UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/013
Judgment No.: UNDT/2018/049
Date: 13 April 2018
Original: English

Before: Judge Ebrahim-Carstens

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:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Records Clerk at the GS-4 level in the Field Personnel Division ("FPD"), Department of Field Support ("DFS"), in New York, filed an application contesting the decision appointing him as a Clerk at the GS-3 level in 1997 against an unclassified post (Post No. QSA-02861TOL041) in the Department of Peacekeeping Operations ("DPKO"). The Applicant seeks retroactive correction of his grade to the GS-5 level from the date of his appointment on 16 June 1997 to 2000 when the post was classified at that level. He also seeks compensation for loss of opportunity and the emotional distress caused by the Respondent's administrative delay in responding to his claim.

2. In response, the Respondent contends, *inter alia*, that the application is not receivable as it is time-barred because: (a) the Applicant knew of the Organization's decision to appoint him at the GS-3 level in 1997; (b) he had reason to know by January 2000 that the post had previously not been classified; and (c) that the Tribunal cannot receive claims more than three years after the receipt of a contested administrative decision. Alternatively, the Respondent contends that the Applicant failed to comply with the 60-day time limit to request management evaluation of the decision not to grant his request for retroactive placement at the GS-5 level from 16 June 1997. Furthermore, the Respondent submits that the principle of *res judicata* bars the Applicant since the United Nations Appeals Tribunal has rendered a final Judgment in Case No. UNDT/NY/2012/060 on the same issue of whether the Applicant should have been placed at the GS-5 level from 16 June 1997.

3. Finally, the Respondent avers that, if the application is receivable, it should be dismissed on the merits as the Applicant has not demonstrated that a delay in classification of the post breached his terms of appointment or caused him loss. Also, the Applicant has not established that he would have been selected for the position of

Records Clerk at the GS-5 level, had the post been classified at the GS-5 level prior to 2000.

Factual and procedural history

Agreed facts

4. In their jointly signed submission of 17 February 2017, the parties outline the following agreed facts (footnotes omitted):

> … In August 1992, the Applicant commenced work with the Organization on a temporary appointment for a period of three months. At the end of 1996, apart from a five month break in service, he had served with the Organization for four years.
>
> ... In June 1997, the Applicant commenced work as a Clerk in the Department of Peacekeeping Operations at the G-3 level.
>
> ... In 23 May 2000, the Applicant was promoted to the GS-4 level, with effect from 1 June 2000.
>
> … On 25 January 2000, the post was classified at the GS-5 level.
>
> … On 8 September 2011, the Applicant made two requests for retroactive payment of a special post allowance ["SPA"] to compensate him for having performed work at the GS-5 level since 16 June 1997. These two similar requests were addressed to the Executive Officer for DPKO, and to OHRM.
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> ... 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 Management Evaluation Unit ["MEU"] recommended two years' payment of SPA. The Applicant received payment of SPA for the period 17 Apri1 2010 to 16 Apri1 2012.
>
> … On 1 July 2012, the Applicant filed an application in Case No. UNDT/NY/2012/060 contesting the payment of the SPA to be insufficient.
>
> ... On 11 September 2014, the Applicant filed a request for management evaluation of: a) the decision on 16 June 1997 to appoint

him to a post that was not classified; b) the decision to not classify this post until January 2000; and c) the decision to not correct his pay grade to GS-5 following the classification of the post at GS-5 level in January 2000. He sought placement at the GS-5 pay grade retroactive from 16 June 1997, the date of his entry on duty in the post.

… On 17 September 2014, the MEU responded to this request, advising that it was premature as no decision had yet been taken by the administration.

… Between October 2014 and September 2015, the Applicant communicated with senior management of the department regarding the issues outlined in his management evaluation request.

… On 24 September 2015, the Applicant requested the amendment of his 11 September 2014 management evaluation request to reflect that he had attempted to pursue the matter with the Administration without resolution.

… On 4 February 2015, the Dispute Tribunal issued its decision with respect to the Applicant's request for SPA while performing higher level functions (*Hosang*, UNDT/2015/012). In that decision, the Dispute Tribunal ordered that the Applicant receive SPA from the GS-4 to the GS-5 level from 25 January 2000 until the date that he ceases to perform such duties at the GS-4 level.

… On 30 December 2015, the Appeals Tribunal (2015-UNAT-605) upheld the decision of the Dispute Tribunal in relation to the awards of compensation equivalent to SPA from January 2000.

… On 13 January 2016, MEU responded to the Applicant's revised request for management evaluation, finding that it was not receivable *res judicata*. Specifically, that the matter raised in the 11 September 2014 management evaluation request had been explicitly dealt with by the MEU in response to an earlier management evaluation request dated 1 March 2012, as well as by both the Dispute Tribunal and the Appeals Tribunal.

… On 8 April 2016, the Applicant filed his application.

Management evaluation in the present case

5. The record shows that on 11 September 2014, the Applicant submitted a request for management evaluation of:

> A) The decision to place me on a post that was not classified (post number QSA-02861-TOL-041 (IMIS1371) at the time of my appointment at GS-3 level in 1997;
>
> B) The decision to not classify this post until January 2000 (it was classified at grade GS-5);
>
> C) The decision to not correct my pay grade to GS-5 from GS-3 following the classification of this post.

6. On 17 September 2014, the MEU wrote to the Applicant to inform him that his request for management evaluation was not receivable, *inter alia*, stating:

> […]
>
> […] You contend that you should be remunerated retroactively to the GS-5 level for the period you carried out the functions between 1997 and 2000. However, prior to your submission to the MEU, you did not put the matter before the Administration. The MEU noted the statement in your request that you want to give the Administration "a chance to correct itself". It is clear from this that the Administration has not as yet reviewed the matter, and accordingly has not had an opportunity to take a decision on retroactive remuneration in favour or against your request.
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> The MEU accordingly found that no administrative decision has been taken in the present matter. As it is the mandate of the MEU to determine whether an administrative decision complies with the Organization's applicable regulations, rules and policies, the absence of such a decision makes your request premature. Therefore, the MEU lacks authority to review your case.
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> The MEU noted that, firstly, should you wish to pursue the matter, you should inform the Administration of your grievance for its review and determination. Should you wish to challenge the outcome of that determination at that point, you retain your right to request management evaluation at that time, provided you do so within the proper statutory time-frame.
>
> […]

7. By email dated 15 October 2014, the Applicant requested to meet, accompanied by his Counsel, with Mr. DP (name redacted), a staff member of DPKO and DFS to discuss the issues raised in his request for management evaluation dated 11 September 2014 and the response dated 17 September 2014.

8. By email dated 28 October 2014, and in response to a follow-up email from the Applicant sent the same day, Mr. DP responded by stating: "As to the 17 September 2014 MEU response I see no need for a meeting and nothing to discuss".

9. By email dated 17 April 2015, the Applicant wrote again to Mr. DP, referring him once more to the letter from the MEU dated 17 September 2014, and stating that in accordance with the advice set forth therein, he was again recalling his grievance for the attention of the Department for its review and determination.

10. By email dated 27 April 2015, Mr. DP responded to the Applicant, stating that the history of the Applicant's appointment and post classification had been addressed at the Dispute Tribunal and needed to be further determined by the Appeals Tribunal. He concluded by stating that "the matter will be finalized upon due completion of the appeal process". It is common cause that the Appeals judgment was issued on 30 October 2015.

11. By email dated 28 May 2015, the Applicant responded to Mr. DP stating that the presiding Judge in Case No. UNDT/NY/2012/060 had determined that the issue "is another case" and that the matter therefore was not addressed by the Tribunal as part of Case No. UNDT/NY/2012/060. The Applicant requested that the Department reconsider its position and take the corrective action requested.

12. The Applicant followed-up by email dated 14 September 2015, again requesting that the Administration take a decision on the matter "[i]n my favour or against it".

13. By email dated 14 September 2015, Mr. DP responded to the Applicant, stating that the issues addressed in his previous emails "appear to be covered in [*Hosang* UNDT/2015/012] as relating to the history and circumstances of the classification of the post and the consequences thereof" (emphasis in original). However, Mr. DP asked for further clarification regarding the Applicant's statement

that the presiding Judge in Case No. UNDT/NY/2012/060 had determined that the issue was the subject of another case.

14. By email dated 15 September 2015, the Applicant responded to Mr. DP, stating that the matter raised was not addressed in *Hosang* UNDT/2015/012, and that that particular judgment relates to the history and circumstances of the post classified in January 2000 and the consequences thereof. He noted that the Dispute Tribunal provided the parties with the audio recording of the hearing in Case No. UNDT/NY/2012/060 and suggested that the Respondent's Counsel could confirm his statement regarding the remarks of the Judge in that case and provide their own comments and clarification.

15. By letter dated 24 September 2015, the Applicant wrote to the MEU stating that, in light of their letter dated 17 September 2014, he had taken action "to get a decision in my favor or against it by my department (DFS) in line with the letter but did not succeed". He requested an amendment of his prior request for management evaluation, dated 11 September 2014, as follows (emphasis in original):

> Under the question ***Have you discussed the matter with your supervisor(s)/the decision maker?*** please delete the reply "No" and replace it with the following:
>
> "Yes. I have discussed the matter with my department in a series of emails from 15 October 2014 to 15 September 2015 seeking a decision in line with MEU letter MEU/1279-14R (MM) of 17 September 2014. I did not succeed. The history of this email is attached.

16. On 30 September 2015, the MEU wrote to the Applicant acknowledging his correspondence dated 11 September 2014, as amended on 24 September 2015, stating (emphasis in original):

> … pursuant to Staff Rule 11.2 (d), the management evaluation in your case is to be completed within 30 days of receipt of your complete request, or no later than **24 October 2015**. If there is any delay in completing the management evaluation, the MEU will contact you to so advise. In any event, please be advised that, pursuant to Staff Rule 11.4 (a), the 90-day deadline for filing an application to

> the UNDT, should you wish to do so, will start to run from **24 October 2015**, or the date on which the management evaluation was completed, if earlier …

17. On 13 January 2016, the MEU wrote to the Applicant with reference to his request for management evaluation dated 11 September 2014, as amended on 24 September 2015. The MEU concluded that the Applicant's request for management evaluation was not receivable, *inter alia*, stating:

> Given the findings of the MEU that this matter has been thoroughly considered and adjudicated by the [Dispute and Appeals Tribunals], the MEU considered that the principle of res judicata was applicable to this case and thus, it could not find this matter receivable. […]

The proceedings before the Dispute Tribunal

18. The Applicant filed the application in the present case on 8 April 2016.

19. On 12 May 2016, the Respondent filed his reply.

20. On 25 January 2017, the Applicant filed a submission addressing the Respondent's reply as directed by Order No. 1 (NY/2017), dated 5 January 2017.

21. On 10 February 2017, the parties filed a joint submission pursuant to Order No. 21 (NY/2017), dated 2 February 2017, informing the Tribunal that they did not agree to attempt informal resolution.

22. On 17 February 2017, the parties filed a joint submission also pursuant to Order No. 21 (NY/2017), informing the Tribunal that they agreed for this matter to be decided on the papers. The parties also submitted a list of agreed and contested facts and issues, as well as of the documentary evidence they requested to be produced.

23. On 21 February 2017, the Applicant, submitted a "Motion to File a Correction to an Altered Document". The Applicant, referring to an annex submitted by the Respondent appended to the parties' joint submission, stated that this annex, (consisting of tables setting out education, tests, and minimum experience required

for the various grades and which is part of a Personnel Directive PD/1/94 on Guidelines for the Recruitment and Promotion of General Service staff at HQ), had "been altered to not show the complete text of this page". To the motion, the Applicant appended an "uncovered complete text […] for the full information of the court".

24. On 22 February 2017, by Order No. 37 (NY/2017), the Tribunal directed the Respondent to comment on the Applicant's motion.

25. On 24 February 2017, Counsel for the Respondent submitted comments as directed by Order No. 37 (NY/2017) stating that the Respondent had "provided the copy of Personnel Directive PD/1/94 that [he had] on record. This copy contains annotations and highlighting, which may have unintentionally obscured the text". Counsel further noted that he had since obtained a clean copy of the document, which he then appended.

26. On 27 February 2017, the Applicant filed a motion seeking leave to file a rebuttal to the Respondent's above filing, stating that "[t]he Applicant has evidence to disprove [the] statement" of the Respondent.

27. On 6 June 2017, by Order No. 104 (NY/2017), the Tribunal granted the Applicant's motion for leave to file a rebuttal instructing the Applicant to file his submission, "concisely setting out the nature of such rebuttal evidence and attaching any further documentary evidence if available" by 16 June 2017.

28. On 15 June 2017, the Applicant filed his submission pursuant to Order No. 104 (NY/2017) together with annexes indicating *inter alia* that the "Applicant repudiates and considers disingenuous the Respondent's remarks […] regarding page 11 […]" and provided a specimen as an annex of the page in issue, which illustrates "that page 11 was obscured by a piece of blank paper -- not by 'annotations and highlighting'". The Applicant alleged that on comparing the two, the specimen he produced clearly indicated that "the same part of page 11 was intentionally obscured during that period not 'unintentionally obscured'". The Applicant maintained that

the concealed text, shown uncovered in the specimen, supported the contention that he could have been appointed at GS-5 level when he was reappointed in July 2000; as he had more than "5 years of progressively responsible related experience" (being the text obscured by the concealed portion). The Applicant alleged that the untrue and misleading statements and the concealment and withholding of evidence demonstrated a pattern of abuse of judicial process.

29. On 19 June 2017, the Applicant resubmitted his submission of 16 June 2017 with corrected annexes.

30. By Order No. 132 (NY/2017) dated 13 July 2017, the Tribunal ordered the Respondent to file a response, if any, to the Applicant's submissions of 16 and 19 June 2017 by 21 July 2017, further noting that it would "proceed to decide the matter on the papers before it, or give any further directions as prayed or as necessary".

31. On 21 July 2017, the Respondent filed his response to Order No. 132 (NY/2017) in which he submitted that:

> … The Respondent apologizes for the inconvenience caused by filing an incorrect copy of PD/1/94 as an attachment to the joint submissions dated 17 February 2017.
>
> … The Respondent has on record two distinct electronic copies of PD/1/94, Recruitment of external candidates to posts in the General Service and related categories at Headquarters. The first copy is a clean copy of PD/1/94. The clean copy has no annotations, or highlighting. This copy is attached to the Respondent's Reply dated 12 May 2016 as Annex R/8.
>
> … The second electronic copy of PD/1/94 contains annotations and highlighting, which may have obscured a portion of the text of PD/1/94. Due to an internal error, this second copy was shared with the Applicant's counsel during the preparation of the joint submissions in response to Order No. 21 (NY/2017). Due to a second internal error, this second copy, with the annotations removed, was then filed as an attachment to the joint submission of the parties. Counsel for the Respondent subsequently corrected and apologized for this error on 24 February 2017.

> … The Applicant identifies no prejudice from the filing error. A complete copy of PD/1/94 has been available to the Applicant since at least the date of the Respondent's Reply.

Consideration

Preliminary matters—apparent filing error in connection with the Respondent's submission of an attachment to the 17 February 2017 joint submission

32. At the outset, the Tribunal notes that a clearcopy of PD/1/94 with the relevant text unobscured was attached to the Respondent's reply, but not to the joint submission, which instead contains the copy without the relevant text. In any proceedings, an agreed joint bundle is produced for judicial efficacy and is normally the documentation that a tribunal would rely upon in deciding a matter; it must therefore include all the correct documents for a justiciable finding. The Tribunal also notes that the copy of PD/1/94 produced by the Applicant indicates that the relevant text was obscured by a piece of blank paper prior to being photocopied. This is disconcerting. However, the Tribunal makes no comment regarding the Applicant's allegations of skullduggery, as the allegedly "changed" document is not dispositive of any fact in issue regarding this judgment on receivability.

Receivability

33. It is trite law that the Dispute Tribunal is competent to review its own competence or jurisdiction (see, for instance, *O'Neill* 2011-UNAT-182, *Christensen* 2013-UNAT-335, *Tintukasiri* et al. 2015-UNAT-526, *Harb* 2016-UNAT-643, *Babiker* 2016-UNAT-672). When considering the receivability of an application, the Dispute Tribunal is therefore not limited by the pleadings of the parties or their presentation of the possible receivability issues.

34. The parties' joint submission of 17 February 2017 sets forth the following legal issues for determination by the Tribunal regarding the receivability of the application:

(a) Is the Application receivable under Article 8(4) of the Statute, which requires an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested decision?

(b) Is the Application receivable under Staff Rule 11.2(c), which requires a staff member to submit his request for management evaluation within 60 days from the date of which the staff member received notification of the administrative decision to be contested?

(c) Whether the Application is receivable *ratione materiae* under the principle of *res judicata*? Does Judgment No. UNDT/2015/012 in Case No. UNDT/NY/2012/060, as affirmed in part by the Appeals Tribunal in Judgment No. 2015-UNAT-605 preclude the Dispute Tribunal from hearing the present Application?

Was the application filed more than three years after the Applicant's receipt of the contested decisions?

35. The Respondent submits that the challenge to the decision to maintain the Applicant on an unclassified post is time-barred under former staff rule 111.2(a), now staff rule 11.2(c), and art. 8.4 of the Dispute Tribunal's Statute. The Respondent states that the Applicant had reason to know in January 2000 that the post that funded the position of Records Clerk had not previously been classified. On 11 January 2000, the Applicant made a request for classification of the post. He signed a P.270 form entitled, "Request for Classification and Recruitment", with respect to the post, which form clearly indicated that the post was unclassified. The Applicant's claim that he only realized in 2014 that the post was unclassified is neither credible, nor relevant. By 11 January 2000, the date on which the Applicant signed the P.270 form, he ought to have known that the post had not been previously classified.

36. By Order No. 1 (NY/2017), the Tribunal directed that the Applicant file a response to the reply addressing the Respondent's contentions on the receivability of the application. In his 25 January 2017 response, the Applicant "states that his claim for correction of his grade was filed by Application and received by the Tribunal on or about 8 April 2016, less than three years from the time he

discovered the contested decision in August 2014". In the Application, he submits that he first became aware of the contested decision on 23 July 2014, during the course of proceedings before the Tribunal in Case No. UNDT/NY/2012/060, when the Respondent "introduced into evidence an agreed court bundle of 142 pages of documents, one of which revealed that the post was 'not previously classified' prior to the classification exercise held in January 2000".

37. The Tribunal notes that art. 8.4 of the Dispute Tribunal's Statute states that "an application shall not be receivable if it is filed more than three years *after the applicant's receipt of the contested administrative decision*". The question is therefore when did the Applicant "receive" the contested decision—in January 2000 or during the course of proceedings of Case No. UNDT/NY/2012/060 in July 2014?

38. The Appeals Tribunal, in *Auda* 2017-UNAT-746, para. 31, stated that it has "repeatedly ruled that the decisive moment of notification for purposes of Staff Rule 11.2(c) is when 'all relevant facts … were known, or should have reasonably been known'". In *Auda*, the Appeals Tribunal indicates that the applicant admitted that he had been verbally informed of the relevant decision and that the Appeals Tribunal found that this verbal communication was sufficient to establish that the applicant had been properly notified. In a dissenting opinion in *Auda*, her Honor Judge Halfield stated that "the record would need to demonstrate that such a communication was made clearly and unambiguously with sufficient gravitas to support a reasonable finding that the staff member had been notified of an administrative decision for purposes of Staff Rule 11.2(c)", making particular reference to *Babiker* 2016-UNAT-672.

39. The Tribunal notes that staff rule 11.2 concerns the time limit for filing management evaluation and, unlike art. 8.4 of its Statute, refers to the moment when the staff member received "notification" of the relevant administrative decision rather than "the applicant's receipt" thereof. However, the Tribunal finds no reason why the principles in *Auda* for establishing the moment of notification of an administrative

decision should not be equally applicable, *mutatis mutandis*, to the moment of receipt of an administrative decision.

40. The Tribunal notes that the Respondent contends that the Applicant had reason to know about the contested decision in January 2000 as he had submitted a form which would imply such understanding. However, upon a close examination of the annexed form P.270, there is nothing therein that implies that the Applicant should have had any such knowledge—it is simply a form by which the Applicant makes a "request for classification and recruitment" for "General Service and related categories" based on a "revision of duties". The Respondent states that as Part B, para. 4, of the form; which requires completion if the job description is to be used for requesting a review of classification level; is unfilled and not completed, it of necessity indicates that the request for classification was not due to changes or revisions that occurred in the duty assignment, but as a result of the post not having been previously classified.

41. The Tribunal is puzzled as to how this submission by the Respondent demonstrates that the Applicant implicitly knew that his post had not been classified since 1997. This is particularly so as the form also contains the following text, "SIGNATURES: The signatures confirm the certification as indicated. They do not imply any decision concerning the grade level of the post". Furthermore, it is clear from the face of the front of the form under the section headed "Reason for Classification" that a box which states "Revision of Duties" has been crossed, thus belying the Respondent's argument that the request was made as a result of the post not having been previously classified. In view of this apparent contradiction on the face of the document, its evidential value in support of the Respondent's position is questionable.

42. Furthermore, unlike in *Auda*, the Respondent does not argue that the Applicant in any way admitted to having been notified and/or having received the contested decision. Indeed, the Applicant remained persistent in following-up for a response either in or against his favor, despite the mixed messages he was

receiving. With reference to the dissenting opinion in *Auda*; which accords with the *ratio decidendi* in the case of *Babiker*; it is also clear that the record does not clearly and unambiguously demonstrate with sufficient *gravitas* a reasonable finding that, in any possible way, the Applicant received the contested decision in January 2000.

43. Accordingly, the Respondent's claim that the application is time-barred under art. 8.4 of its Statute is rejected.

Did the Applicant fail to file a request for management evaluation within 60 days from receiving the contested the decision?

44. Staff rule 11.2(c) provides that:

> … A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

45. The Tribunal notes that, in essence, the issue is when, and if at all, the Applicant was notified of the contested decision, and whether his request for management evaluation was timeous.

46. The Respondent submits that the Applicant was notified of the Organization's decision with respect to his grade level when he signed his letter of appointment at the GS-3, step 5, level for the position of Records Clerk in 1997 and that he did not request administrative review of this classification within 60 days under former staff rule 111.2(a). The Respondent contends that as a staff member of the Organization, the Applicant was in a position to make the necessary enquiries concerning the decision to appoint him at the GS-3 level, including requesting the relevant documents concerning the classification of the post. His failure to act diligently on

such matters does not serve to reset the time limit for challenging the decision of the Organization to appoint him at the GS-3 level.

47. The Respondent submits that the Applicant wrote to the Executive Officer of DPKO and DFS on 15 and 28 October 2014. In his correspondence, the Applicant requested a meeting to discuss his request for placement at the GS-5 level retroactive from 16 June 1997. These requests were rejected. On 28 October 2014, the Executive Officer wrote to the Applicant and stated that: "I see no need for a meeting and nothing to discuss". The Respondent submits that it was clear and unequivocal from the Executive Officer's email that the Organization had decided not to grant his request for retroactive placement at the GS-5 level. Therefore, the Applicant was required to submit his request for management evaluation within 60 days from 28 October 2014 under staff rule 11.2(c). The time limit expired on 29 December 2014. The Applicant requested management evaluation on 24 September 2015, almost nine months after the time limit had expired.

48. In his 25 January 2017 response to Order No. 1 (NY/2017), the Applicant submits that his request for management evaluation of the contested decision, being "[t]he decision to place me on a post that was not classified", was sent within the 60-day time limit on 11 September 2014.

49. The Tribunal finds that when the Applicant first approached the MEU regarding the contested decision in the present case (on 11 September 2014), the MEU's response was that he had failed to "put the matter before the Administration" before approaching the MEU (letter dated 17 September 2014); in other words, that his request was premature. When the Applicant then contacted the Administration to have the matter considered, his request for a meeting was first rejected on 28 October 2014. Almost a year later, on 14 September 2015, he was then informed by the same person who rejected the meeting request that the issue appeared to be under consideration by the Dispute Tribunal in Case No. UNDT/NY/2012/060, later decided in *Hosang* UNDT/2015/012. Following, the Appeals Tribunal's consideration of *Hosang* UNDT/2015/012 in *Hosang* 2015-UNAT-605, when

the Applicant again approached the MEU, he was then informed (on 13 January 2016) that " this matter has been thoroughly considered and adjudicated by the [Dispute and Appeals Tribunals]" and that "the principle of res judicata was applicable to this case".

50. With reference to the operative date of notification and the principles stated in *Auda* (cited above), and the Administration's 14 September 2015 communication regarding the then pending proceedings in his previous case before the Dispute Tribunal, it is clear that the Applicant could not reasonably have known if the errors regarding the correct level or classification of his post in 1997 had been dealt with before the Appeals Tribunal issued its final fully reasoned judgment on 30 October 2015.

51. Furthermore, it is the consistent jurisprudence of the Appeals Tribunal that neither the Dispute nor the Appeals Tribunal may grant a remedy without a claim (see, for instance, *Debebe* 2013-UNAT-288). It is evident from *Hosang* UNDT/2015/012 and 2015-UNAT-605 that the Applicant never made a claim for retroactive classification of the level of his post but solely for SPA. Furthermore, neither party took issue or contended that the Dispute Tribunal erred in not considering and adjudicating upon such claim, for which reason it did not form part of the appeal to the Appeals Tribunal (see, for instance, *Kadri* 2015-UNAT-512 in which the Appeals Tribunal found that the Dispute Tribunal shall examine and adjudicate upon all, and not just a few of the issues before it (similarly in *Reid* 2015-UNAT-563)). This comes as no surprise, the Presiding Judge of the Dispute Tribunal having declared that this classification issue was the subject of another case.

52. The Tribunal finds that despite the Applicant's diligent persistence and many efforts, as also stated by the MEU in its first response of 17 September 2014, it does not appear from the case record that an administrative decision was actually ever taken until September 2014 at the very least, regarding the issue at contention in the present case, namely the retroactive classification of the Applicant's grade. Indeed, in the said MEU letter, the Applicant is advised that "you will be able to

challenge the administrative decision when it is rendered by the Administration". It is also clear from *Hosang* UNDT/2015/012 and 2015-UNAT-605 that no judicial determination has been made regarding such matter—essentially because, under art. 2.1(a) of the Dispute Tribunal's Statute, such decision would firstly require that an administrative decision had in fact been taken.

53. As not taking an administrative decision (or, in other words: an omission) is an appealable decision in itself under the consistent jurisprudence of the Appeals Tribunal, the failure to make a decision on retroactively classifying the level of the Applicant's post is therefore appealable (see, for instance, *Schook* 2010-UNAT-013, *Tabari* 2010-UNAT-030, *Fedorchenko* 2015-UNAT-499 and *Terragnolo* 2015-UNAT-566). Regarding the applicable date, in *Survo* 2016-UNAT-644, the Appeals Tribunal found that the date of an implied decision, and thereby also an omission, is based on objective elements that both parties can accurately determine, i.e., when the staff member actually knew or should reasonably have known about it.

54. Considering the several contradictory communications he received from the different sections of the Administration, it is only reasonable to conclude that the Applicant only realized on 14 September 2015 that the Administration did not intend to take any decision regarding the retroactive classification of the post, when he was wrongly informed that the issues addressed in his previous emails "appear to be covered" in *Hosang* UNDT/2015/012. By filing the second request for management evaluation on 24 September 2015, the Applicant was therefore well within the 60-day time limit of staff rule 11.2(c). Consequently, the Respondent's claim that the Applicant's request for management evaluation was late under staff rule 11.2(c) is rejected.

Is the issue in the present case *res judicata*?

55. The Respondent's principal contentions may be summarized as follows:

a. The authority of a final judgment cannot be readily set aside. There must be an end to litigation, and the stability of the judicial process requires that a final and binding judgment as to the rights and liabilities of the parties cannot be set aside other than for the gravest of reasons. There are only limited grounds for review of a final judgment (*Chaaban* 2015-UNAT-554). A party cannot re-litigate his or her case (*Shanks* 2010-UNAT-026bis);

b. The Administrative Tribunal of the International Labour Organisation ("ILOAT") has explained the scope of the *res judicata* principle as follows (ILOAT Judgment No. 2316):

> It extends to bar proceedings on an issue that must necessarily have been determined in the earlier proceeding even if that precise issue was not then in dispute. In such a case, the question whether res judicata applies will ordinarily be answered by ascertaining whether one or other of the parties seeks to challenge or controvert some aspect of the actual decision reached in the earlier case.

c. The ILOAT has set out three criteria to determine whether the *res judicata* principle applies. The principle applies "where the parties, the purpose of the suit and the cause of action are the same as in the earlier case" (ILOAT Judgment No. 3511, ILOAT Judgment No. 1263, and ILOAT Judgment No. 1216);

d. The "identity of purpose means that what the complainant is seeking is what he would have obtained had his earlier suit succeeded" (ILOAT Judgment No. 1263, and ILOAT Judgment No. 1216). Further, "it is not the actual wording of the decision that matters but the complainant's intent" (*ibid*.);

e. The ILOAT has also noted that "a complainant may not eschew the *res judicata* rule by just prompting a new decision and saying it is not the same as the one he challenged earlier. The criterion is not the substance of the decision but the complainant's true intentions" (ILOAT Judgment No. 785);

f. The cause of action is the foundation of the claim in law. "It is not the same thing as the pleas, which are submissions on issues of law or of fact put forward in support of the claim" (ILOAT Judgment No. 1263; ILOAT Judgment No. 1216; ILOAT Judgment No. 785);

g. The question will be "does the complainant's claim to damages for material and moral injury have the same foundation in law as the claims […] in earlier judgments?" (*ibid.*);

h. The three criteria for establishing the principle of *res judicata* as articulated by the ILOAT are met in this case. First, the parties in the earlier Case No. UNDT/NY/2012/060 and this case are the same;

i. Second, the Applicant's purpose in bringing this case is the same. In his earlier case, the Applicant challenged the decision of 16 January 2012 not to pay him SPA to the GS-5 level from 16 June 1997. The Applicant asserted that he performed duties at the GS-5 level from 16 June 1997 and sought to be compensated accordingly. The Dispute Tribunal granted his application and rescinded the contested decision of 16 January 2012 (*Hosang* UNDT/2015/012, paras. 1 and 78). On appeal, the Appeals Tribunal varied the award of compensation and order for costs against the Respondent. The rest of the Dispute Tribunal's judgment was affirmed (*Hosang* 2015-UNAT-605, para. 24);

j. The Applicant's intention in bringing this case is the same. Again, he asserts that he performed duties at the GS-5 level from 16 June 1997 and, in his application, requests the Dispute Tribunal to "correct [his] rating to

the GS-5 [level] retroactive from the date of his appointment on 16 June 1997";

k. Third, the cause of action in both cases is the same. While the Applicant attempts to characterize the contested decisions differently, the foundation in law in both cases is the same. The foundation in law in both cases is the Secretary-General's alleged failure to comply with staff regulation 2.1, the Organization's classification procedures set out in ST/AI/1998/9 (System for the classification of posts), and the principle of equal pay for equal work (*Maulfair* UNDT/2012/12);

l. In the earlier case, the Dispute Tribunal was aware of the fact that the post was first classified in 2000. During the hearing on the merits, the Applicant's representative requested the correction of his level from 16 June 1997. However, the Dispute Tribunal "decided that the matter was another case". The Dispute Tribunal reasoned that any issue regarding appropriate remuneration and benefits at the GS-5 level could not predate the classification of the post on 25 January 2000 (*Maulfair*);

m. In this case, the Applicant cannot challenge the Dispute Tribunal's ruling in his earlier case that the issue of appropriate remuneration and benefits at the GS-5 level could not predate 25 January 2000. To do so, the Applicant was required to appeal against the Dispute Tribunal's judgment. However, he did not file any appeal or cross-appeal on that issue;

n. The Appeals Tribunal's final judgment renders the Applicant's claims that he ought to have been placed at the GS-5 level from 16 June 1997 *res judicata*. This issue was necessarily determined in his earlier case, and, as such, the Applicant is barred from raising it again in this case.

56. The Applicant, on the other hand, contends that the appeal in the present case is not the same as in Case No. UNDT/NY/2012/060. Contrary to the Respondent's contention, the issue in the previous case was insufficient payment of SPA, and not

whether the Applicant should have been placed at the GS-5 level from 16 June 1997. In particular, the Applicant submits that:

> a. The Respondent is not being called to answer the same cause twice. The contested decision in the first case was the denial of sufficient SPA for services rendered at the classified GS-5 level. As remedy, the Applicant called for: (a) rescission of the decision and his placement at the GS-5 level from the date this would have been implemented had the classification exercise and required associated procedures been properly followed and resulted in his favour, in other words, a promotion, or, (b) payment of a monetary allowance retroactive from the time the court would decide he should receive it, in line with the contested decision. Had the Applicant's call for placement at the GS-5 level won the favour of the Dispute Tribunal, the promotion most likely would have taken effect from 1 June 2002 in line with the lawfully required two-years in grade from his promotion to GS-4 on 1 June 2000. This plea, however, was not successful and is not mentioned in the subsequent judgment, namely *Hosang* UNDT/2015/012. The proceedings and judgment in Case No. UNDT/NY/2012/060 clearly show that the contested decision and issue in that case was the denial of sufficient SPA, not whether the Applicant should have been placed at the GS-5 level from 16 June 1997 as the Respondent contends;
>
> b. Although the Applicant's Counsel introduced the new matter in his previous case, the Dispute Tribunal did not consider for which reason it could not have been, nor was it addressed by the Appeals Tribunal. There is no evidence that the question of either placement or promotion of the Applicant was ever considered by the Dispute or Appeal Tribunals.

57. The Tribunal notes that the principle of *res judicata* has been affirmed by the Appeals Tribunal in several judgments (see, for instance, *Costa* 2010-UNAT-063, *El-Khatib* 2010-UNAT-066, *Meron* 2012-UNAT-198, *Gakumba* 2014-UNAT-492 and *Chaaban* 2015-UNAT-554). A valid defense of *res judicata* provides that

a matter between the same persons, involving the same cause of action, may not be adjudicated twice. As stated in *Bangoura* UNDT/2011/202, matters that stem from the same cause of action, though they may be couched in other terms, are *res judicata*, which means that an applicant does not have the right to bring the same complaint again. Essentially, *res judicata* operates to bar a subsequent proceeding if the issue submitted for decision has already been the subject of a final and binding decision as to the rights and liabilities of the parties on the merits in that same regard (see ILOAT Judgment No. 2316).

58. In the present case, the question is therefore whether these proceedings concern the same cause of action, as that adjudicated by the Dispute Tribunal in *Hosang* UNDT/2015/012, which was subsequently appealed to the Appeals Tribunal and decided in *Hosang* 2015-UNAT-605.

59. From the outset, in these proceedings the Applicant raised that he "had a contractual right to be appointed to a classified post", contending that his post was not classified upon his appointment on 16 June 1997. He sought management evaluation on 11 September 2014 "of the decision to place [him] on a post that was not classified at the time of [his] appointment at GS-3 level in 1997 and the decision to not classify [his] post until January 2000 and the decision to not correct [his] pay grade following such classification".

60. In *Hosang* UNDT/2015/012, para. 1, the Applicant contested "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"; which claim was clearly based on the performance of those duties and not on reclassification of the post. As for the merits of the case, the Tribunal made the following orders:

> 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.

61. In *Hosang* 2015-UNAT-605, the Appeals Tribunal affirmed these parts of the Dispute Tribunal's judgment, providing that:

> 22. We dismiss the Secretary-General's appeal of the award of prospective compensation of the monetary equivalent of SPA for an uncertain duration. The Judgment awards compensation in the amount of the difference in salary between earnings at the G-4 and G-5 level – retroactive from 25 January 2000 to the date the post is filled, deducting the payment of SPA for the period 17 April 2010 to 16 April 2012 already received by [the Applicant]. It is for the Secretary-General to fill the vacancy.
>
> 23. Finally, we find no merit in the Secretary-General's appeal against the award of compensation in the amount of USD 1,000 for loss of opportunity. It is not duplicative since the award of SPA from the G-4 to the G-5 level compensates for the lower salary he received during the period his post was already classified at the higher level. [The Applicant], however, at the G-4 level, consequently also lost the opportunity to thereafter apply for a promotion from the G-5 level to a higher grade.

62. The Tribunal finds that, while the question of the Applicant's entitlement to SPA—amongst other matters—depends on the classification level of the relevant post that the staff member was, or is, "called upon to assume" (staff rule 3.10), the issue of retroactive classification of an unclassified post is a distinct and separate question that involves entirely different considerations and administrative processes. This follows simply from the fact that the first issue is governed by staff rule 3.10 and ST/AI/1997/17 (Special post allowance), whereas the legal framework for classifying

posts is ST/AI/1998/9 (System for the classification of posts). Furthermore, a post classification is job-oriented, and the classification of each post depends on the nature of the duties and responsibilities assigned to it and not on the personal experience, qualifications or performance of the incumbent (see former United Nations Administrative Tribunal Judgment No. 1322 (2007)). The correct classification of a post is a staff member's contractual right, as stated by the Appeals Tribunal in *Aly* et al. 2016-UNAT-622, paras. 41 and 42, and reiterated in *Ejaz, Elizabeth, Cherian & Cone* 2016-UNAT-615 (footnotes omitted):

> … The classification system is promulgated under the Staff Regulations and Rules and it is part of the conditions of employment for all staff members as the rules are incorporated by reference into all United Nations employment contracts.
>
> … In reliance on Staff Regulation 2.1, the former United Nations Administrative Tribunal (Administrative Tribunal) consistently held that the classification of posts of staff members is part of their conditions of service, and classification of a post is to be done according to its job description and failure to regularise the discrepancy between the level of classification and an employee's functions is a breach or a violation of a staff member's rights. The Administrative Tribunal Judgment No. 1113, *Janssen* (2003) on failure to implement a classification for budgetary reasons resulting in violation of the applicant's rights; the Administrative Tribunal Judgment No. 1136, *Sabet and Skeldon* (2003) on failure to carry classification to its conclusion in violation of the principles in Staff Regulation 2.1; and the Administrative Tribunal Judgment No. 1115, *Ruser* (2003) on failure to correct the discrepancy between the level of classification and the budget of the staff member's post are of relevant and persuasive authority.

63. It is clear from *Hosang* UNDT/2015/012 and 2015-UNAT-605 that the Dispute and Appeals Tribunals with finality resolved the issue of the Applicant's entitlement to SPA for the relevant period in that case. Indeed, in the agreed facts it is stated by the parties that "On 4 February 2015, the Dispute Tribunal issued its decision with respect to the Applicant's request for SPA while performing higher level functions… In that decision, the Dispute Tribunal ordered that the Applicant receive SPA from the GS-4 to the GS-5 level from 25 January 2000 until the date that he ceases to perform such duties at the GS-4 level".

64. It is evident that the Dispute and Appeals Tribunals made no orders regarding the possible retroactive classification of the relevant post based on the documentation that fortuitously found its way into the Dispute Tribunal court bundle, apprising the Applicant for the very first time that his post was unclassified. From a comprehensive perusal of *Hosang* UNDT/2015/012 and 2015-UNAT-605, this is perfectly logical as the issue does not appear to have been considered at all. Indeed, the Presiding Judge in the Dispute Tribunal in *Hosang* UNDT/2015/012, according to the Applicant, had found that the issue of the present case was "another case" at the hearing conducted on 7 August 2014 after a document submitted into evidence by the Respondent "revealed that the post was 'not previously classified' prior to the classification exercise held in January 2000". This contention stands undisputed by the Respondent. Furthermore, it is clear from para. 16 of the Appeal Tribunal's judgment in *Hosang* 2015-UNAT-605 that the Applicant's contention in the previous case was that: "Contrary to the Secretary-General's contention, the correctness of the classification of the post or of [the Applicant's] level was not an issue. The issue was whether [the Applicant] actually performed the functions required in the post".

65. Accordingly, the Tribunal rejects the Respondent's claim regarding *res judicata* as the issue in the present case is still a live and unresolved matter.

Conclusion

66. In all the above circumstances, the Tribunal finds that the application is receivable.

67. The Tribunal observes that the various issues in connection with the non-classification of the Applicant's post dating back to 1997 have no doubt cost the Organization and its justice system an excessive amount of time and resources to date. At this stage, in light of the present judgment, the particular circumstances of this case including the passage of time, as well as the findings in *Hosang* UNDT/2015/012 and 2015-UNAT-605, the Tribunal therefore strongly encourages the parties to explore amicable and informal resolution for final closure of this matter.

If this is not possible, the Tribunal will direct the parties to file their closing statements on the merits of the case, including submissions on the issue of remedies, and thereafter decide the case on the papers before it unless otherwise requested. In this regard the Tribunal directs that:

a. The proceedings are suspended for one month pending the parties' efforts to find an amicable resolution to the present case;

b. By **5:00 p.m. on Monday, 14 May 2018**, the parties shall inform the Tribunal as to whether the case has been resolved; in which event, the Applicant shall confirm to the Tribunal, in writing, that his application is withdrawn fully, finally and entirely, including on the merits. In case the parties consider that additional time is needed for the settlement negotiations, the parties shall request a further suspension of the proceedings by also stating a time limit;

c. If the parties fail to reach an amicable solution, they are to file their closing statements, including a submission on remedies, by **5:00 p.m. on Monday, 21 May 2018**.

(Signed)

Judge Ebrahim-Carstens

Dated this 13th day of April 2018

Entered in the Register on this 13th day of April 2018

(Signed)

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