



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DERSEH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Yuki Daijo, ECA

Amboko Wameyo, ECA

Introduction and procedural history

1. The Applicant, a Mail Assistant at the G-5 level, is serving on a continuing appointment with the Economic Commission for Africa (ECA) in Addis Ababa, Ethiopia. He filed an application on 16 September 2016 challenging the decision by the Chief of the ECA Human Resources Services Section (Chief/HRSS), dated 17 February 2016, not to grant his request for payment of a Special Post Allowance (SPA) against a G-6 Mail Assistant post.

2. The Respondent filed a Reply on 18 October 2016.

3. On 28 December 2016, the Applicant filed additional submissions in which he averred, *inter alia*, that his First Reporting Officer (FRO) deliberately deleted the list of his functions and that the Respondent had submitted a fake performance appraisal document for the year 2013-2014.

4. On 31 January 2017, the Respondent filed a motion praying for leave to respond to the Applicant's submissions. The Tribunal granted this motion by its Order No. 033 (NBI/2017).

5. The Respondent filed his response to the Applicant's additional submissions on 16 February 2017.

6. On 28 February 2017, the Applicant filed, by email, a motion seeking production of his original e-PAS from Inspira for the 2013/2014 performance cycle and the original reassignment email dated 5 April 2012 between his FRO and SRO from the UN email server.

Facts

7. Pursuant to art. 16.1 of the UNDT Rules of Procedure, the discretionary authority to hold an oral hearing lies with the Dispute Tribunal. Additionally, art. 19 of the Rules of Procedure provides that the Tribunal may at any time issue any order or give any direction which appears to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

8. The Tribunal has decided that an oral hearing is not required in determining the issues in this case and as such, has relied on the parties' pleadings and additional submissions.

9. The Applicant works in the Registry Sub-Unit in the Public Information and Knowledge Management Division (PIKMD) of ECA. When his supervisor and First Reporting Officer (FRO), Ms. Aster Abebe, joined the Registry Unit in September 2011, there were five Mail Assistants, including the Applicant, in the Registry. Two of the Mail Assistants were at the G-6 level, two were at the G-4 level and the Applicant was at the G-5 level.

10. Mr. DE, a G-4 staff member, was assigned to work with Mr. CM, one of the G-6 Mail Assistants, who was *inter alia* responsible for incoming and outgoing pouch services, which included data entry, distribution of mail from the pouch and delivery and collection of the pouch from the airport.

11. Mr. CM was on sick leave between 23 March 2011 and 8 February 2012 thus the other Mail Assistants in the Registry Sub-Unit performed his duties as a team. Mr. CM passed away on 9 February 2012.

12. On 3 May 2012, Ms. Abebe drafted a proposal on the reassignment of work, which she discussed with the Applicant and another senior colleague in the Registry. Ms. Abebe's proposal included the assignment of the Applicant to assume Mr. CM's G-6 duties and for Mr. DE to perform the Applicant's G-5 duties.

13. On 4 May 2012, Ms. Abebe sent her draft proposal to her supervisor, Mr. Konstantin Tsenov, the then Chief of the Protocol and Logistics Unit, for his advice. After several follow up emails from Ms. Abebe, Mr. Tsenov responded as follows on 23 January 2013: "Please let's wait to see the restructuring exercise. At this point under a completely new leadership we cannot comment or take unilateral decisions."

14. The Registry Sub-unit's management reports for May 2012, December 2013 and February 2014 included the following challenge:

One G-6 post is vacant and the Registry Sub-unit is under staffed. The Office is waiting for the GSS to take action. Till then, the request submitted to Mr. Tsenov to reassign [the Applicant] and [Mr. DE] to do [Mr. CM's and the Applicant's] job respectively but action was not taken.

15. Between 16 May 2014 and 15 June 2014, ECA advertised the post of a G-6 Mail Assistant in the Registry Sub-Unit/PIKMD. The Applicant applied for the vacancy and took a written test in January 2015. He did not pass the written assessment and was therefore not selected for the post.

16. The minutes of a Registry Sub-unit staff meeting held on 1 June 2015 included the following discussion:

[The Applicant] mentioned that he would be happy if the work of incoming pouch can be assigned to another staff member because it is too much for him. The supervisor explained the reason why he was assigned as follows: (1) [the Applicant] was complaining in the previous years that the pouch work was assigned to a junior staff while he was a senior; (2) the pouch job was given to him to have fair distribution of work. The supervisor also mentioned that the current distribution of work is right.

17. On 24 July 2015, the Office of Staff Legal Assistance (OSLA) wrote to the ECA Human Resources Services Section (HRSS) requesting a Special Post Allowance at the G-6 level for the Applicant for three years, commencing from 1 March 2012.

18. After a Registry Sub-unit staff meeting on 5 August 2015, Ms. Abebe sent an email to the Applicant requesting that he hand over all the files of incoming pouches, pending pouch mails and mails from UNFCU to another staff member, Ms. MM, since these tasks were part of her duties. She further informed him that Mr. DE would re-commence collecting pouches from the airport and assist Ms. MM in the distribution process.

19. By memorandum dated 17 February 2016, the Chief/HRSS informed the Applicant of the decision not to grant him SPA as requested by OSLA on 24 July 2015 for the following reasons: Mr. CM's duties had been assigned to Mr. DE; the

Applicant had never been assigned to perform the full functions of a G-6 Mail Assistant in the Registry Sub-unit; and the Applicant had failed the written technical test for the G-6 Mail Assistant post that was advertised in 2014. Ms. Abebe confirmed in a witness statement dated 17 October 2016 that during the period in question, she had not asked the Applicant to carry out any functions of a G-6 Mail Assistant.

20. On 26 March 2016, the Applicant requested management evaluation of the Chief/HRSS's decision of 17 February 2016. In a response dated 28 June 2016, the Under-Secretary-General for Management informed the Applicant of the Secretary-General's decision to uphold the decision not to grant him SPA.

Applicant's case

21. The decision not to grant the Applicant SPA is unlawful because the reasons advanced by his supervisor, Ms. Abebe, are untrue and contradictory. On one hand, she claims that Mr. CM's duties were assigned to Mr. DE and on the other hand, she claims that most of the G-6 functions, which were supervisory, were performed by the Registry Supervisor who is at the G-7 level.

22. Ms. Abebe sent the 3 May 2012 draft proposal to Mr. Tsenov after she assigned the Applicant to perform the functions of the G-6 post. As a result of her instructions, he performed all the functions of the G-6 post from 5 March 2012 to 5 August 2015. During this period, Ms. Abebe repeatedly reported to her supervisor that the Applicant was performing the functions of the G-6 post.

23. The Applicant and Ms. Abebe agreed on his work plan in accordance with the United Nations Performance Appraisal System Guidelines & Reference Material dated January 1995. He performed the managerial and supervisory task of time management for the Registry Sub-unit.

24. The email of 5 August 2015 is proof that he was performing the functions of the G-6 post since he was instructed to hand over said functions only after he requested payment of an SPA on 24 July 2015.

25. Ms. Abebe deliberately deleted the list of jobs from the e-mail correspondence of 4 May 2012 before it was submitted to the Tribunal. These functions are included in the Applicant's e-PASes.

26. The Applicant has no knowledge of Annex 7 to the Respondent's reply. This is a fake/fraudulent e-PAS document that was deliberately prepared and submitted to mislead the Tribunal. The fake/fraudulent e-PAS contains altered and illegally added sentences in order to diminish his performance at the G-6 level.

Respondent's case

27. ST/AI/1999/17 (Special post allowance) requires a statement from the Applicant's supervisor indicating that he performed the higher-level functions but the Applicant's supervisor has denied ever assigning him to perform such functions.

28. Ms. Abebe intended for the Applicant to take over Mr. CM's duties but action was never taken on her proposal by her supervisor.

29. The G-6 Mail Assistant performs managerial and supervisory tasks that are not performed by the G-5 Mail assistant. The Applicant's e-PASes from 2012-2016 do not indicate that he performed any of the managerial and supervisory tasks that define the G-6 post.

30. Neither the Applicant nor his supervisor made a request for SPA because the Applicant was not assigned to perform any higher-level functions and he has not established the higher-level functions he carried out between 1 March 2012 and 5 August 2015.

31. Pursuant to ST/AI/1999/17 and the jurisprudence of the Tribunal, a staff member must perform the full functions of a higher-level post to become eligible for SPA. The only task assigned to the Applicant after Mr. CM passed was receiving incoming pouch from the airport and distributing the UNFCU mails that came with the pouch. Taking up one element of Mr. CM's duties does not qualify the Applicant for SPA.

32. The Applicant's supervisor did not deliberately delete the list of functions of the Applicant. The email was submitted by the Respondent to show that the change in functions was merely a request and that a response was still pending. Since there was no implementation, the Respondent's counsel did not consider the list to be relevant.

33. The Applicant's submission that the Respondent filed a "fake or fraudulent e-PAS document" is unfounded and unsupported by the evidence. The Applicant has deliberately withheld information from the Tribunal as to the facts surrounding the e-PAS labeled as annex 7. The said e-PAS is a true and correct reflection of the Applicant's e-PAS for 2013/2014.

34. The Applicant was initially rated as "partially meets expectations" at the end of the 2013/2014 performance cycle. After discussions with his FRO, she agreed to change the rating to a positive one. Since it was not possible to roll back the e-PAS, the first e-PAS was cancelled and the FRO created a new e-PAS in MS-Word. Apart from the ratings, the two e-PASes are similar. Upon completion, the FRO signed the new e-PAS on 15 May 2014 and gave it to the Applicant for signature. It appears that he did not sign it but then gave it to the second reporting officer for signature and then submitted it to HRSS. The document alleged by the Applicant to be the original e-PAS for 2013/2014 is unsigned and was created a year after the e-PAS in annex 7 was submitted to HRSS.

Considerations

35. The only issue for determination here is whether the Applicant performed duties at the G-6 level and was therefore entitled to a Special Post Allowance.

36. The Applicant's case is that after the demise of Mr. CM, the G-6 level Mail Assistant on 9 February 2019, he was assigned all the functions of the deceased staff member starting from 5 March 2012 and that he performed the full functions of the G-6 post until 5 August 2015 when he was asked by his supervisor to hand over the duties to another staff member. He claims that he is therefore entitled to SPA for the period of over three years.

37. The Respondent contends on the other hand, that when the G-6 level post became vacant after the death of Mr. CM, the Applicant's supervisor made a draft proposal which included that the Applicant take over the G-6 functions of the deceased Mr. CM. The draft proposal was never approved by Mr. Tsenov whose approval was needed before it could be implemented. The Applicant was therefore never reassigned to the higher-level functions of the vacant G-6 position.

38. ST/AI/1999/17 is the legislation that deals with the award of SPAs. It states in relevant part at its section 2.1:

39. "...payment of a non-pensionable SPA is authorized ...in exceptional cases when a staff member is called upon to assume the full duties and responsibilities of a post which is clearly recognizable at a higher level than his or her own for a temporary period exceeding three months."

40. Section 5 provides for the conditions to be met before a request for SPA may be considered. These conditions include the requirement that the request for SPA may be initiated by the staff member or his or her supervisor. There must be a statement also from the supervisor that the staff member took up the full functions of the higher-level post and that the staff member demonstrated an ability to fully meet the performance expectations of all functions of the post.

41. Evidence before the Tribunal clearly establishes that the Applicant's supervisor proposed that he perform the full functions of the deceased G-6 staff member but the required approval needed to implement that proposal was never given.

Did the Applicant perform the full functions of the vacant G-6 level post in this case?

42. For three consecutive years, 2012, 2013 and 2014, the management report of the Applicant's Registry sub-unit indicated among its challenges, the fact that "one G-6 post is vacant and the Registry Sub-Unit is understaffed. The office is waiting for the GSS to take action." The report also observed that the request to

Mr. Tsenov to reassign the Applicant carry out the functions of the G-6 post was not acted upon.

43. The Applicant's supervisor Ms. Abebe gave a witness statement. In that statement, she averred that a G-4 level staff member Mr. DE had assisted Mr. CM, the deceased G-6 level staff member, in his day to day work which included the handling of pouch services. After the demise of Mr. CM, Mr. DE continued to deal with pouch services but the Applicant complained that it was a G-6 job being performed by a G-4 staff member.

44. She further stated that although following his complaints the Applicant was allowed to share the handling of pouch services with Mr. DE in the 2013/2014 performance cycle, in the next reporting cycle of 2014/2015 he added the entire handling of pouch services to his goals and was allowed to carry out the task which is also a function of the G-5 level position.

45. When midway into the 2014/2015 reporting cycle the Applicant began to complain that he was overworked and wanted the handling of pouch services assigned to another staff member, his complaints were captured in the minutes of the Registry staff meeting of 1 June 2015. On 5 August 2015, Ms. Abebe instructed the Applicant in an email to hand over the handling of pouch services to two other staff members.

46. The Applicant contended that from 5 March 2012 until 5 August 2015, he performed all the functions of the G-6 level post and that throughout that period, his supervisor repeatedly reported to Mr. Tsenov that he was performing the G-6 level functions and that his reassignment to the higher functions were not rejected.¹ He claimed that he continued to perform the functions of the G-6 level post until directed by his supervisor to hand them over to other staff members.

47. The Applicant while asserting that he carried out functions at the higher level of G-6 did not enumerate what these higher-level functions consisted of except to mention that he performed the supervisory task of time management for the sub-unit. He did not prove his assertion that his supervisor reported to Mr.

¹ Application, paragraph 2, page 5.

Tsenov that he was performing higher-level functions and that this was approved by Mr. Tsenov. The applicable legal principle in a case like this is that he, who asserts, must prove. In other words, aside of making claims, the onus is on the Applicant to place the proof of the full G-6 functions he performed in the sub-unit before the Tribunal. This he has not done.

48. The Applicant's claim that he performed higher-level functions appears to center mainly on the handling of pouch services which had previously been undertaken by the deceased G-6 staff member. The evidence is that the function was continued by a G-4 Mail Assistant before the Applicant took it over at his own insistence. The minutes of the sub-unit's staff meeting on 1 June 2015 (Annex 10) shows that the Applicant asked to be relieved of the work pertaining to incoming pouch. A decision was accordingly taken at the meeting of 5 August 2015 for the Applicant to hand this task over to another staff member.

49. In order to qualify to receive SPA, the staff member must discharge the full functions of the higher-level post.² The Tribunal expects that in making out his case, the Applicant would seek to prove or establish not only the list of G-6 level functions he performed after the demise of his senior colleague but also that he discharged the full functions of that post which are stipulated in Annex 05, the vacancy announcement for the post. Instead, the available evidence shows that the Applicant shared the handling of pouch services with another staff member for a while only to claim that higher level functions were taken away from him when the pouch services were assigned to a junior colleague, at his own request.

50. Not only is the payment of SPA discretionary, certain conditions must be met before it is considered and granted. One of these conditions is that the Applicant's supervisor submits a statement to indicate that he took up the full functions of a higher-level post and whether he demonstrated an ability to fully meet the performance expectations of all functions of the post.³ The Tribunal notes that even though OSLA counsel initiated a request for SPA on behalf of the Applicant, his supervisor Ms. Abebe did not submit the statement as required and

² ST/AI/1999/17, Section 4(b)

³ *ibid.* Section 5(b)

has been able to show through emails and other documentary evidence that the request for SPA is at least doubtful.

Are the allegations that the Respondent filed a fake or fraudulent e-PAS for the 2013/2014 reporting cycle and deliberately deleted the list of jobs from the email correspondence submitted to the Tribunal credible?

51. In additional submission filed on 28 December 2016, the Applicant alleged that in the email correspondence filed by the Respondent as Annex 03 that the list of tasks assigned to him were deliberately deleted. He further alleged that Annex 07 filed by the Respondent is “a fake or fraudulent e-PAS document”.

52. The Respondent in reply to these allegations pointed out that the list of tasks were part of a request to Mr. Tsenov for approval to reassign the Applicant to G-6 functions following the demise of the G-6 staff member in the sub-unit. That approval was never granted and the reassignment of the Applicant to G-6 duties was accordingly never made.

53. With regards to the allegation that Annex 07 which is the Applicant’s performance rating for the 2013/2014 reporting cycle filed by the Respondent is “a fake and fraudulent e-PAS document;” the Respondent explained that Annex 07 was a proper document made between the Applicant and his supervisor to replace an earlier e-PAS in Inspira. In that earlier e-PAS, Annex 7(a), which was cancelled by the Applicant’s supervisor (as shown on that document), the Applicant was rated as not meeting performance expectations.

54. The Tribunal believes the explanations made by the Respondent in respect of the Applicant’s allegations and must underscore the obligations owed the Tribunal by parties before it. The Tribunal is tasked with examining the cases brought by the parties with a view to properly applying relevant laws and holding accountable those who have acted unlawfully. False and inaccurate statements made by any party with nothing but the intention to do mischief constitute unethical behavior. The Tribunal views these allegations by the Applicant as not only unethical but also as unfounded, misleading and malicious.

Judgment

55. The Applicant has not successfully established his claim that he performed the full functions of the higher-level G-6 post in his sub-unit between March 2012 and August 2015. He is not entitled to the SPA payment he claims.

56. This Application fails in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 10th day of May 2019

Entered in the Register on this 10th day of May 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi