UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.:	UNDT/NY/2012/052 UNDT/NY/2012/053
Judgment No.:	UNDT/2014/131
Date:	4 November 2014
Original:	English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

DÍAZ-MENÉNDEZ

CENTELLAS MARTINEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. This is a consolidated judgment on these cases which were subject to an order for combined proceedings (Order No. 146 (NY/2014) dated 16 June 2014).

2. The Applicants are translators in the Department of General Assembly and Conference Management ("DGACM"). They filed separate applications on 12 June 2012, contesting the decision by the Office of Human Resources Management ("OHRM") that they were not eligible for the benefit of having their entry grade upon recruitment reconsidered under the new "Recruitment policy for entry level language staff. Grading Guidelines" ("Guidelines"), adopted on 1 January 2011, since they were appointed on a date falling outside the one-year period of retroactive application of the Guidelines. The Applicants seek rescission of the decision which they contend is unlawful since it is based on an arbitrary and unlawful cut-off date. They seek to have their step-in-grade reviewed in accordance with the Guidelines without reference to the one-year period of retroactive application.

3. The Respondent filed his replies on 13 July 2012, stating that the applications are not receivable. However, should the Tribunal find the applications receivable, they should be dismissed on their merits.

Factual background

4. On 23 March 2009, Ms. Díaz-Menéndez signed her letter of appointment to the position of Associate Spanish Translator at the P-2 level, step 5 with effect from 20 March 2009. On 30 April 2009, Mr. Centellas Martinez was appointed to the position of Spanish Translator at the P-3 level, step 3.

5. During a meeting held on 14 June 2010, DGACM expressed its concern to OHRM at the increasing difficulty in recruiting and retaining specialist language staff. The minutes reflect DGACM's position in the following terms (emphasis added):

> […] DGACM expressed general concern with the frequent *loss of potential new recruits and recent recruits* due to an unattractive remuneration package from the Secretariat [making] it *more and more difficult for DGACM to recruit and retain staff from a small and diminishing pool of qualified language professionals*.

6. The minutes record that (emphasis added):

> DGACM to review financial impact should the above-stated agreement on entry-level recruitment be offered *on a retroactive basis of 1-2 years*. Of paramount concern is the financial impact this will have on offices and to be reviewed carefully with input from [Office of Programme Planning, Budget and Accounts]. Lastly, Policy Support Unit/OHRM to also advise on implementation on a prospective basis, as well.

7. The Tribunal was not provided with any evidence as to the outcome of the review of the financial impact of the proposal.

8. However, by email of 26 November 2010, OHRM advised DGACM that, following a five-month review and discussion, it was ready to formally promulgate a revised version of the Guidelines. The email further stressed that (emphasis added):

> … the proposed new 'Guidelines' would ensure that all professional staff joining the Organization through competitive examinations are reviewed and graded at the time of entry into the Organization in an *equitable, fair and uniform manner*, irrespective of occupational groups …

9. By email of 13 January 2011, OHRM advised DGACM as follows (emphasis added):

> Effective 1 January 2011, the new grading guidelines have been implemented. As agreed, there will [be] 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 [Entry On Duty] as of 1 January 2010. *Section D will also amend all current offers for language staff under recruitment retroactive to 1 January 2010*.

10. On 9 December 2011, the Applicants together with another colleague sent an email to OHRM requesting that their entry level grade and step be reviewed following the promulgation of the new Guidelines.

11. By memorandum dated 15 December 2011, OHRM responded that the Guidelines did not apply to the Applicants as they were recruited prior to 1 January 2010.

12. On 7 February 2012, the Applicants submitted a request for management evaluation. On 15 March 2012, the Management Evaluation Unit communicated a response.

13. On 12 June 2012, the Applicants filed two individual applications before the Tribunal. On 13 July 2012, the Respondent submitted his replies.

Procedural background

14. By Order No. 91 (NY/2014), dated 23 April 2014, the Respondent was directed to file a submission on the receivability of the applications in light of the recent judgments of the United Nations Appeals Tribunal in *Faraj* 2013-UNAT-331 and *Neault* 2013-UNAT-345 regarding the time limit to file an application with the Dispute Tribunal. On 28 April 2014, the Respondent withdrew its contention that the applications were time-barred, but maintained that the applications were not receivable *ratione materiae* on the ground that the Guidelines did not impact on the Applicants' terms of appointment.

15. By Order No. 146 (NY/2014), dated 16 June 2014, the Tribunal ordered the Applicants to make a consolidated submission relating to the lawfulness of the inclusion of a cut-off date in the Guidelines, its application to staff members within the same occupational group and its consequences on the Applicants' right to equal pay for equal work, particularly in view of the Appeals Tribunal's jurisprudence, including *Chen* 2011-UNAT-107 and *Tabari* 2011-UNAT-177.

16. On 27 June 2014 and 3 July 2014, the Applicants filed their submission pursuant to Order No. 146 (NY/2014). On 21 July 2014, the Respondent submitted his response.

17. During the hearings held on 28 and 30 July 2014, the Tribunal heard the following witnesses for the Respondent: Ms. Francette James (Learning Development and Human Resources Services Division, OHRM) and Mr. Robert Smith (Chief, Compensation and Classification Section, OHRM).

Applicants' submissions

18. The Applicants challenge the decision which was based on the sole reason that they were appointed prior to 1 January 2010, hence outside the one-year period of retroactive application of the Guidelines.

19. The Applicants contend that the decision was not in accordance with any properly promulgated administrative instrument. In addition, it is an unfair and irrational application of the policy and is discriminatory in that it breaches their right to equal pay for equal work. The detriment to the Applicants is that the refusal to consider them under the Guidelines affected their status and salary. To exemplify their contention that the decision was irrational, the Applicants referred to the case of another Spanish translator who was appointed at a later date and thus considered eligible under the Guidelines, although he passed the same competitive examination and was placed on the same roster as the Applicants ("Staff member X") (see paragraphs 48 and 49).

20. Further, the Applicants submit that the Appeals Tribunal's judgment in *Chen* 2011-UNAT-107 does not support the proposition that the principle of equal pay for equal work should be limited solely to the classification of posts as the principle of equal pay for equal work includes salary steps.

Respondent's submissions

21. The Respondent submits that the applications are not receivable on the ground that the contested decision does not affect the Applicants' terms of appointment. The Applicants have no right under their terms of appointment to require that the new policy on determination of entry level grade be applied to them with retroactive effect nor do they have any ongoing right of review of their entry level grade.

22. The Applicants' entry level steps were determined lawfully. Following a change of policy, the Administration is not bound to re-write all contracts entered into with staff members prior to that change. On the contrary, if entry level steps were reduced, the Applicants would not argue that the new policy should be applicable to them.

23. In line with OHRM's policy based on staff rule 3.16 (retroactive payments), the Administration determined that staff recruited within a year of the implementation of the Guidelines should be entitled to have their entry level reviewed. The Applicants simply did not fall within this category of staff.

24. The Guidelines are not discriminatory and do not breach the Applicants' right to equal pay for equal work. In *Tabari* 2011-UNAT-177 the Appeals Tribunals stated that the principle of equal pay for equal work "does not prevent the legislative body of the Administration from establishing different treatment of different categories of workers or staff members, if the distinction is made on the basis of lawful grounds". Further, *Chen* is not applicable since the principle of equal pay for equal work applies only in the context of classification of posts.

Issues

25. The issues to be determined in these cases can be summarised as follows:

a. Whether the applications are receivable;

b. Whether the Administration's action, based on staff rule 3.16, was lawful;

c. Whether it was in breach of the Applicants' right to equal pay for equal work;

d. Whether the one-year period of retroactive application of the Guidelines was a proper exercise of administrative discretion.

Consideration

26. The parties agreed during the Case Management Discussion held on 16 June 2014 that the present cases were different to that of *Basanta Rodriguez* UNDT/NY/2012/055. In that case, the Dispute Tribunal found that the staff member concerned was eligible to be considered under the Guidelines on the grounds that the implementation date of 1 December 2010, and related cut-off date of 1 December 2009 for retroactive consideration, was not properly applied to him. Having found that the Administration failed to follow its own Guidelines, it was not necessary to consider other issues arising in that case.

27. This judgment is concerned with staff members working at DGACM, i.e. Spanish translators, including the Applicants, who successfully passed the competitive examination in 2007 and were consequently placed on a roster following which recruitment was initiated and offers of appointment sent to staff members on different dates. Some of these staff members benefited from a salary increment due to the retroactive application of the Guidelines whereas others,

including the Applicants who were recruited prior to the one-year period of retroactive application, were considered to be ineligible.

