensure the Montreal duty station's compliance with the rest of the United Nations system.

12. On 28 March 2012, Michele Rattray-Huish, SCBD's Chief, Financial Resources Management Service, informed all staff that, effective 1 April 2012, all

SCBD posts would be renumbered to bring them into harmonization with that of all other United Nations organizations at the seven-level structure.

13. On 29 March 2012, the Applicant wrote to the Secretary-General appealing the decision to renumber her post from G-7 to G-6. She asserted that the renumbering exercise would amount to a downgrade of her post since she was recruited from Beirut using the United Nations Common system at the one to seven level structure.

14. On 11 April 2012, the Applicant was invited to attend a one-hour test for the position of Human Resources Associate by an ICAO recruitment team. She declined to attend the test on the grounds that the post had been classified at the G-6 level instead of G-7 based on the renumbering exercise effective 1 April 2012.

15. On 23 April 2012, the Applicant wrote again to the Secretary-General requesting for a management evaluation.

16. On 7 November 2012, the Applicant filed a Motion requesting the Tribunal to extend the time for her to file an application on the grounds that she wished to contact the Ombudsman's Office in an attempt to resolve the issue through mediation. On 15 November 2012, the Tribunal issued Order No. 147 (NBI/2012) by which the Applicant was required to file an Application by 27 November 2012.

17. The present Application was subsequently filed on 27 November 2012. The Respondent filed his Reply on 28 December 2012.

18. On 15 January 2013, the Tribunal issued Order No. 009 (NBI/2013) referring the matter for mediation by the Mediation Division in the Office of the Ombudsman and stayed the proceedings until 26 February 2013 pending the mediation attempt. On 20 February 2013, the Director of the Mediation Division with the consent of the parties applied for extension of time for the conduct of the mediation up to 30 April 2013. The request was granted by the Tribunal.

19. The Parties' attempts at arriving at a settlement through mediation have been unsuccessful.

The Applicant's case

20. The Applicant submitted that as a long serving GS staff member of the United Nations Secretariat, she previously held contracts at the GS-6 level with ECSWA in Beirut prior to joining UNEP/SCBD. ECSWA uses the United Nations Common GS classification system from one to seven salary scale.

21. She applied for the UNEP/SCBD vacancy announcement as an internal candidate.

22. There was no mention in the vacancy announcement that the levels in Montreal were classified under the one to nine salary scale and that the levels of the posts had no specific mention of the "abnormal salary scales".

23. If she had known at the time of applying to these positions that a renumbering exercise would subsequently affect her promotion, she would not have accepted the appointment and would have stayed at her previous duty station.

24. At no time was she informed that her recruitment in Montreal would be subject to a transition from a nine-level salary scale to a seven-level classification system nor was she ever alerted of its implication on her career development.

25. When she accepted the appointment at the Montreal duty station, she had to resign from her previous position and absorb all her relocation costs to Montreal.

26. The Applicant disagrees with the claim that the contested decision is merely a renumbering exercise for the following reasons:

- a. It will result in an arbitrary downgrade of all GS staff at the SCBD by one level.

b. It will result in an arbitrary reclassification of all GS posts at the SCBD by one level lower before any classification exercise.

c. The claim that all GS posts at the SCBD were classified by ICAO on a one to eight standard is not consistent with the actual classification paperwork on some GS posts.

27. The Applicant submits that her rights will be adversely affected in the following ways:

a. Her right to due process will be violated because the lead agency, ICAO, spent a considerable amount of time and effort to review and classify posts where necessary based on the new global standard but the SCBD was not included in the process.

b. Several appointments were converted to permanent and continuous appointments in past years and therefore the status of those holding those types of contracts and those holding fixed-term contracts needs to be clarified. The downgrading of her level is in direct breach of the contract she signed with UNEP and the United Nations Headquarters.

c. The renumbering exercise will have an impact on her acquired seniority as the process will not consider the number of years served prior to 1 April 2012.

d. On 17 April 2012, staff members were informed that ICAO had confirmed that the SCBD posts were classified on a one to eight classification standard. However, in 1998, UNON considered four GS posts at the SCBD. The end result of this classification exercise conducted by UNON was the upgrade of these posts to GS-7 level. In effect, those posts were not classified by ICAO on a one to nine structure but by UNON on one to seven structure. These four posts have not been classified again since 1998 and this clearly reflects that at least four posts of the SCBD were classified by UNON and not by ICAO.

e. The SCBD was never on a one to eight or one to nine classification standard as no GS posts were ever reclassified beyond the GS-7 level regardless of duties performed. Staff of the SCBD were repeatedly told that at UNEP the ceiling for GS staff was at the GS-7 level because at the Headquarters in Nairobi there were no GS-8 or GS-9 posts.

f. In recent years, Canadians serving as GS staff at other duty stations outside of Montreal applied to vacancy announcements issued by UNEP. They were duly appointed through a Central Review Panel to GS level posts at the SCBD. At no stage in the recruitment process were these applicants made aware or alerted to the fact that the Montreal duty station was not in compliance with the one to seven structure on a global standard.

g. The downgrading will impact her mobility and career advancement as mobility is currently limited for GS staff members generally and specifically for staff members with multiple nationalities. In effect, the reclassification at ICAO in advance of the renumbering exercise at the SCBD has created an unfair advantage for ICAO staff in mobility and career advancement.

h. In an audit report dated 17 May 2006, the Office of Internal Oversight Services (OIOS) noted that several posts had not been reviewed since 1997 even though the United Nations Secretariat had admitted that job descriptions for some of these staff might have changed and advised action on this point in discussion with the Chief of Personnel. Several GS posts are still pending review.

28. In view of the foregoing, the Applicant prays for the following reliefs:

a. That the Administration should not implement the administrative decision in her particular case by keeping her current level at UNEP/SCBD at the GS-7 step 10 level;

b. Salary adjustment to reflect the correct remuneration of a UNEP classified G7 step 10; and

- c. Salary adjustment to reflect the correct remuneration of a UNEP classified G7.

The Respondent's case

29. The Respondent submitted that until May 2012, the Montreal duty station was known to have a nine-level GS salary scale with posts numbered from GS-1 to GS-9 as was promulgated regularly by the ICSC in the compendium of salary scales for the GS category of staff. In reality, however, SCBD GS staffs were all employed within the GS-2 to GS-8 levels under the nine-level scale.

30. Pursuant to art. 11(a) of its statute, the ICSC establishes and reviews both headquarters methodology and non-headquarters methodology for surveys of best prevailing conditions of employment of GS and other related categories.

31. In recent years, the ICSC has promulgated a new seven-level job classification standard for GS and related categories within the United Nations Common System organizations thereby providing for the first time a harmonized approach to job classification for GS jobs globally.

32. In March 2010, ICAO, the lead agency at the Montreal duty station, was requested to implement the new seven-level standard and to convert to a seven-level salary structure (“the renumbering exercise”).

33. In anticipation of the renumbering exercise, ICAO decided to undergo some internal reorganization which entailed a review of the classification of posts based on the nine scale classification standard. UNON followed the established precedent for the United Nations Secretariat and therefore waited for the conversion to the GCS to be completed to conduct a classification review exercise.

34. ICAO began the renumbering exercise in 2011. In mid-March 2012, ICAO informed UNON/HRMS of 1 April 2012 as the effective date of the alignment of the Montreal duty station to the GCS and to the new job description format.

35. UNON/HRMS proceeded to implement the new GCS for GS posts in Montreal following the lead agency; staff were informed of this by email from Mr. Elmi.

36. UNON/HRMS postponed the implementation of the new numbering system until 1 May 2012 to grant some staff extra time to understand the process but as ICAO had otherwise introduced the new scale from 1 April 2012, it was not considered appropriate for the renumbering to be delayed any longer as there was need to have congruency at the duty station, that is, to avoid the United Nations system having different GS scales operational at the same location for a protracted period of time and also due to the fact that the lead of ICAO and the instructions of the ICSC had to be followed.

37. The result of the renumbering exercise on the Applicant was that her position was renumbered from GS-7 to GS-6. This did not in any way affect her salary or benefits.

38. The Applicant has failed to exhaust alternative remedies. The Applicant refused to sign her P.270-Request for Classification form and as a result, no classification review has been undertaken in respect of her post. In the circumstances, the Applicant should be estopped from pursuing the present case, since she has refused to pursue the remedies available to her prior to approaching the Tribunal. The Applicant's deliberate avoidance of the mechanism in ST/AI/1998/9 (System for the classification of posts) which allows for a review of the classification of her post means that she does not, in equity, come before the Tribunal with clean hands.

39. The renumbering of a post is not an appealable administrative decision. The Applicant has not suffered any appreciable alteration in the terms and conditions of her employment such as to generate an appealable administrative decision. The contested decision has no direct legal consequence for the Applicant. The Applicant's salary and benefits remain as they were prior to the implementation of the decision. The only change for the Applicant is that rather than being called a "G-7", she is called a "G-6" level staff member.

40. The Respondent has a right and an obligation to implement the renumbering exercise. The Respondent is required to implement the decision of the ICSC which in the present case involved the application of the GCS. ICAO has been the lead agency in respect of the salary scales in Montreal for years. It is normal and natural for UNON to follow ICAO's salary scales and there is nothing arbitrary or discriminatory in this.

41. Contrary to her assertions, the Applicant was not demoted.

42. The Applicant was not internationally recruited. The very fact of the Applicant having to bear her own costs of relocation to Montreal from Beirut is evidence that she was not internationally recruited within the meaning of staff rule 4.5. The Applicant seeks to distinguish herself from other GS staff at SCBD on the basis that she was recruited from outside the duty station.

43. Contrary to the Applicant's contentions that because ICAO conducted a review of the classification of posts prior to the implementation of the seven-level scale her due process rights were violated, the Respondent submits that there is no correlation between the renumbering exercise and a reclassification exercise. That ICAO chose to conduct a review at the same time as implementation of the GCS is irrelevant. The renumbering exercise was not a reclassification exercise and the Applicant's post is correctly classified as GS-6 under the GCS.

44. The Applicant purports to divulge privileged settlement discussions in her cover letter to the Tribunal. The Respondent submits that at no point has an offer of settlement been made to the Applicant.

45. The Applicant has suffered no loss following the renumbering exercise and there is no injury to compensate.

46. The Applicant's claim lacks merit and is premature. The Management Evaluation Unit noted that the Applicant's complaint was moot when viewed in light of the classification review taking place. If the Applicant contends that her post was wrongly classified at the GS-6 level under the GCS, her recourse in the first instance is to the Classification review process and then to the Classification Appeals Committee under ST/AI/1998/9 not to the Tribunal.

47. The Respondent, in view of these arguments, requests the Tribunal to dismiss the Application.

Legal Issues

48. The legal issues arising for determination in this case are as follows:

- a. Is this Application receivable?
- b. Did the renumbering exercise at the SCBD result in a violation of any of the Applicant's rights?

Considerations

Is this Application receivable?

49. The current Application is challenging the Secretary-General's decision to renumber posts at the Montreal duty station which the Applicant asserts has resulted in a downgrading of her level without a proper classification exercise.

50. It is the Respondent's case that in recent years, the ICSC has promulgated a new seven-level job classification standard for GS and related categories within the United Nations Common System organizations and that the renumbering of a post is not an appealable administrative decision. The Respondent further submitted that he is required to implement the decision of the ICSC which in the present case involved the application of the GCS.

51. Article 2.1(a) of the Statute of the Tribunal (UNDT Statute) provides that the Tribunal shall be competent to hear and pass judgment on an application filed by an individual against the Secretary-General of the United Nations:

To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

52. What constitutes an administrative decision depends on the nature of the decision, the legal framework under which the decision was made and the consequences of the decision¹.

53. The ICSC was established by the United Nations General Assembly as an independent expert body. Pursuant to General Assembly resolution 3357 (XXIX) of 18 December 1974, its mandate is to regulate and coordinate the conditions of service of staff in the United Nations common system, while promoting and maintaining high standards in the international civil service.

54. Article 1.1 of the Statute sets out the mandate of the ICSC as follows:

The General Assembly of the United Nations establishes, in accordance with the present statute, an International Civil Service Commission (hereinafter referred to as the Commission) for the regulation and coordination of the conditions of service of the United Nations common system.

55. Pursuant to art. 11(a) of the ICSC Statute, the ICSC shall establish the methods by which the principles for determining conditions of service should be applied.

56. In resolution 67/241 (Administration of Justice at the United Nations), the General Assembly reaffirmed that “the decisions of the International Civil Service Commission are binding on the Secretary-General and on the Organization”.

57. In *Obino*, UNDT/2013/008 (upheld on appeal²), it was held that

Though [the ICSC] may communicate its recommendations on conditions of service to the Secretary-General these will still have to be approved by the General Assembly and it is to the General Assembly that the ICSC is answerable and accountable...

Consequently, the Tribunal cannot impute the decisions of an independent entity, such as the ICSC, to the Secretary-General due to the different roles they play vis-à-vis the United Nations and its staff members.

58. The Secretary-General has not been vested with any discretionary authority with respect to the implementation of ICSC decisions. Since the

¹ *Andati Amwayi*, 2010-UNAT-058.

² *Obino*, 2014-UNAT-405.

Secretary-General has no discretionary authority in this respect, his implementation of the ICSC decision to renumber posts is not an administrative decision under art. 2 of the UNDT Statute.

59. In the present case, the Applicant contends that the implementation of the renumbering of her post will have adverse effects on her rights including her mobility and a career advancement but she did not place any evidence before the Tribunal to show that the contested decision was taken in a discriminatory manner or that there arose any legal consequences as a result of the renumbering of her post. At best her concerns are speculative.

Did the renumbering exercise at the SCBD result in a violation of any of the Applicant's rights?

60. Notwithstanding its findings on the issue of receivability, the Tribunal has carefully reviewed the Applicant's contentions in respect to the alleged violations of her rights during the renumbering exercise. The Applicant submitted that had she known at the time of applying for the position that a renumbering exercise would subsequently affect her promotion, that she would not have accepted the appointment and would have stayed at her previous duty station. The Applicant has however failed to show how her promotion was affected.

61. The Applicant submitted that at no time was she informed that her recruitment in Montreal would be subject to a transition from a nine-level salary scale to a seven-level classification system nor was she ever alerted of its implication on her career development.

62. The Tribunal finds that the renumbering exercise followed a promulgation, in March 2010, by the ICSC of a new seven-level job classification standard for GS and related categories within the United Nations Common System organizations whereas the Applicant's recruitment took place on 22 August 2006.

63. The Applicant submitted that when she accepted the appointment at the Montreal duty station, she had to resign from her previous position and absorb all her relocation costs to Montreal and that the renumbering exercise will result in an

arbitrary reclassification of all GS posts at the SCBD by one level lower before any classification exercise.

64. The Tribunal finds that the Applicant's appointment to the SCBD was a new appointment and that that was the reason why the Applicant had to resign from her previous position. It was the Applicant's choice to leave her previous position in ESCWA in Beirut to join SCBD. That move was not a promotion. That the said move entailed the Applicant's relocation to Canada at her own expense was not the fault of the Organization and cannot form part of this case.

65. The Tribunal also finds that the renumbering exercise is distinct and separate from a reclassification exercise and is not arbitrary. The uncontested evidence before the Tribunal is that the Applicant has failed to sign a P.270 form which is required for a classification review of her post in accordance with ST/AI/1998/9.

66. The Tribunal finds that it behoves the Applicant to submit to a classification review of her post in accordance with the relevant Staff Regulations and Rules. This Application is premature and appears to confuse a renumbering exercise with a classification exercise.

Conclusion

67. For the reasons already stated above, this Application is not receivable and is accordingly refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 26th day of June 2014

Entered in the Register on this 26th day of June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi