UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/013
Judgment No.: UNDT/2019/008
Date: 28 January 2019
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

HOSANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Nicholas C. Christonikos

Counsel for Respondent:
Alan Gutman, ALD/OHR, 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 against an unclassified post when he was hired as a Clerk at the GS-3 level in 1997 (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 chance and the emotional distress caused by the Respondent's administrative delay in responding to his claim.

2. In his reply, the Respondent contends, is essence, that the application 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.

3. On 13 April 2018, by Judgment No. UNDT/2018/049, the Tribunal declared the application receivable.

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.

... On 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 [the Office of Human Resources Management] ["OHRM"].

... On 1 March 2012, the Applicant filed a request for management evaluation claiming SPA for the entire period of time during which he was performing duties at a higher level.

... On 16 April 2012, the [MEU] recommended 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.
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> … 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.
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> … 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.
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> … On 8 April 2016, the Applicant filed his application.

The administrative and judicial proceedings of the instant case

5. The full administrative history and judicial proceedings leading up to this matter are contained in Judgment No. UNDT/2018/049, the decision on receivability, which for reasons of judicial economy, the Tribunal shall not repeat herein.

6. On 13 April 2018, the Tribunal issued Judgment No. UNDT/2018/049 in the present case, declaring the application receivable and providing the following orders:

> … 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**.

7. On 13 May 2018, in response to Judgment No. UNDT/2018/049, the Applicant filed his closing statement and, on 22 May 2018, the Respondent filed his closing statement.

8. On 23 May 2018, the Applicant filed a motion for leave to file his comments on the Respondent's closing statement. In response thereto, on 24 May 2018, the Respondent opposed the Applicant's motion. On 29 June 2018, the Applicant filed a "clarification of motion dated 23 May 2018".

9. By Order No. 172 (NY/2018), the Tribunal granted the Applicant's request to file his comments on the Respondent's closing statement and instructed the parties to file their final submissions in response to the previous closing statements by 14 September 2018

10. The parties duly filed their final submissions as per Order No. 172 (NY/2018) on 14 September 2018.

Consideration

Scope of the case

11. Based on the parties' submissions, the principal issues of the present case are defined as follows:

a. Did the Applicant have a right to have the post to which he was appointed as a Clerk at the GS-3 level in 1997 classified?

b. If in the affirmative—as remedies—is the Applicant entitled to:

i. An upgrade of his level to the G-5 level and to be paid accordingly, and/or

ii. Any monetary compensation for his alleged loss of chance (pecuniary damages) and/or stress related to the delay in classifying the post (non-pecuniary damages)?

Did the Applicant have a right to have his post classified?

12. The Applicant contends that the Respondent did not abide by staff regulation 2.1 when it reappointed him to an unclassified post in DPKO on 16 June 1997. The Applicant argues that whilst the Respondent has wide discretion to establish rules and related policies in line with the regulations (and the power to make exceptions to them), the Administration is nevertheless required to comply with the letter of the regulations and, in this case, should have made appropriate provision for the classification of the post before appointing anyone to it. The Applicant contends that it was improper to not classify the post for more than two years and, when the post was lawfully classified, to not take retroactive corrective action regarding his pay grade, or at least to take this corrective action at the time of his subsequent reappointments in line with Personnel Directive PD/1/94 regarding "[r]ecruitment of external candidates to posts in the General Service and related categories at Headquarters" ("the Directive"). In response

to the Respondent's submission that the Applicant has no legal right to compel the Organization to re-examine a decision that was taken 17 years prior, the Applicant avers that he has a legal right to a review of administrative decisions under Chapter XI of the Staff Regulations and Rules, and that he exercised this right by filing a management evaluation and an application to the Dispute Tribunal. The Applicant further states that the Respondent ignores the purpose of Chapter XI of the Staff Regulations and Rules in regard to the obligation to review administrative decisions formally contested by the staff, which would directly undermine Judgment No. UNDT/2018/049.

13. The Respondent submits that the Applicant was appointed at the GS-3 entry-level grade in accordance with the prevailing framework for the recruitment of external candidates to posts in the Directive, which was promulgated following the introduction of job classification standards for the General Services and related categories. At the time of the Applicant's appointment, he had no legal right to an appointment at the classified level of a post. In accordance with the Directive, the Applicant was assigned an entry-level grade based on his experience. A classified job description was not required for the recruitment of the Applicant to a four-month temporary appointment. The recruitment for such an appointment could be initiated with "a description of the principal functions to be performed." (see the Annex to the Directive, para. 14(a)). The Organization appointed General Service staff members at entry-level grades based on their qualifications and experience, rather than at the classified level of the post funding their position (see the Annex to the Directive, para. 12). Contrary to the Applicant's suggestion, current policies and issuances do not apply to his appointment in 1997—neither staff regulation 2.1 as currently drafted, nor ST/AI/1998/9 (System for the classification of posts), applied to his appointment in 1997.

14. The Respondent therefore argues that a classified job description was not required for the Applicant's recruitment because the Organization appointed the Applicant, an external candidate, to a four-month temporary appointment on 16 June 1997 against a post occupied by a staff member on mission assignment. The Directive

provided for the temporary appointment of staff members without a classified job description. The recruitment for such an appointment could be initiated with a description of the principal functions to be performed for which reason the Applicant was lawfully assigned an entry-level grade based on his experience. At the relevant time, the Organization appointed General Service staff members at entry-level grades based on their qualifications and experience, rather than the classified level of the post funding their position, and the Directive provided the appointment of staff members at an entry-level grade based on work experience and education. The purpose of assigning staff members at an entry-level grade, rather than the grade of a post was to provide time for induction into the procedures of the Organization and to complete familiarization with the job to be performed.

15. The Respondent further avers that the former United Nations Administrative Tribunal found that under the prevailing legal framework there was no legal right to appointment at classified level of a post, referring to its Judgement No. 506, *Bhandari* (mistakenly, cited by the Respondent as Judgement No. 535, which it is not—that being the Case No. 535). Relying on the *Bhandari* judgment (dated 26 February 1991), the Respondent contends that the Applicant was contractually bound by his acceptance of the GS-3 entry-level grade, and he was offered an entry-level grade in accordance with the grading levels contained in the Directive and the experience and education that he stated in his job application. It was open to the Applicant to decline the offer at the time, if he was dissatisfied with it.

16. The Respondent contends that Applicant has no legal right to compel the Organization re-examine an earlier decision now. The Applicant has established no breach of his appointment stemming from the 14 September 2015 correspondence from DPKO declining to re-examine the Applicant's appointment with the Organization in 1997. The Applicant was lawfully appointed in accordance with the prevailing legal framework. The Respondent submits that the Staff Regulations and Rules and the Dispute Tribunal's Statute provide for the finality and certainty of the Organization's decisions following the expiration of the period for requesting management evaluation

and filing an application before the Dispute Tribunal. This principle is particularly important with respect to administrative decisions taken more than 17 years ago.

17. The Respondent submits that the Applicant's arguments that the post should have been classified at the GS-4 or GS-5 level have no merit. First, the 25 January 2000 classification of the post to the GS-5 level does not establish that the Applicant's appointment at the GS-3 level was in error as the applicable legal framework did not require a classified job description. It provided for an entry-level grade based on the experience and education of the staff member. Second, there would have been no material benefit to the Applicant from the classification of the post to the higher level. Had the post been classified at levels suggested by the Applicant, he would either have been appointed at an entry-level grade of GS-3, or not appointed at all.

18. At the outset, the Tribunal is puzzled as to why a substantive question as the one in the present case that dates back so many years is still pending and has not simply been resolved by the parties.

19. The relevant staff regulation and rules in force in 1997, when the Applicant was appointed as Clerk at the G-3 level, are set out in ST/SGB/Staff Rules/Rev.9. In its article II, under the headline, "classification of post and staff", staff regulation 2.1 provided as follows and, contrary to the Respondent's submission, it remains unchanged until today,

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

20. A plain reading of staff regulation 2.1 makes it clear that the Administration is obliged to provide a classification not only for the staff members but also for the posts that they are encumbering (the Appeals Tribunal has endorsed the plain meaning rule of interpretation in several judgments; see, for instance, *Scott* 2012-UNAT-225, *De Aguirre* 2016-UNAT-705, and *Timothy* 2018-UNAT-847). This is obvious from the

use of the operative word "and" instead of "or" between "posts *and* staff" (emphasis added) and from the stipulation that "the Secretary-General *shall* make appropriate provisions" for this classification "according to the nature of the duties and responsibilities required". From a budgetary point of view, this is also only logical—if a post is not classified how would the relevant entity in charge of payroll otherwise be able to identify the relevant budget line from where it is to draw the money for the staff member's salary? In line herewith, the Appeals Tribunal has found that (see *Aguirre* 2016-UNAT-705, para. 49, emphasis added),

> … Under Staff Rule 2.1(a), posts *shall* be classified in categories and level, except for posts of Under-Secretary-General and Assistant Secretary-General. Posts are to be classified "according to standards promulgated by the Secretary-General and related to the nature of the duties, the level of responsibilities and the qualifications required". Under Staff Rule 2.1(b), each post *shall* be assigned to a suitable level in any of the following categories: … General Service ….

21. The Respondent refers to the Annex to the Directive, paras. 12 and 14(a), to suggest that the Administration nevertheless had no duty to classify the post when appointing the Applicant as a Clerk at the GS-3 level and which provides as follows (emphasis in the original),

> 12. Staff appointed on a short-term basis for the General Assembly or other temporary assignment will normally be recruited at the appropriate entry-level, subject to their meeting the recruitment criteria as set forth in Appendices A and B. Former Headquarters General Services staff members may be recruited on short-term assignment at the level they had attained prior to separation from service, provided that the functions to be performed are similar or equivalent to those they had undertaken at the time of separation.
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> …
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> 14. Departments and offices should submit recruitment requests to the General Service Staffing Section, indicating the Post, Job Description and Persona; Action (P.5) numbers:
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> (a) For post of <u>less than one year's duration</u>, a description of the principal functions to be performed should be attached to the recruitment request. A copy of the summary of principal functions from an appropriate job description may be used.

22. On close perusal of the Directive in its entirety, including paras. 12 and 14(a) of its Annex, it follows that it is nowhere as much as contemplated that a staff member at the GS-level, even on a short-term temporary appointment as the Applicant, could be hired against an unclassified post. Rather, the approach and intent of the Directive would appear to be the opposite, namely that all posts must be classified since it is provided that, "The basic principle of the post classification system is that it is job-oriented, with the level of each post being determined by the duties and responsibilities assigned to it" (see para. 1, first sentence, of the Annex)—if a post is not classified, the design of the system would simply not be "job-oriented" as envisioned. As also stated in Judgment No. UNDT/2018/049 (see para. 63), 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.
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> … 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.

23. In support of the Respondent's argument that the Applicant has nevertheless no right to be hired against a classified post, the Respondent refers to the judgment of *Bhandari* of the former United Nations Administrative Tribunal. As a matter of principle, the Tribunal primarily notes that judgments of the former United Nations Administrative Tribunal are only of persuasive and not of binding authority (see, for instance, *Abu Hamda* 2010-UNAT-022, *Sanwidi* 2010-UNAT-084, *Leal* 2013-UNAT-337, *Darwish* 2013-UNAT-369, and *Muwambi* 2017-UNAT-780). However, in any event, the Tribunal observes that not only is *Bhandari* clearly distinguishable on the facts, but more importantly, that it does not concern the situation where a staff member was hired against an unclassified post. Rather in that case a staff member was hired at the P-2 level against a post that was classified but at the P-3 level—in other words, the post in *Bhandari* was classified. Therefore, the offer made to the applicant at inception of the contract in that case was lawful, and she was bound because she accepted it.

24. Consequently, the Tribunal finds that as the correct classification of a post is a staff member's contractual right, that the Applicant, when appointed to Clerk at the GS-3 level, had a right to be hired against a post classified at this level, namely the GS-3 level.

Remedies

Is the Applicant entitled to retroactive payment at the G-5 level?

25. As remedy, the Applicant seeks the correction of his pay grade to the GS-5 level retroactive from an appropriate point in time, and the payment of the sum corresponding to the difference between the amount of pay at that level and the amount of salary and SPA already paid to him, plus interest.

26. The Respondent submits that the Applicant's arguments that the post should have been classified at the GS-4 or GS-5 level have no merit. Firstly, the 25 January

2000 classification of the post to the GS-5 level does not establish that the Applicant's appointment at the GS-3 level was in error. Secondly, there would have been no material benefit to the Applicant from the classification of the post at the higher level. Had the post been classified at the levels suggested by the Applicant, he would either have been appointed at an entry-level grade of GS-3, or not appointed at all.

27. The Tribunal observes that, when appointed in 1997, whether the post was classified or not, the Applicant was hired at the GS-3 level and from the facts of the case, it follows that he knew about his level when he was recruited. As part of the remedies, the Applicant now intends to challenge the propriety of this decision approximately 19 years later as he believes that he should have been placed at the higher GS-5 level.

28. The Tribunal notes that, in the application, the Applicant defines the contested decision as, "Appointment to unclassified post". The administrative decision under review in the present case is clearly the decision by which the Applicant was recruited against an unclassified post when he was hired as a Clerk at the GS-3 level in 1997, and not the decision concerning the level he should have been hired at. These are two entirely different administrative decisions—invoking the latter decision in an effort to rectify the first decision does not change this circumstance. The Tribunal observes that, if it were to award the Applicant retroactive payment at the GS-5 level for the failure of appointing him against a classified post, it would have to do so by giving effect to a possible right for him to be appointed at this higher level. Not only would this amount to specific performance under art. 10.5(a) of the Dispute Tribunal's Rules of Procedure rather than compensation under its art. 10.5(b), but it would require the Tribunal to make a determination on the appropriate classification of the post at the material time, which is not a function of this Tribunal and which would be at best speculative.

29. Accordingly, the Applicant's request for retroactive payment at the GS-5 level is denied in the context of the present case.

Is the Applicant entitled to any monetary compensation for his pecuniary and/or non-pecuniary losses in connection with being hired at the GS-3 level against an unclassified post?

30. In essence, the Applicant seeks compensation for (a) his loss of chance of not having been able to apply for higher level positions and (b) for his alleged stress in relation to the delay in classifying his post.

31. The Dispute Tribunal's Rules of Procedure, art. 10.5(b), makes it clear that any compensation for harm must be "supported by evidence". However, the Tribunal notes that the Applicant has provided no evidence whatsoever to substantiate any harm in connection with him being incorrectly hired against an unclassified post.

32. As for his alleged loss of chance, the Applicant claims as a remedy that he be "equitably compensated" by an award of the monetary equivalent of a special post allowance to the GS-6 level retroactively until such time as he may be promoted to that level or until his separation from the Organization. The Tribunal notes that this claim is not only unsustainable as being extremely remote and speculative, but that it is also linked to the Applicant's claim that he was incorrectly hired at the GS-3 level and not the GS-5 level. As stated above, the substantive issue of the present case concerns whether the Applicant was improperly hired against an unclassified post and not whether the level he was hired at was incorrect. For this reason, the Tribunal therefore cannot entertain a review of his loss of chance to apply for higher level positions.

33. The Applicant's claims for pecuniary and/or non-pecuniary compensation are denied.

Conclusion

34. In all the above circumstances, the Tribunal grants the application in part, finding that,

a. It was unlawful for the Respondent to hire the Applicant as a Clerk at the GS-3 level against an unclassified post in 1997, and

b. All the Applicant's claims for remedies are denied.

(Signed)

Judge Ebrahim-Carstens

Dated this 28th day of January 2019

Entered in the Register on this 28th day of January 2019

(Signed)

Nerea Suero Fontecha, Registrar