Applicable law

28. Article 2.1(a) of the Tribunal's Statute states:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application …
>
> (a) 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;

29. In *Andati-Amwayi* 2010-UNAT-058, the Appeals Tribunal ruled that "[w]hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, *and the consequences of the decision*" (emphasis added). The Appeals Tribunal further held that an applicant, who considers that an administrative decision is in breach of his/her rights, may impugn that decision where it has a direct impact on his/her interest and standing (*Ivanov* 2013-UNAT-378, para. 15). At the heart of the Dispute Tribunal's jurisdiction is its statutory remit to judicially review decisions which affect the contractual entitlements of employees (*Bauzá Mercére* 2014-UNAT-404, para. 17).

30. Accordingly, where a decision could have an impact on an applicant's terms of employment, such a decision constitutes an administrative decision subject to review by the Tribunal (*Larkin* 2011-UNAT-135). The key characteristic of an administrative decision subject to judicial review is that the decision must "produce … direct legal consequences" affecting a staff member's terms or conditions of appointment (*Wasserstrom* 2014-UNAT-457). Further, the Appeals Tribunal held in *Egglesfield* (2014-UNAT-399) that "Staff

Rules are part of a staff member's employment contract and, as such, a staff member may challenge the unlawful application of a staff rule".

31. The staff rule concerned in these cases is staff rule 3.16 of ST/SGB/2010/6 (dated 2 September 2010) which states:

> **Retroactivity of payments**
>
> A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made written claim:
>
> (i) In the case of the cancellation or modification of the staff rule governing eligibility, within three months following the date of such cancellation or modification;
>
> (ii) In every other case, within one year following the date on which the staff member would have been entitled to the initial payment.

32. In *Sanwidi* 2010-UNAT-084, the Appeals Tribunal held, in relation to the exercise of administrative discretion:

> 38. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.

33. In *Hastings* 2011-UNAT-109, the Appeals Tribunal held that an error of law that precluded the exercise of discretion deprives the applicant from being properly considered.

34. With regard to the principle of equal pay for equal work, the Appeals Tribunal held in *Tabari* 2010-UNAT-030 that "[p]ay includes net base pay and all admissible allowances". Denial of pay is a violation of the principle of "equal pay for equal work". The Appeals Tribunal further held in *Tabari* 2011-UNAT-177:

> 17. … different treatment becomes discriminatory when it affects negatively the rights of certain staff members or categories of them, due to unlawful reasons …

35. The Appeals Tribunal held in *Chen* 2011-UNAT-107 that " '[b]udgetary considerations' may not trump the requirement of equal treatment" and that " '[l]ack of funds' cannot justify discrimination". The Appeals Tribunal stated that "[t]here is no discretion to violate the principle of equal pay for equal work".

Receivability

36. The core issue in this case is not, as the Respondent contends, that the Applicants are seeking the implementation of a further right which is not within their original terms of appointment. These cases do not involve a challenge to the Applicants' original contractual terms as contended by the Respondent. The Respondent is mistaken in narrowly characterizing and circumscribing the Applicants' claims as an attempt to renegotiate the terms of their contract which they had willingly accepted at the time. The case of *Perosa* UNDT/2010/044, which the Respondent relies upon, has no application to this case.

37. The Applicants' claims concern the refusal of a benefit which was available, and granted, to other existing staff members under a discretionary power decided upon an incorrect and unlawful reliance on staff rule 3.16.

38. The Tribunal finds that the decision to limit the period of retroactivity to one year under the Guidelines has had not only a direct impact on the Applicants' interests and contractual right to equal pay for equal work, but also has a continuing negative impact on the determination of the Applicants' steps in grade resulting in a loss of remuneration. The contested decision therefore produced direct legal consequences adversely affecting the Applicants' terms and conditions of appointment. The applications are receivable.

Merits

39. The Respondent's first witness, Ms. James, was involved in initial discussions concerning the drafting and issuing of the Guidelines. She confirmed her participation at the meetings of 14 June 2010 between DGACM and OHRM along with senior officers when the necessity of the Guidelines was first discussed. She stated that the rationale of one year was based on staff rule 3.16. She further stated that the Administration was attempting to be fair to staff members who had been newly recruited by granting them the possibility of having their steps reviewed within a year of their recruitment. The email of 26 November 2010 confirmed that the purpose of the Guidelines was to ensure that all professional staff joining the Organization through competitive examinations are reviewed and graded at the time of entry into the Organization in an equitable, fair and uniform manner.

40. Ms. James explained that the changes to the policy in relation to determination of grade and steps was prompted by the increasing difficulties DGACM faced in relation to the recruitment of staff within that section as well as by the need to have a proper retention policy since there was a high turnover due to staff members requesting to be transferred as they felt that the emoluments received were not adequate enough. It was therefore important not only to attract potential recruits to the Organization but also to retain staff members already in service with the Organization. OHRM tried to provide higher steps upon recruitment in line with professional experience as an incentive both to recruit new staff and to retain staff members. She further stated that a period of retroactive application of up to two years was actually proposed by DGACM. However, the financial impact of this proposition needed to be assessed.

41. Other than that, Ms. James was not in the position to assist the Tribunal with particular reference to the question why DGACM's recommendation of a two years period of retroactivity was not adopted. Senior staff members from

OHRM or DGACM were not called by the Respondent to explain their reasons and to rebut the inescapable conclusion that it was based on a misapplication of staff rule 3.16 and not on an assessment of the financial impact. If it was, no such evidence was adduced and, if it had been adduced, the Tribunal would have been prepared to evaluate it in light of any justification offered and having regard to the principle of equal pay for equal work or work of equal value.

Reliance on Staff rule 3.16 and Applicants' right to equal pay for equal work

42. The Respondent conceded, in his replies and in evidence, that reliance on staff rule 3.16 "may have been misplaced" and indicated that "[i]n any event … this does not give other staff members the right to insist that the error be replicated in their case". However, no evidence, regulation, rule, administrative issuance or authority was presented by the Respondent in support of the inclusion of a one-year period of retroactive application of the Guidelines. Insofar as the Administration may argue that the restriction of one year for the retroactive application of the Guidelines fell within its discretionary power, the fact remains that such discretion must be exercised in a proper manner and be consistent with the stated policy objective. In this case, the policy imperative was both the recruitment of new staff and the retention of existing staff.

43. The Tribunal does not agree with the Respondent's contention that the principle of equal pay for equal work does not apply in the context of step increments within grade and that, therefore, the case of *Chen* is not applicable. As the Appeals Tribunal held in *Tabari* 2010-UNAT-030, "pay includes net base pay and all admissible allowances".

44. While the principle of equal pay for equal work does not, in theory, prevent the Administration from establishing different treatment for different categories of staff members, as in the case of *Tabari*, it is conditional upon such distinction being made on the basis of lawful grounds. There is no evidence of this being the case. On the contrary, the decision to apply a one-year retroactive

period was based on an unlawful application of staff rule 3.16 and created an unlawful distinction between staff members within the same category.

45. It is in any event questionable whether this case is on all fours with *Tabari* 2011-UNAT-177. In that case, there was a clear differentiation between different categories of workers, i.e. locally recruited staff and international staff, each governed by different terms and conditions. As held in *Tabari* 2011-UNAT-177, different treatment becomes discriminatory when it unlawfully affects the rights of a category of staff members. In these cases, the unlawful inclusion of a one-year cut-off date resulted in an arbitrary distinction within the same category of staff members, all of whom passed the 2006 Competitive Examination for Spanish Translators and were placed on the same roster in 2007. The only difference between those staff members who benefitted from the adjustment of their step in accordance with the Guidelines and the Applicants was the date of receipt of an offer of appointment.

46. The Respondent's reliance on the former Administrative Tribunal's Judgment No. 343, *Talwar* (1985) that "it is wholly impossible for a precedent to be created as a consequence of an erroneous practice that should be discontinued" is difficult to comprehend. It is not being suggested that staff members have the right to insist that an error be replicated in their case. On the contrary, the Applicants are seeking an order that the error be extinguished and that they be subjected to a lawful application of the Guidelines, absent the unlawful restriction of a one-year retroactive application.

Administrative discretion in determining the duration of retroactive period

47. Since retention of staff was an important policy consideration why limit its application to those who were recruited in the year preceding the commencement of the guidelines? No explanation was offered. It would appear that the decision makers, in deciding to exercise their discretion in granting a period of retroactive application, felt constrained by the terms of staff rule 3.16 which has been

conceded as being an erroneous application of the Staff Rules. However, once the Administration decides to exercise its discretion, it has an obligation to do so in a proper manner. The Administration failed to take into account that by limiting the period of retroactive application to one year based on staff rule 3.16, they were fettering their discretion to find a lawful means of meeting the policy objectives of recruiting *and retaining* language staff.

48. The implementation of the Guidelines had the effect of achieving an irrational and absurd result as exemplified by a comparison of the position of the Applicants' with that of Staff member X who was recruited at a later date.

49. Staff member X was initially classified at the P-3 level, step 1. Mr. Centellas was initially classified at the P-3 level, step 3. Mr. Centellas was therefore considered more experienced than Staff member X and awarded more steps upon recruitment. However, following the application of the Guidelines, Staff member X had his entry level reclassified at the P-3 level, step 6. At the time of the application, Staff member X's grade was at the P-3 level, step 8, whereas Mr. Centellas was at the P-3 level, step 6. Such an anomaly casts serious doubt on the rationality of the decision of retroactive application to one year.

50. Likewise, Ms. Diaz's professional experience was no longer reflected in her step classification. Ms. Diaz entered into service on 20 March 2009 at the P-2 level, step 5, with a master's degree in Translation and Interpretation, five years of in-house experience as a translator and over 13 years of experience teaching language and translation. However, under the Guidelines, any staff member joining the Organization on or after 1 January 2010 with a master's degree in Translation and only four years of professional experience would already be classified at the P-3 level step 2. On the basis of her professional experience, Ms. Diaz should have been re-classified at a much higher level and thereafter be in receipt of any consequential benefit. Failing to have one's professional

experience reflected in the steps awarded to others is no incentive to remain in service with the Organization.

51. The action of the Administration therefore fell short of being rationally connected to one of the principal objectives pursued, namely to retain staff and to review steps in line with the staff member's professional experience. The Administration cannot claim that it was necessary to adopt the Guidelines so as to address this issue whilst failing to incorporate such an imperative in the Guidelines and failing to properly and fully address the situation of staff members who will be excluded from consideration under the Guidelines because of the retroactive period chosen. The chosen cut-off date has resulted in an arbitrary differentiation between staff who should have been treated equally. Like any discretion, it may not be exercised in an arbitrary, capricious, or illegal manner. As stated by the Appeals Tribunal in *Chen*, "there is no discretion to violate the principle of equal pay for equal work".

52. Further, whilst the principle of a retroactive implementation of the Guidelines was accepted at the level of policy discussion, its extent was still open to discussion. No satisfactory explanation was provided to the Tribunal in relation to opting for a one year period of retroactivity, other than on a mistaken application of staff rule 3.16, or why the initially suggested period of two years of retroactivity was not adopted.

53. If the length of the period of retroactive application was linked to budgetary considerations, it was unsupported by evidence adduced in the course of proceedings. The Administration cannot have it both ways, either the choice of a one-year retroactive application was based on staff rule 3.16 in which event it was unlawful, or it was based solely on financial considerations in which case it would be a breach of the principle of equal pay for equal work. As the Appeals Tribunal held in *Chen*, lack of funds cannot justify discrimination and budgetary considerations may not trump the requirement of equal treatment.

54. The Tribunal finds that the chosen period of retroactive application of one year is not only unlawful because it is based on an misconstruction and misapplication of staff rule 3.16 but it is manifestly unreasonable, irrational, and above all unjustifiably discriminatory. It does not amount to a proper exercise of administrative discretion and breached the fundamental principle of equal pay for equal work. Accordingly, the Tribunal finds it appropriate to rescind the decision not to accord to the Applicants the same treatment as it accorded to those who joined after 1 December 2010.

Compensation

55. Mr. Smith testified that steps attributed upon appointment depend on an appointee's education and professional experience. Mr. Smith also stated that steps are used to recognize performance, which was confirmed by Ms. James who further testified that steps increment also takes place upon promotion in accordance with staff rule 3.4 (b).

56. As previously stated by the United Nations Appeals Tribunal, "[n]ot every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages" (*Antaki* 2010-UNAT-095; *Chen* 2011-UNAT-107). The Tribunal finds that both Applicants suffered financial loss for which they are entitled to full compensation. There being no claim or evidence of moral damage, no compensation is awarded under this head.

57. As stated in sec. 5 of the Guidelines, "staff members […] 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 Applicants' performance. The Applicants are entitled to be considered in accordance with

the Guidelines, absent the one-year period of retroactive application, with any appropriate adjustments to salary and applicable benefits and entitlements.

Judgment

58. The contested decision in the case of Ms. Díaz-Menéndez is rescinded.

59. The contested decision in the case of Mr. Centellas Martinez is rescinded.

60. Within 60 calendar days of the present Judgment, the Respondent shall consider the Applicants in accordance with the Guidelines, without regard to the retroactive period of one year, with any appropriate adjustments to salary and applicable benefits and entitlements, plus interest at the US Prime Rate from the date that the sum of money would have been properly due, but for the one year retroactive application of the Guidelines, to the date of payment. Payment of compensation is due within 60 days of the date that this Judgment becomes executable. If the total sum is not paid within that period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Goolam Meeran

Dated this 4th day of November 2014

Entered in the Register on this 4th day of November 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York