UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/060
Judgment No.: UNDT/2015/012
Date: 4 February 2015
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

HOSANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Nicholas C. Christonikos

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

Introduction

1. The Applicant contests the Administration's decision of 16 January 2012 refusing to grant him retroactive payment of Special Post Allowance ("SPA") for the entire period of time during which he was performing duties at a higher level. An assessment of the lawfulness of the impugned decision necessarily involves an examination both of the history and circumstances concerning the classification of his post and the consequences flowing from the failure on the part of the Administration, over a period in excess of 10 years, to send to the Applicant formal notification of the fact that the post he encumbered had been classified at a higher level. As a consequence of this failure, the Applicant claims that he suffered economic loss in excess of the two years of SPA granted to him upon the recommendation of the Management Evaluation Unit ("MEU"), as well as loss of chance and opportunity for promotion.

Facts

2. In June 1997, the Applicant took up his duties as a G-3 level Clerk in the Department of Peacekeeping Operations ("DPKO"). On 25 August 1999, he was promoted to the G-4 level on the same post, to take effect formally on 1 June 2000.

3. On 11 January 2000, the Applicant made a request for the classification of his post.

4. On 25 January 2000, the post was classified at the G-5 level. In accordance with sec. 2.4 of ST/AI/1998/9 (System for the classification of posts), the Administration was required to provide the Applicant with a copy of the notice of the classification results. In breach of its statutory duty, it failed to do so.

5. When the Applicant discovered, upon examination of his personnel file referred to within the Organization as the Official Status file ("OS file"), that the duties he had been performing since 1997 had been assessed at the G-5 level since 25 January 2000 and not at the G-4 level as he had been led to believe, he raised the issue informally with management. The matter was not resolved.

6. On 8 September 2011, the Applicant made two separate requests, first to the Chief, Section II, of the Office for Human Resources Management ("OHRM") and second, to the Executive Office, DPKO, for compensation in the form of a retroactive payment of SPA for having performed duties at the G-5 level since 16 June 1997.

7. On 16 January 2012, the Executive Office, DPKO, notified the Applicant that his request for SPA was refused on the ground that it had not been endorsed by Mr. Craig Hanoch, the Applicant's supervisor at the time, as required under ST/AI/1999/17 (Special post allowance). The decision was based on Mr. Hanoch's view that the Applicant had never been selected to perform, nor had performed, higher level functions from 16 June 1997 to 8 September 2011, the period indicated in his request for retroactive SPA.

8. On 1 March 2012, the Applicant filed a request for management evaluation claiming SPA for the entire period of time during which he was performing duties at a higher level. On 16 April 2012, the MEU recommended that the Applicant be granted two years' payment of SPA to compensate him for the work performed at the G-5 level. The Applicant subsequently received payment of SPA for the period 17 April 2010 to 16 April 2012. The Applicant considers this payment to be insufficient given that he had been performing the duties at the G-5 level for 12 years at the time of the request.

9. The Applicant seeks rescission of the decision not to grant him retroactive SPA for the full period that he had been performing duties which had been graded at the G-5 level. As a remedy, he requests that his placement be at the G-5 level retroactive from the date the classification should have been implemented. Alternatively, the Applicant seeks compensation in the form of a monetary equivalent of a SPA retroactive from the date he should have received it and until such time as the post is properly advertised and filled.

10. In his reply, filed on 1 August 2012, the Respondent's primary contention is that the application is not receivable because the Applicant did not identify or contest any express or implied decision, made from 1997 to the present, not to grant him SPA or not to conduct a competitive selection exercise. The Respondent's alternative contention is that if the Dispute Tribunal were to find the application receivable, it should be dismissed on the merits.

11. During a hearing on 23 July 2014 and 7 August 2014, the following witnesses gave evidence: Mr. Paul Orsini (a retired staff member who worked in the Personnel Record Unit); Mr. Alexander Sokol (the Applicant's First Reporting Officer from 1999 to 2002); Mr. Craig Hanoch (the Applicant's Second Reporting Officer from 2009 onwards); and Ms. Elza Maharramova (Compensation Officer, Compensation and Classification Section, OHRM).

Issues

12. The issues to be determined by the Tribunal are as follows:

a. Whether the application is receivable?

b. Whether there were procedural errors which breached the Applicant's rights following the classification of the post at the G-5 level?

c. If there were, what justiciable consequences flowed from those procedural errors?

d. Whether the contested decision was a proper exercise of administrative discretion?

e. What compensation, if any, should be awarded taking into account the payment of two years SPA already given to the Applicant by the Administration?

Consideration

The claim

13. In *Massabini* 2012-UNAT-238, the United Nations Appeals Tribunal held (paras. 25-26):

> The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.
>
> Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

14. During a case management discussion held on 11 June 2014, the Applicant was asked to clarify the scope of his claim. Counsel for the Applicant confirmed that the Applicant's claims concerned not only the retroactive payment of SPA for the period during which he was performing duties at the G-5 level, but also the failure of the Administration fully to implement staff regulation 2.1 (Basic rights

and obligations of staff). He also sought compensation for loss of opportunity and a chance to be considered for promotion, which would have been afforded to him had the post been advertised in a timely manner.

15. Such clarification is consistent with the particulars provided by the Applicant in his request for management evaluation, dated 1 March 2012, where the Applicant stated in relation to the rights he alleged were violated that: (a) he was denied retroactive payment of SPA; (b) the post had never been advertised so as to allow him to apply; and (c) the Administration was applying the rules to suit its own convenience (request for management evaluation, p. 2). Such clarification is also consistent with his application to the Dispute Tribunal (application, paras. 18-19, 21).

16. The Tribunal observes that although the Applicant had been performing the said duties since June 1997, the classification of the post at the G-5 level only took place on 25 January 2000. Accordingly, any issue regarding appropriate remuneration and benefits at the G-5 level cannot predate 25 January 2000.

Receivability

17. Pursuant to arts. 2, 3 and 8 of the Dispute Tribunal's Statute, an application shall be receivable if the applicant contests an administrative decision alleged to be in non-compliance with his/her terms of appointment or contract of employment.

18. The Respondent contends that "the Applicant does not identify or contest any express or implied decisions allegedly made from 1997 to the present not to grant him SPA or not to conduct a competitive selection exercise for the post" (reply, para. 28). The Respondent submits that a right to retroactive payment cannot arise unless there is an entitlement to payment and an entitlement to SPA can only arise where a request has been made (reply, para. 29). The Respondent also contends that the Applicant "failed to exhaust the internal process and remedies available to him,

prior to requesting retroactive payment and prior to bringing this [a]pplication before the Tribunal" (reply, para. 30).

19. What the Respondent failed to recognize, by this submission, is that a request for SPA cannot be made in circumstances where the Respondent has failed to notify the staff member by sending her/him a copy of the assessment as required by sec. 2.4 of ST/AI/1998/9 (System for the classification of posts). The Respondent conceded that the Applicant was not provided with a copy of the classification decision of 25 January 2000. However, he argues that the Applicant knew, through a telephone call from an unknown and unidentified staff member from the DPKO Executive Office, that the post has been reclassified at the G-5 level. Insofar as this argument is advancing the proposition that notwithstanding the failure to give the Applicant a copy of the assessment report, the Applicant nonetheless had constructive knowledge of the classification decision, as submitted by the Respondent in his closing submission on 7 August 2014, it lacks merit for the reasons set out in paras 31-38 below and merely seeks to take advantage of the Organization's failure to follow its own procedures (*Wu* 2010-UNAT-042).

20. The Respondent's reliance on *Mbatha* UNDT/2011/096 and Order No. 139 (NY/2011) in *Hassanin* is misplaced. Quite apart from the fact that neither is binding on the Tribunal, they also are not on point and are of no assistance in resolving this issue.

21. The Appeals Tribunal held in *Schook* 2010-UNAT-013 (para.6) that:

> Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. Therefore, a written decision is necessary if the time-limits are to be correctly calculated, a factor UNDT failed to consider. Schook never received any written notification that his contract had expired and would not be renewed. He did not receive a "notification of the decision in writing", required by Rule 111.2 (a).

22. The Tribunal finds that the Applicant was not provided with a copy of the classification result, in accordance with sec. 2.4 of ST/AI/1998/9. In the circumstances, he was not in possession of the required formal notification so as to put him in a position to seek the appropriate remedy.

23. The Appeals Tribunal found in *Tabari* 2010-UNAT-030 that exceptional circumstances may require that time limits be waived, especially when it is not possible to determine, from the records, the applicable time limit. There is no evidence of what transpired from the moment the Applicant raised the issue informally with his management until he finally made a formal written request to the DPKO Executive Office and OHRM. The overall tenure of the Applicant's evidence was to the effect that he wished to resolve the matter amicably so as to avoid litigation. When this attempt failed, it would appear that, in desperation, he finally decided to make a formal request for review followed by an application to the Tribunal. The Tribunal observes that the Administration did not raise the issue of time bar in its decision of 16 January 2012 nor did the Respondent raise any issue regarding the applicable time-limits in his reply before the Tribunal. The Tribunal considers that the Applicant acted timeously once he discovered the decisive fact that the post he was encumbering was assessed at the G-5 level. The Tribunal finds that the Applicant exhausted the internal processes in an attempt to secure resolution without a judicial determination.

24. Further and in any event, contrary to the Respondent's assertion, the Applicant did make a request for retroactive payment of SPA on 8 September 2011. Even if the Respondent is correct in asserting that the correct procedure was not followed, it does not negate the fact that the Applicant had requested SPA. As held in *Rosana* 2012-UNAT-273, "the date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine". On 16 January 2012, a decision was made not to

grant him SPA. This is the decision the Applicant is now contesting. Management evaluation was requested on 1 March 2012. On 16 April 2012, the MEU notified the Applicant of its decision. The application was subsequently filed in accordance with art. 7 of the Dispute Tribunal's Rules of Procedure. At no time did the Respondent assert that the application was time-barred.

25. Furthermore, the Applicant's claim is not limited solely to the refusal of SPA payment from 16 June 1997 to 16 April 2010. Such a limitation would disregard key issues in this case as indicated in paras. 14 and 15 above. A fundamental breach on the part of the Respondent was the failure to provide the Applicant with a copy of the classification decision, in accordance with sec. 2.4 of ST/AI/1998/9. The post at the G-5 level should have been advertised within a reasonable period of time after its classification, so as to confer upon him the right to apply for it given that sufficient time may have elapsed since his promotion to the G-4 level. A further issue related to a breach of the principle of equal pay for equal work in that for over 10 years the Applicant had been performing higher graded duties without being paid the corresponding rate for the job.

26. It cannot reasonably be argued that if it is proven that a staff member has been paid less than the proper rate for the job, it would be regarded by the Administration as being a lawful exercise of managerial prerogative and consistent with the duty of integrity imposed on all staff under art. 101.3 of the Charter of the United Nations. The Tribunal finds that the contested decision is alleged to be in non-compliance with the Applicant's terms of appointment. The application is receivable.

Whether there were procedural errors which breached the Applicant's rights following the classification of the post at the G-5 level and, if there were, what justiciable consequences flowed from those procedural errors?

27. Staff regulation 2.1 states:

> In conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required.

28. Section 2.4 of ST/AI/1998/9 provides (emphasis added):

> A notice of the classification results, including the final ratings and/or comments on the basis of which the decision was taken, shall be sent to the requesting executive or administrative office, which will keep it in its records *and provide a copy to the incumbent of the post*.

29. Section 4.3 of ST/AI/1998/9 provides (emphasis added):

> Staff members whose posts are classified at a level above their current personal grade level in the same category *may be considered for promotion in accordance with established procedures, including issuance of a vacancy announcement*, where applicable.

30. The Tribunal finds that the Respondent's failure to provide the Applicant, as the incumbent of the post, with a copy of the classification decision deprived him of the opportunity to exercise his right to request payment of SPA while performing duties classified at a higher level and to be given an opportunity to compete for a promotion to the G-5 level.

31. However, the Respondent contends that, by the Applicant's own admission, he had been informed orally of the result of the classification at the end of January 2000 and told that it would be recorded in his OS file. The Respondent submitted in his closing submissions that this constituted "constructive notice". The Respondent makes the rather bold submission, notwithstanding the clear breach

of the Administration's duty under sec. 2.4 of ST/AI/1998/9, that "any failure to provide a physical copy of the results directly to the Applicant was immaterial".

32. The Respondent relied solely on the Applicant's motion of 2 July 2012, where the Applicant corrected his application and stated, in good faith, that he had received the said phone call and been informed that "the information would be placed on his official status file". However, the Applicant explained during the hearing that the unknown staff member referred to information being placed "on his file". As part of his duties, the Applicant was involved in dealing with what was referred to, at the time, as "working files" or "skeleton files". In his request for management evaluation and his application to the Tribunal, he referred to OS files because by then, he knew that the reference to OS files was in fact a reference to the working and skeleton files as he knew them at the time. However, in view of his conversation with Mr. Sokol, his supervisor, he saw no reason to doubt what he was told or to make any further inquiry. The Applicant testified that, in December 2000, he asked Mr. Sokol to clarify his correct grade by checking his file. Mr. Sokol informed him that his post was in fact classified at the G-4 level. He accepted this information in good faith given his recent promotion to that level. Mr. Sokol stated that he could not recall this conversation.

33. The Appeals Tribunal has repeatedly affirmed the Dispute Tribunal's broad discretion to determine the admissibility of evidence and the weight to be attached to such evidence (see for instance *Charles* 2013/UNAT/286, *Messinger* 2011-UNAT-123 and *Larkin* 2011-UNAT-134).

34. Notwithstanding the Tribunal's reservation about the Respondent's approach to the fundamental question whether the Respondent was in breach of duty under staff regulation 2.1 and ST/AI/1998/9, the Tribunal permitted the Respondent to explore his arguments to their fullest extent.

35. The Respondent did not call any evidence nor did he identify the person who apparently called the Applicant. More importantly, what exactly the Applicant was told via the telephone has not been established. There is no evidence, other than the Applicant's statements, that he received a phone call from the DPKO Executive Office.

36. Having heard the Applicant and having considered the totality of the evidence, the Tribunal concludes that the Respondent's contention lacks merit. The Respondent disregarded the Applicant's evidence that he had been informed, without any further explanation, that the information would be placed "on his file" and that he had legitimately believed in December 2000 that his post was classified at the G-4 level following his conversation with his supervisor. The fact that Mr. Sokol stated he did not recall this conversation does not render the Applicant's evidence less reliable. The Applicant was not provided with a copy of the classification result. In the absence of administrative action to either correct the level of the post or to recruit on the higher classified post, the Applicant could not be criticised for having accepted in good faith what he had been told by his supervisor, namely that the post had been classified at the G-4 level.

37. It is entirely understandable to the Tribunal that a staff member in the Applicant's position would place more reliance on what his supervisor told him than on a telephone call from an unidentified person in the absence of any formal notification. The fact is that the Respondent failed to send a copy of the classification result to the Applicant in breach of ST/AI/1998/9. That the Applicant may have received a telephone call does not render that violation immaterial, as contended by the Respondent.

38. The Tribunal notes that, in *Wu* 2010-UNAT-042, the Appeals Tribunal held, in relation to the Respondent's argument that a staff member had constructive knowledge of the Administration's decision, that the Respondent was seeking to take

advantage of the Organization's failure to follow its own procedures. In this case, the Respondent is seeking to cast upon the Applicant blame for the consequences of the Administration's failure to abide by staff regulation 2.1 and ST/AI/1998/9.

39. Additionally, the Tribunal finds no merit in the Respondent's submission that the Applicant would, in any event, not have been eligible to compete for the G-5 post, had it been properly advertised following its classification at that level. The Respondent submitted that the Applicant was encumbering a G-3 level post in January 2000 and that he would have needed to remain at the G-4 level for a minimum of two years before being eligible to apply for a G-5 post. This argument overlooks the fact that the Applicant's promotion to the G-4 level in August 1999 would have taken effect immediately if the Applicant was not encumbering an unclassified post. The Respondent's argument also overlooks the significant fact that even if one accepted the Respondent's argument, the Applicant was eligible to apply for the G-5 level post from June 2002 to 22 June 2012 when it was eventually advertised after the Applicant filed his claim. The Tribunal finds that the Applicant suffered an actual loss of a chance to be considered for this post at the G-5 level over at least those 10 years.

40. The Respondent's attempt to demonstrate, through the testimony of Ms. Maharramova, that the post had been inappropriately classified at the G-5 level in January 2000 is misplaced. Ms. Maharramova testified that the classification exercise that she carried out, in relation to the Applicant's duties as defined in his classification request of 11 January 2000, was constrained by the information provided by the Respondent. No discussion was held with anyone, including the Applicant, in assessing the level and content of his duties. Further, Ms. Maharramova acknowledged, not without some degree of embarrassment, that her review did not comply with all the requirements of ST/AI/1998/9, particularly sec. 2.3 which provides that "[t]he classification analysis shall be conducted

independently by two classification or human resources officers". She confirmed that she was not responding to a formal classification request but merely expressing an opinion which was requested of her on the basis of the limited information made available to her by the Respondent. It is unfortunate that she was placed in this position. The Tribunal finds that Ms. Maharramova's opinion was not arrived at by following the approved procedure under ST/AI/1998/9. Accordingly, it cannot displace the properly conducted review, completed in 2000, of the very duties the Applicant was performing at the time and continuously since then.

41. The Tribunal notes that there is no evidence of an appeal being lodged by the Respondent, pursuant to secs. 5 and 6 of ST/AI/1998/9, against the decision of 25 January 2000 to classify the post at the G-5 level. Mr. Orsini, who has served on the classification and appointments sub-committee, confirmed during his testimony that it was open to the Administration to appeal the classification decision, if it was in disagreement with the classification level.

42. The Tribunal finds that the Administration's failure to provide the Applicant with a copy of the classification result is in clear breach of staff regulation 2.1 and secs. 2.4 and 4.3 of ST/AI/1998/9. The purpose served by staff regulation 2.1 and ST/AI/1998/9 is to ensure that a staff member encumbering the post in question is notified of the classification result so that she/he may pursue the rights triggered by that classification, including the right set out in sec. 4.3 of ST/AI/1998/9 to be considered for promotion, where relevant, or the right to request payment of SPA under staff rule 3.10 and ST/AI/1999/17.

43. The Applicant is entitled to receive appropriate compensation for the consequences flowing from the violation of his rights. The failure to give him a copy of the decision prevented him from exercising: (a) the rights that would flow from a formal, official, written notification; and (b) the right to request payment at the proper rate for the job he was performing. He also had a legitimate expectation

that the G-5 level post would be advertised so that he could request SPA in accordance with the rules and apply for a promotion to a higher grade. The violation prevented him from doing so.

Whether the contested decision was a proper exercise of administrative discretion?

44. Staff rule 3.10 (SPA) of ST/SGB/2001/1 dated 1 January 2011 (in terms similar to previous staff rules on this matter) states (emphasis added):

> (a) Staff members shall be expected to assume *temporarily*, as a normal part of their customary work and *without extra compensation*, the duties and responsibilities of higher level posts.
>
> (b) Without prejudice to the principle that promotion under staff rule 4.15 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member holding a fixed-term or continuing appointment who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months *may, in exceptional cases, be granted* a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level.
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> …
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> (d) The amount of the special post allowance shall be equivalent to the salary increase (including post adjustment and dependency allowances, if any) which the staff member would have received had the staff member been promoted to the next higher level.

45. ST/AI/1999/17 (SPA), dated 23 December 1999 which took effect on 1 January 2000, further regulates payment of SPA. Section 4 (Eligibility) of ST/AI/1999/17 provides that (emphasis added):

> Staff members who have been temporarily assigned to the functions of a higher-level post in accordance with the provisions of section 3 above *shall be eligible to be considered* for an SPA when they meet all of the following conditions:
>
> (a) They have at least one year of continuous service under the 100 series of the Staff Rules;

> (b) They have discharged for a period exceeding three months the full functions of a post which has been (i) classified, and (ii) budgeted at a higher level than their own level. Such period may be part of the one year required by subsection 4 (a) above;
>
> (c) They have demonstrated their ability to fully meet performance expectations in all the functions of the higher-level post.

46. Section 5 of ST/AI/1999/17 sets out the conditions and required documentation to be provided by an executive office before a request for SPA is considered. This process was not activated, as it should have been, at least three months after 25 January 2000 when the post was classified at the G-5 level.

47. Payment of SPA is a discretionary grant (sec. 2.2 of ST/AI/1999/17). However, such discretion must be exercised in a proper manner and, like any discretion, it may not be exercised in an arbitrary, capricious, or illegal manner (*Sanwidi* 2010-UNAT-084). An error of law that precludes the exercise of discretion deprives the staff member from being properly considered (*Hastings* 2011-UNAT-109).

48. The impugned decision is the Administration's refusal, on 16 January 2012, to grant the Applicant's request for retroactive payment of SPA mainly on the grounds that: (a) the SPA request was made by the Applicant directly to OHRM and the Executive Office, DPKO and *was not recommended by the substantive office*; and (b) the Applicant *did not perform higher level functions* during the period indicated in his request.

49. The Respondent contends that the contested decision correctly concluded that the Applicant was not performing duties at a higher level.

50. Mr. Sokol gave evidence confirming that the job description prepared for the purpose of the classification request (pp. 114-116 of the agreed bundle of documents) accurately reflected the duties performed by the Applicant at the time.

Those duties are further reflected in the Applicant's performance appraisals from 1999 onwards. The Applicant's performance appraisals, signed off by Mr. Sokol and subsequently by Ms. Bejasa-Omega, show that, since 1999, the Applicant was generally rated as "fully meets performance expectations". When Mr. Hanoch became the Applicant's Second Reporting Officer in 2009 ("SRO"), the Applicant was rated as "frequently exceeds performance expectations" by his First Reporting Officer ("FRO"), Mr. Lecrann, and Mr. Hanoch concurred with this appraisal. During the 2010-2011 performance cycle, the Applicant was rated as "successfully meets expectations". The Applicant received a similar rating for the period 2011-2012. The record shows that the Applicant remained on the same post since 2000.

51. Mr. Hanoch testified that, in his view, the Applicant did not perform duties at a higher level. The Tribunal notes that Mr. Hanoch took up his functions as the Applicant's supervisor only in 2009. He did not provide a satisfactory explanation of the grounds upon which he formed the view that, prior to 2009, the Applicant had not been performing duties at the G-5 level notwithstanding the clear documentary evidence (see para. 55 below), corroborated by oral testimony from Mr. Sokol, of the duties performed by the Applicant at the material time. It was that very job that was classified at the G-5 level.

52. The Tribunal fails to understand how the contested decision could rationally and legitimately have been based on Mr. Hanoch's opinion, howsoever it was arrived at, when a lawfully and properly conducted assessment of the actual duties performed by the Applicant rated them at the G-5 level.

53. Additionally, neither the Applicant's FRO for 7 years, from 2002 to 2009, nor the Applicant's FRO for the performance appraisal period of 2009 to 2012, were called to testify in support of the Respondent's contention that the Applicant was not performing the full functions of the post. Yet, the Respondent called Mr. Hanoch whose evidence was self-serving and directed at justifying the assessment

he provided and upon which the contested decision is based. The Tribunal takes into account the fact that the post the Applicant is still encumbering was advertised at the G-5 level on 22 June 2012. The Respondent has not explained the basis upon which they could justify advertising the post at the G-5 level whilst arguing that the Applicant has not been performing duties at that level. Ms. Maharramova, on the other hand, accepted that she had not carried out a proper assessment exercise in accordance with ST/AI/1998/9 and was merely stating an opinion on the basis of the limited information provided to her. The Respondent's attempt to bolster Mr. Hanoch's evidence by substituting this witness' opinion in order to discredit a lawfully conducted assessment in accordance with ST/AI/1998/9 is unworthy of, and does not sit easily with, the high principles of the United Nations in upholding the values of integrity and fairness in dealing with its staff, as set out in art. 101.3 of the Charter of the United Nations and staff regulation 1.2(b) which states that "[s]taff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status".

54. Further, the statement that the Applicant's request for SPA was "not recommended by the substantive office" is factually incorrect and contradicted by the record in that on 24 October 2011, the DPKO Executive Office sent a request to OHRM which included the sentence "[t]he staff member has been performing satisfactorily on the reclassified post for over ten years, as shown in the attached ePAS records".

55. It is instructive to set out the full text of this communication:

> On 8 September 2011, Mr. Vernal Hosang has submitted to the Executive Office, as well as to the Office of Human Resources Management, a request for retroactive SPA effective 16 June 1997.
>
> After review of the case, the Executive Office determined that IMIS post (#1371) against which Mr. Hosang has been serving since

> 16 June 1997, was reclassified to Records Assistant G-5 effective 25 January 2000. The Executive Officer, only upon submission of the case by Mr. Hosang, realized that unfortunately the post was never advertised (neither through the staff selection system nor temporary vacancy announcement). The substantive office has been advised that a Job Opening needs to be posted as soon as possible.
>
> The staff member has been performing satisfactorily on the reclassified post for over ten years, as shown in the attached ePAS records. Notwithstanding that the substantive office and the Executive Office bear the responsibility of not having taken recruitment actions, we are of the opinion that the staff member cannot be penalized for the staffing table oversight. It is also our understanding that the staff member intends to submit the case to the [Dispute] Tribunal, in case of lack of action from this office.
>
> In the light of the above, it requested exceptional approval of retroactive SPA from 25 January 2000 until conclusion of the selection process for the prospective Job Opening in Inspira.

56. It is clear from this communication that the DPKO Executive Office considered that the Applicant's case was exceptional within the meaning of staff rule 3.10(b) and that he was performing duties at the G-5 level. However, this recommendation was not accepted by the Administration resulting in the decision of 16 January 2012 refusing the Applicant SPA.

57. The Tribunal finds that the impugned decision disregarded relevant evidence that the Applicant has been performing satisfactorily on the reclassified post for over 10 years, from 2000 to 2011. The Administration also failed to consider fully and properly whether the Applicant was eligible, under sec. 4 of ST/AI/1999/17, to retroactive payment of SPA from 19 June 1997 to 8 September 2011. In fact, no reference at all was made to ST/AI/1999/17 and the Administration unlawfully restricted the Applicant's request to a period of two years. The Administration further failed to note the violation of staff rule 3.10 whereby if the Applicant was expected to assume *temporarily*, as a normal part of his customary work and *without extra compensation*, the duties and responsibilities of a higher level post, he was certainly not expected to do so for over 10 years.

58. The denial of pay, which includes net base pay and all admissible allowances, is a violation of the principle of equal pay for equal work (*Tabari* 2010-UNAT-030). There is no discretion to violate the principle of equal pay for equal work (*Chen* 2011-UNAT-107). The facts clearly indicate that the Applicant was performing duties of a higher grade without the appropriate remuneration for that grade. These facts were clearly pleaded by the Applicant. Whether the facts, found by the Tribunal, amount to a breach of the principle of equal pay for equal work is a matter of law for the Tribunal to decide. The Tribunal finds that the Administration breached the fundamental principle of equal pay for equal work.

59. Although the Administration refused the Applicant's request for SPA on 16 January 2012, they did not advertise the post until 22 June 2012. As of the date of the hearing on 23 July 2014 and 7 August 2014, no decision had been made on an appointment. During this period, the Applicant has continued to perform the duties on that same post without SPA. There is no evidence that at the date of this Judgment a selection decision has been made.

60. The Tribunal rescinds the contested decision. The Applicant is entitled to appropriate compensation.

What compensation, if any, should be awarded taking into account the payment of two years SPA already given to the Applicant by the Administration?

61. The United Nations Appeals Tribunal held that "[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 damage" (*Antaki* 2010-UNAT-095). The very purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations (*Warren* 2010-UNAT-059; *Iannelli* 2010-UNAT-093). The Dispute Tribunal is in the best position to assess compensation for loss of

a "chance" of promotion and, except in very unusual circumstances, damages should not exceed the percentage of the difference in pay and benefits for two years (*Hastings* 2011-UNAT-109).

62. In *Solanki* 2010-UNAT-044, the Appeals Tribunal held that "compensation must be set by the [Dispute Tribunal] following a principled approach and on a case by case basis" and that "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case". The Dispute Tribunal may award compensation "for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury" (*Antaki* 2010-UNAT-095). Higher compensation than the two years' net base salary of the applicant may be warranted under art. 10.5 (b) of the Tribunal's Statute where there is evidence of aggravating factors and where reasons are given to explain what makes the case exceptional (*Mmata* 2010-UNAT-092).

63. Had the Applicant asked for an award for moral damages, the Tribunal would have considered the proper application of the relevant principles in relation to the facts and would have examined whether there were indeed aggravating factors which caused and/or exacerbated the degree of distress caused by the consequences of the Respondent's failure to follow the relevant law. However, the Appeals Tribunal's ruling in *Debebe* 2013-UNAT-288 precludes an award where no such claim has been made by the Applicant. Accordingly, the Tribunal makes no award for moral damages.

64. The Respondent contends that the Applicant has already received sufficient compensation in the form of a two-year SPA payment. Were he entitled to claim retroactive payment of SPA, he could only have done so for a period of one year pursuant to staff rule 3.16 (Retroactivity of payments) and would, in any event, not have been entitled to SPA payment for an extensive period of time given that SPA is designed to be a strictly temporary allowance. Moreover, he failed to act in a timely

manner after having been informed at the end of January 2000 that the post had been reclassified. Instead, he willfully renewed his fixed-term appointment at the G-4 level. He is therefore bound by his terms of appointment.

65. These arguments are based on the presumption of regularity (*Rolland* 2011-UNAT-122). Clearly, the Administration's actions in this case were such that it cannot rely on that presumption since its failure to follow its own administrative issuances is an effective rebuttal of the presumption. In any event, the Applicant would need to have been aware of the essential fact that he was being underpaid in order for him to make the claim within a year. The Administration failed to send him proper notification as it was required to do and cannot be allowed to benefit from its own default by relying on staff rule 3.16.

66. Given the reasons stated in paras. 35-38 above, the Respondent's contention regarding the Applicant's failure to act with due diligence is a rather inelegant attempt to shift the burden onto the Applicant for the Respondent's breach of its statutory duty under staff regulation 2.1, staff rule 3.10, ST/AI/1998/9 and ST/AI/1999/17. On the contrary, the Applicant has taken all reasonable steps to avoid litigation, including an attempt at resolution through the Office of the Ombudsman and his request for management evaluation. Instead, the decision of 16 January 2012, in relation to which the Applicant is seeking judicial review, further violated his rights by denying, against the weight of evidence, that he was performing the higher level G-5 duties as assessed by a lawful and properly conducted assessment in accordance with ST/AI/1998/9 and as confirmed by the DPKO Executive Office on 24 October 2011 (see para. 55 above).

67. The Applicant is entitled to receive appropriate compensation for the harm suffered from the violation of his rights, including making good underpayment of salary and an award for the loss of chance to be considered for promotion, flowing from the Administration's failure to abide by:

a) Staff regulation 2.1;

b) Staff rule 3.10;

c) ST/AI/1998/9;

d) ST/AI/1999/17;

e) The principle of equal pay for equal work.

68. The Administration agreed to consider the Applicant's claim, following management evaluation, to rectify the situation, created by its own oversight, by the payment of two years SPA from the G-4 level to the G-5 level. Such payment is tantamount to a concession that the Applicant was in fact discharging the full functions of the G-5 post, within the meaning of sec. 4 (Eligibility) of ST/AI/1999/17. However, this compensation falls short of the prejudice suffered by the Applicant over an extensive period of time, since 25 January 2000.

69. The classification request, signed by the Applicant, concerned post QSA-02861TOL041. The classification decision of 25 January 2000 identified the Applicant as the incumbent of post QSA-02861TOL041 and classified it at the G-5 level. The Applicant's Personnel Action, dated 1 July 2011, shows that the Applicant remained the incumbent of this post. During the hearing on 23 July 2014, the Applicant confirmed that he was still encumbering this post. The Tribunal rejected the evidence of Mr. Hanoch and Ms. Maharramova. It is clearly established that the Applicant satisfactorily performed on this post since 25 January 2000. The failure to make proper recompense, as initially suggested by the DPKO Executive Office, is tantamount to condoning the exploitation of a staff member. The Administration had the opportunity to put matters right but deliberately failed to do so. Such exploitation cannot, by any stretch of the imagination, be in

accordance with the principles and values of integrity under art. 101.3 of the Charter of the United Nations and staff regulation 1.2(b).

70. It cannot reasonably be supposed that it was ever contemplated by the General Assembly that there could conceivably be a situation where a staff member would have been deprived of appropriate remuneration for the work he performed over such an extensive period of time. The two years' net base salary limit under art. 10.5(b) of the Dispute Tribunal's Statute could not possibly have contemplated the circumstances of this case nor was it ever intended by the General Assembly to condone or justify the exploitation of staff members. The cap on compensation for harm, which shall normally not exceed the equivalent of two years' net base salary of the applicant, does not apply where the violation of a staff member's rights are as egregious as in the present case. The facts and circumstances of this case are truly exceptional. Whether it was through administrative oversight is not material. What matters is: (a) the fact that for a period in excess of 10 years, the Applicant remained at the G-4 level salary whilst performing duties at the G-5 level and (b) the fact that when the Administration was put on notice of the situation on 8 September 2011, it further violated the Applicant's right by failing to fully and properly consider his request. Mr. Trojanović, of the DPKO Executive Office, made a sensible proposal which ought to have been followed. Instead, the Administration failed to investigate properly the merits of the Applicant's request and placed disproportionate weight on the views expressed by Mr. Hanoch. It is unfortunate that the recommendation initially made by DPKO Executive Office on 24 October 2011 was rejected by the Administration, resulting in the decision dated 16 January 2012.

71. The Tribunal is unable to quantify the precise total loss to the Applicant of non-payment of SPA and/or failure to give effect to the principle of equal pay for equal work. However, should this total amount exceed the two years cap in art. 10.5(b) of the Tribunal's Statute, the Tribunal finds, for the above-mentioned

reasons, that the exceptional circumstances of this case warrant exceeding the award of two years' net base salary of the Applicant. The Tribunal grants the Applicant an award of compensation being the difference in salary between his earnings at the G-4 level and the G-5 level from 25 January 2000 to the date of conclusion of the selection process for the job opening advertising the post on 22 June 2012, as initially recommended by the DPKO Executive Office on 24 October 2011.

72. The Tribunal further considers that it is appropriate to award to the Applicant the sum of USD 1,000 for loss of a chance of being considered for promotion to the post at the G-5 level within a reasonable period after 25 January 2000 when the post was classified.

73. The Tribunal's duty is to ensure that the Applicant is placed in the position he would have been had the Administration complied with its contractual obligation (*Warren* 2010-UNAT-059; *Iannelli* 2010-UNAT-093). The Applicant's attempts at resolving this matter has met only with partial success and the two-year SPA paid to him has not fully compensated him for his losses. Moreover, as a general service staff member not in receipt of legal assistance within the Organization, he was left with no alternative but to seek the assistance of external Counsel. It is not known whether Counsel for the Applicant provided his service on a *pro bono* basis and, if so, what arrangements had been agreed with him as reimbursement of costs necessarily incurred by representing the Applicant. The Tribunal considers that the Applicant must also be compensated for those costs and/or expenses. The award of compensation for the costs/expenses incurred is limited to USD 1,000, subject to the Applicant providing the necessary proof to the Respondent.

Abuse of process

74. Article 10.6 of the Tribunal's Statute states:

> Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

75. The Respondent brought a witness before the Tribunal in order to discredit a lawful classification exercise conducted in January 2000, in circumstances where he failed to appeal the result of that exercise. More troubling is the fact that this witness' evidence was that she was not requested to carry out a proper assessment in accordance with ST/AI/1998/9 but merely to express her opinion on the basis of the limited information provided. This is corroborated by the email request of 18 July 2014 sent to her five days before the hearing. The Tribunal finds that she was called for the sole purpose of bolstering the views and opinions expressed by Mr. Hanoch, which formed the primary basis upon which the impugned decision was based (see paras. 52-53 above). The witness was placed in an impossible and extremely embarrassing position having to admit that what was presented as her "expert opinion" was in fact an opinion that was not arrived at through a proper assessment in accordance with ST/AI/1998/9. It is clear to the Tribunal that Ms. Maharramova did not intend that her evidence could or should be used to displace, in effect, the lawfully conducted assessment made in January 2000. Her evidence served no useful purpose and the Tribunal is left with the inescapable inference that, by calling her as a witness, the Respondent was seeking to divert the Tribunal's attention away from the administrative and procedural errors identified and to obfuscate the real issues in the case.

76. Whilst it is perfectly proper for parties to prosecute their respective claims or defences assiduously, they are obliged to work within proper parameters of legitimacy and propriety if they are to avoid incurring the risk of being found to have

acted in a manner amounting to a manifest abuse of process. The managers responsible for instructing Counsel should have known better than to have placed both Counsel for the Respondent and the witness, Ms. Maharramova, in an embarrassing and untenable position.

77. The presentation of evidence, that is based on fundamental procedural and factual flaws and is aimed at discrediting a properly and lawfully conducted classification exercise conducted more than a decade ago and which was not appealed, amounts to an abuse of process for which the Tribunal considers it appropriate to make an award of costs against the Respondent in the sum of USD 3,000.

Conclusion

78. The application is granted and the contested decision is rescinded.

79. The Respondent is ordered to pay to the Applicant, under art. 10.5(b) of the Tribunal's Statute, exceeding if necessary, the equivalent of two years' net base salary of the Applicant, given the exceptional nature of the case:

(a) Compensation in the form of a monetary equivalent of SPA from the G-4 level to the G-5 level, retroactive from 25 January 2000 until such time as the Applicant may cease to perform these duties at the G-4 level, plus interest at the US Prime Rate from the date that the sum of money would have been properly due, subject to a deduction of the two-year SPA already paid to him;

(b) The sum of USD 1,000 for loss of opportunity and chance of applying, and being considered, for promotion to the post he encumbered for a period of over 11 years.

(c) The sum of USD 1,000 for any costs/expenses incurred by the Applicant in relation to these proceedings, subject to the Applicant providing the necessary proof to the Respondent.

80. 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.

81. The Respondent is ordered to pay costs in the sum of USD 3,000 for abuse of process.

(*Signed*)

Judge Goolam Meeran

Dated this 4th day of February 2015

Entered in the Register on this 4th day of February 2015

(*Signed)*

Morten Albert Michelsen, Officer-in-Charge, Registrar, New York