



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ZANGMO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Robbie Leighton, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is a Human Resources Assistant with the African Union/United Nation Hybrid Operation in Darfur (UNAMID) and currently works at the Regional Service Centre (RSC) in Entebbe, Uganda.

2. In her Application dated 16 July 2013, she is challenging the failure to reclassify her position following her request to the UNAMID Administration to do so. The Applicant submits that the Administration's failure to address her request for post reclassification represents a reviewable decision akin to a refusal to reclassify the post.

3. The Respondent filed a Reply on 19 August 2013 in which it is submitted, *inter alia*, that the Application is not receivable *ratione materiae* because the Applicant has not exhausted the internal remedy of an appeal against the decision on the reclassification of a post under sections 5 and 6 of ST/AI/1998/9 (System for the reclassification of posts).

4. The Respondent asserts that the decision not to re-classify the post is lawful and that there was no unreasonable delay in submitting the Applicant's request for re-classification.

Facts

5. The Applicant started working with the United Nations Mission in Ethiopia and Eritrea on 27 January 2008 as a Human Resources Assistant at the FS-4 level.

6. She was then re-assigned on 23 September of the same year to UNAMID where she worked at the El-Fasher, Darfur duty station on the same job description and level.

7. Effective 1 July 2009, she received a one-year fixed-term appointment which has subsequently been renewed annually.

8. On 19 December 2011, the Applicant was placed on a roster of pre-approved candidates for the position of Human Resources Assistant at the FS-5 level.

9. Thereafter, on 24 January 2012, the Applicant sent an email to one Jose Da Anunciacao who was in charge of Staffing/Post Management at UNAMID asking for advice on the requirements for a reclassification of her post.

10. When she did not receive a reply, the Applicant wrote to the then acting Chief Civilian Personnel Officer (CCPO), Mr. Tinkamanyire Mugisha, on 28 January 2012 asking that he send a request for a re-classification of her post. When Mr. Mugisha did not respond, she approached him in person to reiterate the request. He asked for her job description and told her he would work on her request.

11. In subsequent discussions they held afterwards, he continued to assure the Applicant that he was working on the matter although he had not asked the Applicant to fill and submit the required forms for post reclassification. On 1 March 2012, Mr. Mugisha told the Applicant that he had been asked to put all post reclassifications on hold until the arrival of a new CCPO who would be arriving soon.

12. In April 2012, the new CCPO, Mr. Aggrey Kedogo, arrived at the mission. Two days later, the Applicant approached him on the same matter. He told her that such reclassification was not automatic and promised to speak to Mr. Mugisha and get back to her. The Applicant who did not get any feedback from the new CCPO continued to go to him between April and August 2012 and he repeatedly assured her that the matter was being worked on.

13. On 6 August 2012, Mr. Kedogo sent the Applicant a memorandum reassigning her to the RSC in Entebbe as from 1 September 2012. When she asked him if the reassignment to Entebbe would affect the reclassification she was asking for; he reassured her that it would not and that since she was going to Entebbe as a UNAMID staff member, he would continue to pursue the reclassification issue.

14. When the Applicant went to see the Director of Mission Support (DMS) on 6 September 2012, he was surprised that the matter was still pending but also confirmed that UNAMID would deal with it. He then asked the Applicant to complete a formal request for reclassification which she had never been told to fill by the CCPO.

15. The Applicant proceeded on transfer to Entebbe on 8 September and sent the filled classification form to the CCPO on 21 September 2012. In his reply, he told her that he would make a case for her post reclassification to the Field Personnel Division of the Department of Field Support (FPD/DFS). She also sent a copy of the reclassification form to Mr. Anunciacao on 23 October 2012 at his request.

16. On 25 October 2012, UNAMID sent a reclassification request in respect of three Human Resources Assistant positions in UNAMID from FS-4 to FS-5 including that of the Applicant to certain officers in FPD/DFS, New York.

17. On the same day, Morteza Mirmohammad, Chief Organizational Design and Classification Unit (ODCU), FPD/DFS responded stating that there was difficulty regarding the reclassification of posts in UNAMID. He added that there was also a new development that was not in favour of reclassification because it had been decided that support posts should not be reclassified until UMOJA was implemented as it could impact on the support posts in the mission including that of the Applicant. This response was copied to the CCPO, Mr. Kedogo.

18. On 17 December 2012, the Applicant who had continued to remind the UNAMID officials of her request wrote to her supervisor, Mr. Gurung, complaining about the delay in considering her reclassification request. He told her by telephone on the same day that the CCPO ought to have informed her that FPD was unwilling to reclassify the post.

19. She then immediately wrote to Mr. Kedogo asking for the official correspondence from FPD so as to contact them directly. He replied the same day that he would be in Entebbe soon and that he could discuss the matter with her then.

20. On 21 December 2012, the Applicant and the CCPO met in Entebbe and held a discussion. Mr. Kedogo asked to be given up to 15 January 2013 to resolve the situation. On 27 February 2013, she wrote to him asking for an update but he replied that the possibility of her reclassification was under review as part of the RSC, Entebbe.

21. The Applicant then concluded that the Administration did not intend to consider her request for a reclassification of her post and on 5 March 2013 made a request to the Management Evaluation Unit (MEU). On 18 April 2013, MEU returned a finding that there was no reviewable decision in the case.

22. Thereafter on 17 July 2013, the Applicant filed the present Application.

Receivability

23. The Respondent had argued that this Application is not receivable. The reasons advanced for this argument are that: (i) the Applicant has not exhausted the internal remedy of an appeal against the decision on the reclassification of posts under section 5 of ST/AI/1998/9 (System for the Classification of posts); and (ii) the Applicant was informed of the classification decision at the latest on 17 December 2012 and had 60 days to submit an appeal against the reclassification decision but had not done so. The failure of the Applicant to pursue an internal remedy in respect of the reclassification decision and her not initiating that process within 60 days from the date she was orally informed rendered this Application not receivable.

24. Clearly, the arguments that this Application is not receivable were premised on the provisions of section 5 of ST/AI/1998/9 which is the legislation governing the policies and procedures for the classification and reclassification of posts. The section provides:

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

25. Section 5 is unequivocal that the singular ground upon which a classification decision may be appealed is that the classification standards were applied wrongly and that the said error resulted in classifying the post in issue at the wrong level.

26. In the instant case, there was no attempt or effort made to reclassify the Applicant's post. The claim is not that the Applicant's post was wrongly reclassified. Therefore she did not even have any *locus standi* to seek that internal remedy.

27. The Respondent's preliminary objection that this Application is not receivable is therefore irrelevant and accordingly dismissed. The Tribunal has the jurisdiction to adjudicate this Application.

28. The Tribunal will now consider the substantive issues that were raised in this case.

Applicant's case

29. This Application may be summarized as follows:

- a. The Applicant works as a Human Resources Assistant and her unit deals with the administration of staff benefits and entitlements. Seven Human Resources Assistants in the unit perform the same functions servicing a pool of United Nations employees administered by her office. Their work is divided alphabetically according to the names of the staff members.
- b. The situation is that some of the Human Resources Assistants are on FS-5 level and administer staff members whose names begin with some letters of the alphabet while other Human Resources Assistants on FS-4 level administer staff members whose names begin with other alphabets.
- c. The Applicant is one of three Human Resources Assistants who are on FS-4 while doing identical work with others on FS-5.

d. The failure of the Administration to address the Applicant's request for a reclassification of her post from FS-4 to FS-5 is to all intents and purposes a refusal to do so and is unlawful. The implied refusal is unlawful because it is in breach of art. 23.2 of the Universal Declaration of Human Rights which provides that everyone without any discrimination has the right to equal pay for equal work.

e. This right is applicable to staff members of the United Nations system as held in the case of *Chen* UNDT/2010/068 and upheld by the United Nations Appeals Tribunal (UNAT). As held by UNAT¹, "budgetary considerations may not trump the requirement of equal treatment."

f. The Applicant first requested post reclassification on 24 January 2012. She followed up on the said request with Mr. Kedogo the CCPO consistently for several months and was assured throughout that her request was being processed. It was only on 6 September that the DMS told her to complete the reclassification form.

g. The evidence clearly showed that up until that time nothing had been done about her request and that the request was not dealt with expeditiously.

h. The delay in processing her request had been unconscionable and is compensable.

30. In consequence, the remedies sought by the Applicant include:

a. that the Administration be ordered to conduct a full reclassification exercise on her post and where successful, the results should be applied retroactively to 28 January 2012;

b. that any retroactive payment of salary gained as a result of the reclassification should bear interest; and

¹ 2011-UNAT-107.

- c. that the Applicant be compensated for the delay in processing her request.

Respondent's submissions

31. A summary of the Respondent's case is as follows:

- a. The Administration had decided not to conduct a reclassification analysis of the Applicant's post which means that the said request for classification was denied.
- b. The decision not to reclassify the post was lawful as it was a discretionary decision predicated on the forthcoming review of UNAMID's staffing structure and anticipated changes in support function posts in the Organization in consequence of the implementation of the UMOJA project.
- c. There was no unreasonable delay on the part of the mission in submitting the reclassification request in respect of the Applicant's post as the Applicant had no right to have her request submitted to FPD/DFS within a specified period of time.
- d. There is no right to compensation for delay in the absence of a violation of a right under the Staff Regulations or Rules.
- e. Compensation may only be awarded if harm has been suffered. The Applicant must prove that she suffered damage or was injured as a result of any alleged delay in submitting her request for reclassification. She has not adduced any credible evidence of the loss or damage suffered by her as a result of the delay.

Considerations

Admissibility of Annex 13

32. In making out her case, the Applicant tendered Annex 13 as one of the documents in support. The said Annex 13 is a document which is evidently an

official print-out showing a table of twelve Human Resources Assistants in UNAMID. The print-out is exhibited to support the Applicant's case that although she is on FS-4, she performs the same functions as some of her colleagues who have been promoted to FS-5.

33. In his Reply to the Application, the Respondent prayed the Tribunal to reject the Applicant's Annex 13 and rule it inadmissible evidence under art. 18.1 of the Tribunal's Rules of Procedure (ROP).

34. The Respondent argued that Annex 13 contains confidential information regarding 12 staff members of UNAMID Human Resources Unit, showing the dates they joined the unit, grade level, type of appointment and dates of promotion and that it had not been shown that the said staff members agreed to have this information disclosed by the Applicant.

35. The Respondent continued that the Applicant may have obtained the information through her official access to IMIS records or Nucleus. He argued further that since her exhibiting the said information before the Tribunal was not done in the normal course of her duties, she had in effect violated her duties.

36. The Applicant did not at any stage address this issue.

37. In considering the Respondent's prayer with regard to the admissibility of Annex 13, the Tribunal will consider the provisions of art. 18.1 of the ROP on the admissibility of evidence.

38. That Article provides that it shall fall to the Tribunal to determine the admissibility of evidence. It may exclude evidence which it finds to be irrelevant, frivolous or lacking in probative value. The Respondent has not submitted that Annex 13 is irrelevant or frivolous. Although, he says the information contained in the document is confidential, he is not certain how it was obtained by the Applicant neither was he able to show that the document ought not to be exhibited to the Tribunal.

39. The Tribunal notes that during the cross-examination of the Applicant, Respondent's Counsel did not ask any questions to show that Annex 13 was not coming from proper custody.

40. The document is properly before the Tribunal and the prayer to reject it is refused.

Does this Application make out a proper case of unequal pay for equal work?

41. The crux of the Applicant's case is that although she sits on an FS-5 roster with other colleagues since December 2011, many of those on that roster have been promoted. It is also her case that she performs identical work with these people.

42. The principle of equal pay for equal work which is provided for by art. 23.2 of the Universal Declaration of Human Rights has its origins in gender inequality where women got less pay for doing the same work as men. In the case of *Chen*², the Dispute Tribunal held that this principle is applicable to the United Nations system. The Appeals Tribunal upheld the decision that the said principle does in fact apply.

43. Has it been shown or proven that the Applicant as an FS-4 HR Assistant did identical work with her colleagues on the FS-5 level? The Respondent contests that such is not the case. He argued that the HR Assistants on the FS-5 level had added responsibilities such as supervisory roles beyond what those on the FS-4 level did.

44. The Applicant's Annex 13 is a table showing a list of HR Assistants working in the same unit as the Applicant and located at the same or different duty stations of the UNAMID mission, supposedly performing the same functions. The said Annex 13 was meant to show that some of the HR Assistants in the Applicant's unit who were on the FS-5 level substantially performed the same functions as the Applicant and about two other officers on the FS-4 level.

² UNDT/2010/068, from para. 39.

45. There is also evidence that although some officers in the same unit who had been on the same FS-4 level as the Applicant and placed on the FS-5 roster at the same time as her in December 2011, were later promoted to vacant FS-5 level posts.

46. Annex 13 without more cannot be conclusive evidence that the Applicant while an FS-4 HR Assistant did exactly the same work as her colleagues on the FS-5 level. The Respondent's Annex R1 contains the generic job profiles for the Human Resources Assistant on the FS-4 level as held by the Applicant and Human Resources Assistant at the FS-5 level who the Applicant alleged performed the same functions.

47. A close comparison of the FS-4 and FS-5 levels shows a good deal of similarity in the two posts. However, the FS-5 posts have certain added responsibilities. These include certain supervisory work and the conducting of research on precedents, policy rulings and procedures.

48. A basic principle of law is that a party who alleges a fact bears in principle the burden of proving its veracity. In the present case, the Applicant has failed to make out a proper case of unequal pay for equal work.

Was there unreasonable delay on the part of the mission in submitting the classification request in respect of the Applicant's post? And if so, is the Applicant entitled to compensation for the delay?

49. The Applicant submitted that the Administration is liable for the delay in addressing her request for reclassification of her post from FS-4 to FS-5.

50. On 24 January 2012, the Applicant sent an email to Mr. Jose Da Anunciacao, who was in charge of Staffing/Post Management, asking for advice on the requirements for a reclassification of her post. She received no reply and, on 28 January 2012, she wrote to the then acting CCPO, Mr. Mugisha asking that he send a request for a re-classification of her post. When Mr. Mugisha failed to respond to her, she approached him in person and he informed her that he would work on her request.

51. In April 2012, the Applicant approached the new CCPO, Mr. Kedogo, on the same matter and was repeatedly assured that the matter was being worked on. On 6 September 2012, the Applicant went to see the DMS who confirmed that UNAMID was dealing with her request. It was only at this point that the Applicant was asked to complete a formal request for reclassification form which she had never been told to fill by the CCPO.

52. It was not until 25 October 2012 that UNAMID sent a reclassification request in respect of three Human Resources Assistant positions in UNAMID from FS-4 to FS-5, including that of the Applicant, to certain officers in FPD/DFS, New York. On 17 December 2012, the Applicant was verbally informed that FPD was unwilling to reclassify the post. The Applicant never received formal notification of the decision and regarding her request for reclassification and, on 27 February 2013, she wrote to Mr. Kedogo for an update but he replied that the matter was under review as part of the RSC, Entebbe.

53. Almost one year passed before the Applicant was verbally informed that FPD was unwilling to reclassify her FS-4 post. On the documentary record before the Tribunal, it appears that she is yet to receive any formal notification that her request for reclassification has been denied.

54. The Tribunal finds that the delay by the UNAMID Administration in dealing with the Applicant's request for reclassification was unreasonable.

55. In *Asariotis* 2013-UNAT-309, the United Nations Appeals Tribunal held that for an applicant to be entitled to moral damages, evidence must be produced of harm, stress or anxiety caused to the applicant which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award³.

56. Other than her submission that the delay in processing her request was unconscionable and compensable, the Applicant has not produced any evidence of harm, stress or anxiety. In the present case, whilst the relevant officials showed a

³ At para. 36(iii).

disgraceful ineptitude in dealing with the Applicant's request, the Tribunal does not find that the Applicant is entitled to any compensation. It need not be emphasized that Managers should be alive to their responsibility to deal with their supervisees' reasonable requests in a timely manner and with the necessary dispatch.

Conclusion

57. The Tribunal finds that there was unreasonable delay on the part of the mission in submitting the classification request in respect of the Applicant's post but, in the circumstances of the case, does not award any compensation to the Applicant.

(Signed)

Judge Nkemdilim Izuako

Dated this 23rd day of June 2015

Entered in the Register on this 23rd day of June 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi