



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ELMI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Katya Melliush, UNON

Introduction

1. The Applicant is a former staff member of the United Nations Office at Nairobi (UNON). In his Application dated 21 March 2014, he contests the decision by the Assistant Secretary-General for Human Resources Management (ASG/OHRM), dated 27 February 2014, not to grant him a retroactive promotion for pension purposes as an exception under staff rule 12.3(b).

2. The Respondent filed a Reply on 15 May 2014 in which it was asserted that the Application was without merit and was not receivable.

3. In a response to the Respondent's Reply filed on 30 September 2014, the Applicant raised his concerns with regards to the MEU's apparent disclosure to the Respondent of email communications between him and the said MEU.

4. On 11 February 2015, the Tribunal issued Judgment No. UNDT/2015/013 and ruled that the Application was receivable.

5. The Tribunal, with the consent of the Parties at the Case Management Discussion of 12 May 2015, decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing is not required in determining the merits of this case and that it will rely on the Parties' pleadings and written submissions.

6. The Parties filed their closing submissions on 13 July 2015.

Facts

7. The Applicant assumed the post of P-5 Chief of Human Resources Management Services (HRMS) at (UNON) from 1 January 2005.

8. In April 2008, OHRM commissioned an independent consultant to conduct a comprehensive review of the post and grade structure of UNON's Division of Administrative Services to ensure that its resource structure is commensurate with its role as the central provider of human resources management.

9. The comparative report concluded that:

[T]he Chief position of the Human Resource Management Service should be upgraded to a D-1; both UNOG and UNOV have D-1 Chiefs of HR, and the diversity of work, the difficulty [of] recruiting and retaining staff in this duty station, and diversity of appointment types and location, in addition to the volume of work, justifies a D-1 level position.

10. Following that conclusion reached in the said report, the UNON Administration put forward a budgetary proposal to the United Nations Headquarters in New York at the end of 2008 requesting additional funds for the D-1 position but the request was refused by the Controller.

11. In 2011, a new request for upgrading the UNON Chief of HRMS position to the D-1 level was resubmitted in the Secretary-General's 2012/2013 budget to the General Assembly. At the end of 2011, the General Assembly approved the request.

12. The newly upgraded D-1 position was then advertised on 9 January 2012. The Applicant applied for this post. The written test was conducted in September 2012. The interviews took place in April 2013 and he was selected for the post on 1 June 2013.

13. On 5 November 2013, the Applicant wrote to the ASG/OHRM to request retroactive promotion to the D-1 level as Chief of HRMS/UNON from 1 January 2012. He got no response at that time.

14. On 6 February 2014, the Applicant then filed a request for management evaluation seeking that the Administration considers his application for retroactive promotion from 1 January 2012.

15. On 27 February 2014, the ASG/OHRM responded in writing to the Applicant's 5 November 2013 request for retroactive promotion. In the said response, the ASG/OHRM declined the request. In her letter, the ASG/OHRM reasoned and concluded:

We have been informed by the Pension Fund that any retroactive promotion would give rise to actuarial costs and interest payable by the Organization...

[...]

I noted that as you had received a special post allowance to the D-1 level prior to the completion of the selection process, you received equal pay for work or equal value. Bearing this and the above in mind and in the absence of any administrative error, I regret that I am not in a position to agree to your request to retroactively promote you to the D-1 level effective 1 January 2012 for pension purposes only.

16. By letter dated 6 March 2014, the Chief of the Management Evaluation Unit (MEU) informed the Applicant that his request for management evaluation was moot.

Applicant's submissions

17. The Applicant's case as deduced from his pleadings is summarized below:

18. The Applicant submits that the Tribunal must consider three substantive issues or questions when determining his case as set out below:

a. Did the Administration have discretion to grant retroactive promotion?

b. Was an obligation under the principle of equal pay for work of equal value triggered in the circumstances of this case?

c. Did the Respondent exercise his discretion fairly in refusing the Applicant's request for retroactive promotion?

19. The Applicant argues and submits under these questions as follows:

Did the Administration have discretion to grant retroactive promotion?

20. Pursuant to staff rule 12.3, the Secretary-General may make exceptions to the Staff Rules provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly. The granting of a retroactive promotion is not inconsistent with any Staff Regulation or General

Assembly decision. Therefore, the Secretary-General has the discretion to exceptionally grant retroactive promotions.

21. Such discretion to issue a decision to retroactively promote the Applicant to the post of D-1 Director of Human Resources commencing January 2012 lies within the power of the Administration.

22. The Applicant's initial request for the grant of a retroactive promotion considering the special circumstances of his case which was made on 5 November 2013 was ignored. Prior to the Applicant filing a Management Evaluation Request, the Administration had no intention, whatsoever, of replying to his reasoned request.

23. The fact that the Administration was forced to reply to the Applicant by the subsequent procedural challenge, belies the core principle that the authority exists, pursuant to staff rule 12.3, to exercise Administrative discretion with respect to retroactive promotion.

24. The Respondent, in his Reply dated 15 May 2014, implicitly accepts that such a power to exercise retroactive promotion exists. The reasoning given for the Administration's failure to do so at that time related not to any legal impediment but rather to the costs involved. During the case management discussion held on 12 May 2015, the Respondent's Counsel confirmed that they were not in possession of the actual costing for the Applicant's claim regarding retroactive promotion.

25. This claim is at odds with the initial response made by the Administration to the Applicant on 27 February 2014, stating that, "any retroactive promotion would give rise to actuarial costs and interest payable by the Organization". This letter would suggest that at the minimum, the Administration had in fact obtained and considered such financial information before refusing the request. This appears not to have been the case.

26. The power pursuant to staff rule 12.3(b) to grant retroactive promotion existed and was available to the Administration. The decisions in the cases of

*Zeid*¹ and *Kamal*², highlight that such an administrative power does exist within the United Nations and has been exercised on previous occasions.

27. The reasoning for the Administration's refusal were not related to any legal impediments but rather to the costs involved, and also to its conclusion that its obligations under the principle of equal pay for work of equal value had been met.

Was an obligation under the principle of equal pay for work of equal value triggered in the circumstances of this case?

28. The principle of equal pay for work of equal value has been accepted to be part of the fabric of administrative law within the United Nations. It is not for the Administration to pick and choose that which is convenient for them to follow under this principle.

29. If the principle of equal pay for work of equal value has been accepted as part of international administrative law, then it applies to all aspects of the staff member's interactions with the Administration. In other words, either the principle of equal pay for work of equal value applies in its totality or it does not apply at all. Such a laudable administrative principle does not lend itself to partial compliance at the convenience of the Administration. In *Diaz-Menendez, Centellas Martinez*³, the Tribunal reiterated that the Administration retained no discretion to violate the principle of equal pay for work of equal value.

30. The legal concept of equal pay for work of equal value forms the basis of the Applicant's request for retroactive promotion. Specifically, it is the Applicant's position that equal pay includes pensions. The inclusion of pensions in the concept of equal pay for work of equal value has been accepted in the European Court of Justice (ECJ) jurisprudence and general international administrative law under the Equal Remuneration Convention of 1951.

¹ UNDT/2013/005.

² UNDT/2011/034.

³ UNDT/2014/131.

31. In the ECJ judgment of 17 May 1990 in *C-262/888, Douglas Harvey Barber and Guardian Royal Exchange Assurance Group*⁴, the court determined that all forms of occupational pensions fall within the meaning of the principle of equal pay for work of equal value.

32. This principle is reflected in The Equal Treatment Directive (No.2006/54/EC), which sought to implement principles of equal opportunities and equal treatment of men and women in matters of employment. Article 14 affirmed the principle that a pension scheme for public servants falls within the scope of the principle of equal pay⁵.

33. Article 1 of the Equal Remuneration Convention 1951, while not explicitly defining gross remuneration, is worded in such general terms that it covers not only take-home pay, but also earnings and benefits in a broad sense and is regarded to include pensions⁶. Such a position was confirmed by the International Labour 4(ILO), 34th Session in 1951.

34. Any argument that this universal concept does not apply to the United Nations defies logic. In *Chen*⁷, this Tribunal implicitly accepted that any award of compensation under the heading of equal pay for work of equal value included the payment of backdated pension rights.

35. The Administration failed to give sufficient priority to the Applicant. Once the Applicant's post was upgraded in January 2012, the Administration took effectively taken eighteen months before recruiting him to the D-1 level. During these 18 months, the Applicant had been performing his functions to the full. Despite his continued requests to speed up the process of selection, the

⁴ European Court of Justice case of *Douglas Harvey Barber and Guardian Royal Exchange Assurance Group C-262/88[8]*, § 28, http://eurlex.europa.eu/resource.html?uri=cellar:32ab0ae3-b8cc-4104-8f5c-03d29be408e0.0002.03/DOC_2&format=PDF.

⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006L0054#ntr8-L_2006204EN.01002301-E0008.

⁶ International Labour Conference, Report of the Committee of Experts, 91st Session, 2003, Report III (Part 1B), § 215, <http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-1b.pdf>.

⁷ UNDT/2010/068.

Administration appeared not to act with due consideration for the position and circumstances of the Applicant.

36. Within the time that it took the Respondent go through a recruitment process, the Applicant was losing his pensionable income. The Applicant's pension benefits are computed on the basis of his last three years of service. Although having been paid a Special Post Allowance (SPA) between January 2012 and June 2013, the Applicant, due to the long process of recruitment, had lost out in relation to his valuable pensionable entitlements. The Applicant subsequently retired on 31 October 2014.

37. Despite payment of SPA, the period of time in which the Applicant worked as a P-5 officer on a D-1 post omits pension contributions and as a result violated the principle of equal pay for work of equal value. Consequently, an obligation to remedy this state of affairs by the Administration was triggered.

Did the Respondent exercise his discretion fairly in refusing the Applicant's request for retroactive promotion?

38. The Respondent's refusal to exercise his discretion in favour of the Applicant was based on the reasoning that the costing for retroactive promotion was too high and that payment of SPA meant that his obligations under international administrative law had been met. Such reasoning and considerations were a complete abdication of the Respondent's responsibilities vis-à-vis the staff member and the correct position of international administrative law.

39. In considering the request made by the Applicant on 5 November 2013, the Administration failed to give any real or proper consideration to it. In the ASG/OHRM's decision refusing the Applicant's request for retroactive promotion, no mention or consideration was given to the Applicant's original submissions to her. Specifically:

- a. That the Applicant had been performing the role of Chief of HRMS since January 2005. Although the position had been deemed to be at the D-1 level since 2008, the Administration remunerated him at that

level only as of 1 June 2013. In other words, the Applicant was underpaid for a period of five years.

b. In August 2008 an independent review commissioned jointly by OHRM and UNON concluded that the level of the post of Chief, Human Resources Management Service in UNON was to be D-1, the same level of similar posts in UNOG (Geneva) and UNOV (Vienna), where the Applicant's colleagues were already being paid at the D1 level. The subsequent recommendation to upgrade the Applicant's post was deliberately and intentionally ignored or disregarded by the Administration until 2011.

c. The newly upgraded position was finally advertised in January 2012, but the Administration completed the selection process some 18 months later. According to the Organization's own norms, a recruitment or selection process cannot exceed four months. The Administration did not provide a single reason for such a lengthy recruitment process.

d. The Applicant was promoted to the D-1 level in June 2013, yet the Administration was well aware that the Applicant was to retire in October 2014 and that he would not fully benefit from this promotion for the purposes of his pension benefits.

40. At the same time, the Administration relied on costing that seemed not to have, in fact, been available to them. The Administration's response on 27 February 2014 failed to include any real calculation. It just simply concluded that it would cost the Administration too much.

41. As it was held in *Obdejin*⁸, there is an obligation on the Administration to act fairly in its dealings with staff members. In this instance, any concept of fair treatment was overridden by specific non-quantifiable costs. In any event, as

⁸ UNDT/2011/032.

confirmed in *Chen*⁹, budgetary considerations should not trump the requirement for equal treatment.

42. Aside from the objection relating to costs, the Administration's decision to refuse the request was also grounded on an incorrect reasoning that they had met their obligations vis-à-vis equal pay for work of equal value because the Applicant had received SPA from January 2012. The Administration failed to take into account the fact that receipt of SPA by the Applicant at the D-1 level did not entail any calculable pension contributions for him.

43. The decision to grant retroactive promotion is at the discretion of the Administration. However, discretionary authority is not absolute. In *Banguora*¹⁰, the former Administrative Tribunal concluded that although the Administration has discretionary power, which means necessarily, that staff members do not, strictly speaking, have a substantial right to secure a particular decision that should be protected, they do, however have a right to fair and equitable consideration and treatment because the Tribunal monitors the way in which that power is exercised

44. In the present case, any fair and equitable consideration of the exercise of discretion should have included the fact that the request for retroactive promotion was to remedy the results of a prolonged recruitment process in which the Applicant lost out in relation to pension rights. In addition, the obligations under the principle of equal pay for work of equal value had been triggered and not yet fully met. The withholding of the Administration's discretion was unfair. To that extent, therefore, a suitable remedy was and remains required and warranted.

Remedy sought

45. The Applicant requests the Tribunal to set aside the impugned decision and asks that it be returned to the appropriate official for reconsideration. In the alternative, the Applicant requests a monetary compensation equivalent to the pecuniary damages he will suffer as a result of the Administration's refusal to

⁹ *Op. cit.*

¹⁰ Judgment No. 1029 (2001).

grant him a promotion effective 1 January 2012. The Applicant estimates that these damages are equivalent to the amount of 12 months net base salary.

Respondent's submissions

46. The Respondent's case is summarized below.

a. The only question for the Tribunal is whether the Administration's discretion not to grant the Applicant a retroactive promotion for pension purposes as an exception under staff rule 12.3(b) was exercised fairly.

b. The contested decision is a discretionary decision. The Respondent submits that it is not for the Tribunal to make a determination of whether or not there was merit to the Applicant's request for a favourable discretionary decision; the Tribunal's role is not to substitute its own decision for that of the decision-maker as was held by the Appeals Tribunal in *Hastings*¹¹. As held in *Christensen*¹², the question of whether there are circumstances that justify an exception to the Staff Rules should be considered on a case by case basis.

c. The only question for the Tribunal is whether or not the exercise of discretion in the present case was legal, rational, and procedurally correct, and not tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors – in other words, whether the discretion was exercised properly. This is plainly distinguishable from deciding whether or not the Applicant's case warranted a favourable decision as contended by the Applicant.

d. Other than the general provision for granting exceptions to the Staff Rules, there is no provision for retroactive promotion within the rules and regulations of the Organization, which govern the employment of staff. The relevant instrument governing appointment of staff is ST/AI/2010/3 (Staff selection system), which states at section 10.2 that the

¹¹ 2011-UNAT-109.

¹² 2012-UNAT-218.

decision to select a candidate shall be implemented upon its official communication to the individual concerned. When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision, subject to the availability of the position and the assumption of higher-level functions.

e. Any request for retroactive promotion necessarily requires the Secretary-General to make an exception to the Staff Rules under rule 12.3(b).

f. Even if all the conditions in staff rule 12.3(b) are met, the matter remains a question of the exercise of discretion by the Secretary-General: a staff member has no right to the granting of an exception under this rule.

g. The Applicant's request for an exception to the Staff Rules was considered by the ASG/OHRM as expressed in her correspondence of 17 February 2014. In particular, the provisions of the United Nations Joint Staff Pension Fund (UNJSPF) regulations and rules were considered and revealed not to allow for retroactive contributions, and furthermore the UNJSPF had been consulted and indicated that such a retroactive promotion would incur actuarial costs and interest.

h. In exercising the relevant discretion, the ASG/OHRM took into account the fact that the Applicant had received special post allowance from the date of reclassification, and had therefore received "equal pay for work of equal value".

i. The evidence suggests that the Applicant's request for an exception was properly considered, and that the outcome was not based on any bias or prejudice or other improper motive. It was therefore a lawful exercise of discretion.

j. Should the Tribunal decide that the Secretary-General's discretion was exercised improperly; the question will arise as to what damages should be awarded to the Applicant.

k. The Respondent is unable to obtain an accurate actuarial calculation from the UNJSPF without incurring substantial costs. The Respondent submits that the onus is on an Applicant who pleads economic loss to make a clear and accurate claim, rather than simply speculate. In the present case the Applicant has urged the Tribunal to award him 12 months' net base salary which he estimates is equivalent to the pecuniary damages he will suffer as a result of the Administration's refusal to grant him a promotion effective 1 January 2012. The Tribunal is urged to exercise caution in accepting the Applicant's estimate, and to consider obtaining a proper calculation from the UNJSPF prior to making any award in this case.

Considerations

Respondent's disclosure of legally privileged email communications between the Applicant's Counsel and MEU.

47. In his filing of 30 September 2014, the Applicant's Counsel raises his concerns regarding the disclosure of e-mail communication between himself and the MEU. He submitted:

a. Such material in this case, Annex R/2 of the Respondent's submissions, remains privileged and should not be used to bolster the arguments of the Administration.

b. The MEU is an independent body set up, under the Under-Secretary-General for Management, to investigate and consider decisions of the Administration and specifically the compliance of managers with their human and financial responsibilities. Its primary purpose is to determine whether or not a decision of the Administration complied with established rules and procedure. They are not simply an extension of the

Administration. Rather they provide the Administration, with the opportunity to prevent unnecessary litigation.

c. Sharing confidential communication to the Respondent's Counsel would suggest, at the very least, a breakdown of these principles.

d. The Tribunal should consider the ramifications of such activity were this to be applied in other cases. Specifically, it would lead to the complete absence of any form of communication or possible mediation through the MEU, as legitimate concerns would be raised regarding whether such discussions would be disclosed to the Respondent's Counsel.

e. Such communication must remain privileged and should never, unless express consent is given, be provided to the Respondent's Counsel for any reasons whatsoever to support any particular argument.

f. The Tribunal should bring to the attention of the MEU such a concern.

48. The MEU came into being pursuant to General Assembly resolution 62/228¹³. Its purpose is stated in paragraphs 50 and 51 of that resolution. Paragraph 52 of the said resolution emphasizes that the MEU is an independent unit in the office of the USG/DM. Section 10 of ST/SGB/2010/9 (Organization of the Department of Management) sets out the core functions of MEU. These core functions include:

a. Conducting an *impartial and objective* evaluation of administrative decisions contested by staff members of the Secretariat to assess whether the decision was made in accordance with rules and regulations (emphasis added).

b. Making recommendations to the USG/DM on the outcome of the management evaluations and proposing appropriate remedies in case of improper decisions made by the Administration.

¹³ Administration of justice at the United Nations, para 52.

49. Privilege may attach to information for various reasons and apart from executive privilege, communications that are based on a confidential or fiduciary relationship such as those between a lawyer and his or her client or a psychiatrist and his or her patient¹⁴. The email exchanges between the Applicant's Counsel and MEU in respect to this case were filed by Counsel for the Respondent as Annex R2.

50. It is evident that MEU shared the emails with Counsel for the Respondent and the emails were reproduced in the Respondent's submissions. This represents either a serious failure in judgment by the officers concerned in MEU or an ignorance of the role of MEU in relation to the Respondent. The MEU's role is restricted to conducting an impartial and objective evaluation of administrative decisions contested by staff members of the Secretariat to assess whether a given decision was made in accordance with rules and regulations and not to act as Co-Counsel for the Respondent.

51. As correctly argued by the Applicant, such activity compromises the perception of MEU as an independent, impartial and objective Unit and "would lead to the complete absence of any form of communication or possible mediation through the MEU, as legitimate concerns would be raised regarding whether such discussions would be disclosed to the Respondent's Counsel".

52. The Tribunal shall not exercise its powers of referral in the present case but the Registry is directed to serve a copy of this Judgment on the Chief of MEU who should address this failure in judgment with his staff.

Was the Administration's discretion not to grant the Applicant a retroactive promotion for pension purposes only fairly exercised considering all the circumstances of his case?

53. The Applicant had argued that the Administration had discretion to grant him a retroactive promotion, for purposes only of his pension calculation, as an exception under staff rule 12.3(b). The said Staff rule 12.3(b) stipulates that,

¹⁴ Bertucci 2010-UNAT-062, para. 9.

Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

54. In the present case, the Applicant wrote to the ASG/OHRM to request retroactive promotion to the D-1 level as Chief of HRMS/UNON on 5 November 2013. On 27 February 2014, the ASG/OHRM responded in writing to the Applicant's request for retroactive promotion and declined to grant an exception to the staff rules as requested on the basis that UNJSPF had informed her that a retroactive promotion of the Applicant would give rise to actuarial costs and interest payable by the Organization.

55. It is the Applicant's case that the Administration's refusal to exercise its discretion in his favour was a complete abdication of its responsibilities towards him in respect of well laid-down principles of international administrative law. He further submitted that the Administration failed to give any real or proper consideration to his request and relied on costing that seemed not to have, in fact, been available to them. Finally, the Applicant submitted that despite payment of SPA, the period of time in which he worked as a P-5 officer on a D-1 post omits pension contributions and as a result violated the principle of equal pay for work of equal value.

56. The Respondent, on the other hand, submitted that the provisions of the UNJSPF regulations and rules were considered and revealed not to allow for retroactive contributions, and furthermore UNJSPF had been consulted and indicated that such a retroactive promotion would incur actuarial costs and interest. In addition, the Respondent submitted that in exercising the relevant discretion, the ASG/OHRM took into account the fact that the Applicant had received SPA from the date of reclassification, and had therefore received "equal pay for work of equal value".

57. In *Sanwidi*, UNAT held that,

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. *The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered*, and also examine whether the decision is absurd or perverse (emphasis added).

58. In the present case, it is evident that the ASG/OHRM was incorrect in assuming that the Applicant had received equal pay for work of equal value. This is because she failed to take into account the fact that for the period of time in which the Applicant had worked as a P-5 officer on a D-1 post, his pension contributions were omitted. This state of affairs gave rise to the Applicant earning a lower pension than he was properly entitled to.

59. The Tribunal concurs with the Applicant's submissions that the principle of the inclusion of pensions into the concept of equal pay for work of equal value is applicable in the present case. The Respondent has not challenged that assertion. The ASG/OHRM's exercise of discretion failed to take account of that critical fact and the Applicant ought to be compensated for it.

Remedy

60. The Applicant prayed the Tribunal to set aside the impugned decision and that it be returned to the appropriate official for reconsideration. In the alternative, he seeks monetary compensation equivalent to 12 months net base salary. Rather than joining issues to contest the Applicant's estimate of the damages due to him, the Respondent instead urges the Tribunal to exercise caution in accepting the Applicant's estimate, and to consider obtaining a proper calculation from the UNJSPF prior to making any award in this case.

61. The Respondent further submitted that he is unable to obtain an accurate actuarial calculation from the UNJSPF without incurring substantial costs and that the onus is on an Applicant who pleads economic loss to make a clear and accurate claim, rather than simply speculate. The Tribunal does not have the resources to "incur substantial costs" in obtaining an actuarial calculation and has no reason to discount the Applicant's calculation.

Judgment

62. The Tribunal awards the Applicant 12 month's net base salary as compensation.

(Signed)

Judge Nkemdilim Izuako

Dated this 18th day of April 2016

Entered in the Register on this 18th day of April 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi