UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/065/R1
Judgment No.: UNDT/2016/188
Date: 17 October 2016
Original: English

Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PEDICELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Katya Melluish, UNON
Camila Nkwenti, UNEP

Introduction and Procedural History

1. The Applicant is a Meetings Services Assistant at the Secretariat of the Convention on Biological Diversity (SCBD) based in Montreal, Canada. The SCBD is part of the United Nations Environment Programme (UNEP) which has its headquarters in Nairobi and is administered by the United Nations Office at Nairobi (UNON).

2. On 26 November 2012, the Applicant filed an application with the United Nations Dispute Tribunal (UNDT) contesting the decision to introduce the Global Classification Standard (GCS) for General Service (GS) positions in Montreal. It is the Applicant's case that she was in effect demoted by one level, and that what the Respondent referred to as a "renumbering" exercise was in effect a reclassification of her post which failed to accord with due process and denied her the protection afforded by reclassification exercises under ST/AI/1998/9 (System for the classification of posts).

3. On 26 June 2014, the Dispute Tribunal found that the application was not receivable.[1] The Tribunal held that the Applicant's challenge that the renumbering exercise was a violation of her rights was premature, speculative and without merit.

4. On appeal by the Applicant, the United Nations Appeals Tribunal (Appeals Tribunal) ruled, on 2 July 2015, that the application was receivable and remanded the case to the Dispute Tribunal for consideration before a different judge.[2]

5. The case was assigned to another judge. Following a Case Management Discussion (CMD) in March 2016, the parties filed additional documents and their respective closing submissions.

[1] UNDT-2014-087.
[2] 2015-UNAT-555.

6. On 4 August 2016, the parties were informed that this matter had been transferred to the docket of Judge Goolam Meeran.

7. By Order No. 410 (NBI/2016) the parties were ordered to attend a CMD on 17 August 2016. Following the CMD, the Tribunal issued Order No. 416 (NBI/2016).

8. Both parties stated that the record is complete and that no further particulars, documents or submissions are necessary. They consented to the case being considered and determined on the basis of the documents on file.

The Facts

9. In June 1998, the Applicant commenced employment with the United Nations at the Secretariat of the Multilateral Fund for the Implementation of the Montreal Protocol at the G-6 level.

10. On 29 August 2006, the Applicant joined the SCBD at the G-7 level.

11. On 10 February 2011, the Applicant's appointment was converted to a permanent appointment at the G-7 level, step10 with retroactive effect as of 30 June 2009 which carried a nine-level salary scale applicable to staff serving in the GS category in Montreal, Canada.

12. It is important to note that elsewhere within the United Nations Common System (UNCS), the International Civil Service Commission (ICSC) had promulgated a new seven-scale job classification standard for staff serving in the GS and related categories. This resulted in a harmonised approach to job classification for GS positions globally.

13. The following facts are taken from the Appeals Tribunal's Judgment No. 2015-UNAT-555:

> 6. In March 2012, the International Civil Aviation Organization (ICAO), which acts as the lead agency for ICSC and

UN Common System matters in Montreal, announced that in April 2012 it would commence the conversion from the nine-level salary scale then applied to GS staff at the Montreal duty station to the seven-level salary scale promulgated by the ICSC.

7. In late March 2012, UNON's Human Resources Management Service informed the SCBD staff that, pursuant to the ICAO's lead, it would renumber SCBD posts in order to align them with all the other United Nations organizations at the seven-level structure. As a result of the realignment, G-7 level posts, including Ms. Pedicelli's post, would henceforth be renumbered as G-6 level posts.

8. In early May 2012, a number of staff members, including the Appellant, received Personnel Action forms confirming their new grade. Ms. Pedicelli's Personnel Action form indicated that effective from 1 April 2012 she was appointed at the G-6 level, Step 10.

9. On 20 May 2012, Ms. Pedicelli requested management evaluation of the decision to "reclassify and/or downgrade [her] salary scale level from G7 to G6 due to the introduction of the Global Classification Standard for General Services positions" at the SCBD in Montreal. She claimed that the renumbering exercise amounted to a downgrading of her post, breached Administrative Instruction ST/AI/1998/9 (System for the Classification of Posts), and was conducted without due diligence in the planning and implementation phases.

10. On 28 August 2012, the Management Evaluation Unit (MEU) advised Ms. Pedicelli that her request was moot. The MEU found that SCBD's "realignment exercise" appeared premature and that the SCBD uniformly renumbered all posts without regard to the actual functions and description of each post or tailoring the process. However, while the MEU considered that the renumbering exercise should have been carried out by the SCBD in a non-arbitrary manner that respected the rules of natural justice, the contested decision, i.e., the "realignment exercise", had been rendered moot as the SCBD was conducting a classification exercise pursuant to Administrative Instruction ST/AI/1998/9.

11. On 26 November 2012, Ms. Pedicelli filed an application with the UNDT contesting the manner in which SCBD implemented the Global Classification Standard for GS-positions in Montreal, namely by a unilateral renumbering exercise that resulted in a *de facto* reclassification of posts down one level in breach of ST/AI/1998/9. She requested, inter alia, reinstatement to her personal grade at the level of G-7, Step 10, and related salary adjustments.

12. On 26 June 2014, the UNDT issued its Judgment and dismissed Ms. Pedicelli's application on the basis that it was not receivable. The UNDT found that Ms. Pedicelli had failed to

> challenge an "appealable administrative decision" in that the contested decision was made by the ICSC and not the Secretary-General, and the latter had no discretionary authority in proceeding with implementing the ICSC's decision. The UNDT further found that the contested decision was not taken solely with respect to Ms. Pedicelli, nor did the renumbering exercise give rise to legal consequences that adversely affected her given that her functions, salary and emoluments remained the same even after her post was reclassified at the G-6 level. Consequently, it found that Ms. Pedicelli had no standing to contest the decision. Notwithstanding its findings on receivability, the UNDT also considered the merits of Ms. Pedicelli's claims, and found that her application did not disclose a cause of action.

14. In March 2010, ICAO which acts as the lead agency for ICSC and UNCS in Montreal, announced that in April 2012 it would commence conversion from the nine-level salary scale applied to GS staff at the Montreal duty station to the seven-level salary scale promulgated by the UNCS.

15. Posts in the G-8 to G-2 levels were renumbered G-7 to G-1 levels respectively. For the Applicant, this resulted in her position being renumbered from G-7 to G-6.

16. It is the Applicant's case that her personal grade level, as indicated in her initial letter of appointment, was at the G-7 level. This was confirmed in the conversion of her contract to a permanent appointment at the G-7 level. Accordingly she was being "downgraded" from G-7 to G-6 and this was in violation of her contractual rights.

17. In March 2012, ICAO informed UNON's Human Resources Management Service (HRMS) that the Montreal duty station would be aligned to the GCS as of 1 April 2012.

18. On 1 May 2012, UNON/HRMS implemented the new GCS for Montreal.

19. On 20 May 2012, the Applicant submitted a request for management evaluation of the decision to renumber her post from G-7 to G-6. She asserted that the renumbering exercise would amount to a downgrading of her post. Among her submissions to MEU was that in contrast to the approach SCBD adopted, the

ICAO led renumbering process "applied checks and balances and transition measures to its own staff, provided training opportunities, and correctly, left it to other agencies to determine how they would implement the transition. However, the renumbering exercise with the SCBD staff was led by UNON and not by the UNEP Administration, whereby the required checks and balances were simply omitted."

20. Many staff in the SCBD GS category sought management evaluation of the renumbering decision and the process leading up to the implementation of the impugned decision.

21. On 28 August 2012, MEU found that

> [T]he SCBD administrative decision to implement the realignment exercise did not fully comport with the rules of natural justice and the right of staff members to have administration decisions affecting their rights taken in a non-arbitrary manner.

22. The MEU, however, went on to hold that the Applicant's challenge to the impugned decision was moot because the SCBD was, at the time, also engaged in a classification of posts exercise, in accordance with ST/AI/1998/9 and that GS posts of each staff member would be examined individually, based on its functions and in accordance with United Nations Rules and administrative guidelines.

23. UNEP dispatched an expert consultant to Montreal to explain the exercise to all staff members there. The consultant completed his review and made his recommendations in October 2012.

Considerations

24. Given the issues between the parties as to the import and effect of the Appeals Tribunal's Judgment, the Tribunal considers that it will be helpful to set out the Appeals Tribunal's Considerations and Judgment before commenting on, and ruling, on the respective contentions of the parties:

21. In Articles 10 and 12 of the ICSC Statute, the ICSC is given functions and powers related to the establishment of salaries for staff members in the General Service and related categories. Pursuant to Article 10(a), the "Commission shall make recommendations to the General Assembly on […] [t]he broad principles for the determination of the conditions of service of the staff". Pursuant to Article 12(1), "the Commission shall establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories" at the "headquarters duty stations and such other duty stations as may from time to time be added".

22. By resolution 67/241 (Administration of Justice at the United Nations), the General Assembly reaffirmed that "the decisions of the International Civil Service Commission are binding on the Secretary-General and on the Organization".5

23. Ms. Pedicelli contested the Secretary-General's implementation of the ICSC's decision to harmonize the numbering of posts at the GS level across the United Nations Common System.

24. The Dispute Tribunal dismissed the application on the basis that Ms. Pedicelli had failed to challenge an "appealable administrative decision" in that the contested decision was made by the ICSC and not the Secretary-General, and the latter had no discretionary authority in proceeding with implementing the ICSC's decision. The Dispute Tribunal further found that the not establish that the renumbering exercise gave rise to legal consequences that adversely affected her given that her functions, salary and emoluments remained the same even after her post was renumbered at the G-6 level. Consequently, it found that Ms. Pedicelli had no standing to contest the decision.

25. Article 2(1)(a) of the Dispute Tribunal Statute provides that the Dispute Tribunal is competent to review an application contesting an administrative decision that is alleged to be in non-compliance with an applicant's terms of appointment or the contract of employment. The Appeals Tribunal has had the opportunity to define what constitutes an administrative decision susceptible to challenge. In *Andati-Amwayi*, the Appeals Tribunal considered: […]

> … What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

> … In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.
>
> … What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

26. In *Lee*, this Tribunal held: […]

> … [T]he key characteristic of an administrative decision subject to judicial review is that the decision must 'produce [] direct legal consequences' affecting a staff member's terms and conditions of appointment; the administrative decision must 'have a direct impact on the terms of appointment or contract of employment of the individual staff member'.

27. In the framework of the foregoing principles, we have found that several challenges to the ICSC's decisions were not receivable insofar as the ICSC is "answerable and accountable" only to the General Assembly and not the Secretary-General, to whom ICSC decisions cannot be imputed in the absence of any discretionary authority to execute such decisions. […]

28. In the present case, the Appeals Tribunal concurs that the Secretary-General was duty bound to implement decisions of the ICSC as directed by the General Assembly in resolution 67/241. For the most part, such decisions are of a general application and therefore are not reviewable.

29. Notwithstanding the foregoing, it is an undisputed principle of international labour law and indeed our own jurisprudence that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such decision shall be treated as an "administrative decision" falling within the scope of Article 2(1) of the Statute of the Dispute Tribunal and a staff member who is adversely affected is entitled to contest that decision.

> 30. The substantive argument put forward by Ms. Pedicelli was that the renumbering exercise, resulting in the downgrading of her personal grade from the G-7 level to the G-6 level, adversely affected her contractual rights under her permanent appointment. She contends that the finding by the Dispute Tribunal that the decision had no adverse effect on her is not based on fact.
>
> 31. The Secretary-General submits that the UNDT correctly dismissed the application as non-receivable, finding that the Appellant failed to establish any direct and adverse legal consequence arising from the renumbering exercise, as required by the definition of an "administrative decision".
>
> 32. Contrary to the Secretary-General's submission, the Appeals Tribunal finds that Ms. Pedicelli has demonstrated that the renumbering exercise had an adverse and direct impact on her. Annexed to her UNDT application as well as her appeal brief were Ms. Pedicelli's Personnel Action Forms, the first approved on 23 February 2011, before the renumbering exercise, and the second approved on 4 May 2012, after implementation of the renumbering exercise. Her Personnel Action Forms reflected her respective salary scale and level for the periods under contest and evidence, as Ms. Pedicelli claims, that after implementation of the renumbering exercise her salary was reduced.
>
> 33. The UNDT failed to give any consideration to them and thus erred on a question of fact leading to a manifestly unreasonable decision, and erred in law in concluding that Ms. Pedicelli's application was not receivable.
>
> 34. This error alone warrants remand of the matter to the UNDT for *de novo* consideration.

25. A question has arisen as to the proper meaning and effect of paragraphs 32 to 34 of the Judgment of the Appeals Tribunal in that the first sentence of paragraph 32 may be read as a finding of fact that Ms. Pedicelli suffered an adverse and direct impact in that there was a reduction in her salary. However, the Respondent contends that such a reading would appear to be inconsistent with paragraph 34 which refers to a remand of the case for *de novo* consideration. This issue was discussed at the CMD on 17 August 2016 and by Order No. 423 (NBI/2016), the Tribunal gave the parties the opportunity of addressing the

matter. The Applicant contended that it was not open to the UNDT to review a finding of the Appeals Tribunal but conceded that the information presented by the Applicant, as annexes to her application to the UNDT, were submitted in error and were not intended to prove that she suffered a reduction in salary. The Respondent contended that, in the event that the Judgment of the Appeals Tribunal may be read as a finding that the Applicant incurred a loss in salary, it was based on a misreading of the Personnel Action Forms.

26. The significant question arising from these contentions is whether any finding of fact by the Appeals Tribunal can properly be open to question by the UNDT. The Respondent submits that a finding based on an error of fact is not binding. Given the UNDT's interpretation of the Appeals Tribunal's Judgment, it is not necessary to say more than simply to assert the binding authority of the Appeals Tribunal on questions of fact and law. It is noted that neither party thought fit to ask the Appeals Tribunal for a review of this aspect of the Judgment or to request an interpretation or clarification of paragraphs 32 to 34.

27. Paragraph 32 has to be read in the context of the entire Judgment without a narrow focus on particular words or phrases. A careful analysis of the entirety of the Appeals Tribunal's "Considerations" section will clarify the essential point of the ruling. The Appeals Tribunal was dealing with the grounds of appeal and in particular the basis of the reasoning of the UNDT Judgment which found the claim to be not receivable. In doing so, the Appeal's Tribunal first dealt with the legal principle that where a decision of general application has an adverse impact on the terms of the contract of employment of an individual such a decision shall be treated as an "administrative decision" falling within the scope of art. 2.1 of the Statute of the Dispute Tribunal.

28. A staff member who raises a credible claim which needs to be tested ought not to be shut out at a preliminary stage. There is a difference between a claim that is clearly not receivable because it does not challenge an administrative decision within the meaning of art. 2.1 and a claim which on the face of it raises an apparently credible challenge that a decision of general application has an

adverse impact on an individual staff member. Such a claim has to be determined on its merits.

29. Whether or not the Applicant actually suffered a detriment goes to the merits of her claim and is not to be dismissed on the ground of non receivability particularly in circumstances where the evidence put forward is not taken into account. As the Appeals Tribunal said at paragraph 33 of the Judgment, "[t]he UNDT failed to give any consideration to them and thus erred on a question of fact leading to a manifestly unreasonable decision, and erred in law in concluding that Ms Pedicelli's application was not receivable". And at paragraph 34 "[t]his error alone warrants remand of the matter to the UNDT for *de novo* consideration". The Appeals Tribunal's direction is that the UNDT should now examine the evidence *de novo* since it had not previously been examined by the UNDT as the trier of fact. Any other reading of the Appeals Tribunal's Judgment, would lead to an absurd conclusion.

30. The Appeals Tribunal having determined that the claim is receivable, it falls to this Tribunal to examine *de novo* whether the Applicant's contention is correct that she suffered a financial loss and a downgrading of her personal grade as a direct consequence of SCBD's "realignment exercise".

The Parties' contentions

31. The principal contentions of the Applicant are:

a. That this was a classification exercise which was not compliant with ST/AI/1998/9.

b. That she was in effect downgraded in her post and lost her personal grade as a G-7 level staff member.

c. As a consequence of the reclassification to a lower level she suffered a loss in salary and a consequent diminution of pension benefits.

32. The principal contentions of the Respondent are:

a. This was not a classification or re-classification exercise but a renumbering exercise which was carried out in a mathematical fashion with the aim of aligning the Montreal nine-grade scale with the rest of the UNCS.

b. The Applicant suffered no loss in standing, functions, benefits or any other detriment.

c. The change in the Applicant's personal grade from G-7 to G-6 was a change in name only and carried no loss of any kind and there was no loss or injury to compensate.

d. The renumbering exercise was not at the initiative of the Secretary-General but as the result of a promulgation of the ICSC. The Respondent had no option but to implement it. Whilst conceding that there were procedural flaws in the process of implementation, these were remedied by the subsequent classification exercise. The Applicant was graded at the G-6 level. It was open to her to challenge this decision which she did but it was out of time.

e. The Applicant is mistaken in submitting that she had a personal grade of GCS G-7 and is entitled to a promotion to that grade. In fact her personal grade was "Montreal G-7" which is the same as "GCS-G-6"

Did the Applicant suffer a loss in status, standing, salary, promotion opportunities or pension benefits, or any other compensable loss including moral damages?

33. By Order No. 427 (NBI/2016), the Applicant was given the opportunity of providing evidence, arguments and submissions to justify her claim that she was subjected to a classification exercise and not a renumbering exercise and that as a result she suffered loss.

34. The detailed submissions put forward by the Applicant identify various losses but they are based on the premise that she had a personal grade which was

wrongly taken away from her by a classification of post exercise in breach of ST/AI/1998/9.

35. The issue for the Tribunal to determine is whether this was a classification exercise and, if it was, whether the Respondent followed proper procedures and what loss or damage, if any, has the Applicant in fact suffered.

36. Both sides were given ample opportunity during the course of these lengthy proceedings to put forward all facts, arguments and submissions which included comments on the proper interpretation of the Appeals Tribunal's Judgment No. 2015-UNAT-555.

37. The Tribunal notes the Applicant's explanation that appended to her original appeal were a list of annexes which contained documents submitted in error with her initial application to the UNDT. These documents were not submitted to the Appeals Tribunal to prove that she underwent an absolute reduction in salary and that it was never her contention. This explanation is helpful and properly advanced. The parties are agreed that it is a matter for the Tribunal, on a *de novo* remand, to examine the evidence and adjudicate upon the merits of the parties' respective contentions.

38. It was conceded by the Respondent, at the stage of management evaluation, that the implementation of the renumbering exercise, was procedurally flawed. However, it was remedied by the fact that staff members affected, including the Applicant, were given the opportunity of undergoing a properly conducted classification exercise. The Applicant was graded at "GCS-G6". There is no complaint by the Applicant regarding this decision and the only issue seems to relate to what the Applicant regards as a downgrading of her personal grade. The Tribunal finds that there is no merit in this argument for two reasons.

39. First, the Tribunal is satisfied that this exercise had a legitimate organizational objective of introducing the GCS for GS positions throughout the UNCS. Accordingly, the grade level of staff in SCBD Montreal had to be aligned to conform with the GCS. In the circumstances it was not an exercise in classification within the meaning of ST/AI/1998/9.

40. Second is the fact that when the Applicant submitted her post to a proper classification it was graded at GCS-level G-6 which is equivalent to her previous grade. The Applicant has failed to demonstrate that the alignment of her post to conform with the GCS had a detrimental impact on her salary or pension benefits.

41. The Tribunal is slow to accept, without proper scrutiny, any submission that a breach of procedure was remedied by a subsequent event. However, in this case there is no suggestion that the classification exercise was an attempt by the Respondent simply to insulate himself from liability for any wrongful act. The outcome of the classification was no different to the alignment/renumbering exercise. The Applicant remained at GCS level 6. It is clear from the evidence that even if a formal classification exercise had taken place prior to the realignment of her post to conform with the GCS she would not have retained the G-7 grade which was an anomaly within the system.

42. The figures and calculations used by the Applicant to prove any pecuniary loss were based on the assumption that she was wrongly placed at the GCS-Level-6 instead of GCS-level-7. Since this assumption is flawed her calculations of loss cannot be accepted. The Tribunal finds on the evidence that the Applicant's submissions that she suffered pecuniary loss are without merit. The Applicant also sought reinstatement of her personal grade level to G-7 step X and moral damages of USD60,000 for loss of opportunity and damage to her professional reputation. The Tribunal finds no basis to support such claims and accordingly rejects them.

JUDGMENT

43. The Application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 17th day of October 2016

Entered in the Register on this 17th day of October 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi