



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/071

Judgment No.: UNDT/2019/163

Date: 18 November 2019

Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

YABOWORK

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

1. The Applicant is a staff member serving as a Human Resources Assistant at the G-7 level with the United Nations Economic Commission for Africa (ECA). In her application filed on 21 September 2016, she challenges the decision not to extend her Special Post Allowance (SPA) even though she performs the higher-level responsibilities of a human resources officer.

2. Between May and September 2018, the proceedings were suspended while the parties engaged the services of the Office of the Ombudsman and Mediation Services (OMS) to resolve the dispute between them. On 14 September 2018, the Ombudsman informed the Tribunal settlement discussions had failed.

FACTS

3. The Applicant entered the service of the ECA on 15 May 1989, as a Junior Research Assistant at the G-4 level. On 1 August 2004, she was promoted to the G-7 level as a Senior Human Resources Assistant.

4. On 1 December 2004, she was designated as Certifying Officer and Team Leader in the Staff Services Unit (SSU) within the Human Resources Services Section (HRSS). These duties had hitherto been carried out by the then Human Resources Officer (HRO) and Team Leader, who was at the P-4 level. The P-4 HRO went on prolonged sick leave and was subsequently transferred elsewhere out of the duty station.

5. The Applicant was thus afforded certifying authority for all human resources related entitlements. In recognition of her performance at the higher level, the Applicant was paid Special Post Allowance (SPA) at the P-2 level covering the period 1 December 2004 through 31 August 2010. During this period, the Applicant served under five different Chiefs and Officers-in Charge of HRSS and three successive Directors of Administration (DOA).

6. On 10 September 2010, the OIC HRSS and Chief/SSU informed the Applicant and her colleague that the payment of their SPA would be discontinued.

I am writing to advise you that as both P2 positions in HRSS are now filled and candidates have reported to duty, your SPA's are hereby discontinued effective 1 September 2010.¹

7. They made no mention of the higher-level functions and who these would be assigned to, so both the Applicant and her colleague assumed that those functions were being withdrawn from them.

8. On 21 September 2010 and 10 January 2011, the Applicant's colleague responded to the Chief/SSU and OIC/HRSS requesting that SPA be paid or, in the alternative, that the higher-level functions that they had been performing be discontinued. They received no reply.²

9. On 21 December 2010, the DOA wrote to the Applicant designating her as Certifying Officer for 2011. The Applicant received this memo on 2 February 2011 and continued to perform the higher-level functions she was previously assigned. SPA payment was not restored.

10. On 4 February 2011, the Applicant wrote to the DOA acknowledging receipt of the delegation of authority as certifying officer and requested that the SPA be reinstated. The DOA forwarded the email to the Chief/HRSS, Mr. Rao. There was no response.

11. On 25 July 2012, the Applicant wrote to the Chief/HRSS and OIC/SSU with the same request. She copied the DOA and ECA Senior Management. She had, on the same day, been verbally informed that her request for SPA dated 4 February 2011 had not been approved. She did not receive a reply to this email either.

¹ Application, annex 3.

² *Ibid.*

12. On 28 August 2012, the Applicant filed for management evaluation. The Management Evaluation Unit (MEU) communicated through Counsel for the Applicant and recommended that HRSS and the Applicant seek a classification review by the Office of Human Resources Management (OHRM) in New York.

13. There was correspondence between Counsel for the Applicant and MEU on the classification in October 2012, and MEU reiterated that classification was the way forward.³

14. On 4 December 2012, the Chief MEU wrote to the Applicant. MEU determined that the Applicant's request for management evaluation entailed a question of classification of the functions she was performing and recommended that a classification of the post be undertaken pursuant to ST/AI/1998/9 (System for the classification of posts).⁴

15. The Applicant and her colleague met the Chief/HRSS on 24 December 2012 and suggested mediation. He refused and said that he would rather pursue the classification option.

16. On 31 December 2012, the Applicant wrote to MEU and expressed concern that the classification process would be impeded by hurdles at the drafting and signature stages. MEU responded on 23 January 2013 that they would consider the decision on its merits should it come before them.⁵

17. On 1 February 2013, the Applicant and her colleague submitted a draft classification document to the Chief/SSU by email.

18. On 4 June 2013, the Chief/SSU asked the Applicant and her colleague for clarification on the contents of the draft submitted in February.

³ *Ibid.* annex 7.

⁴ *Ibid.* annex 8.

⁵ *Ibid.* annex 10.

19. On 8 June 2013, the Applicant and her colleague submitted a detailed clarification with the relevant supporting documents. They copied the DOA and the Chief/HRSS and other relevant colleagues on the email.⁶

20. On 13 September 2013, the classification document was finalized and signed by the Applicant, her colleague and her FRO.⁷

21. The document was sent to OHRM/NY by the Chief/HRSS with a cover memo on 21 October 2013 requesting classification on the basis of MEU's recommendation. He did not, however, append his signature to the classification document itself.

22. It is the Applicant's submission that the process lacked transparency, in that it was not clear exactly when the classification request was sent and whom it was addressed to. She and her colleague had to "trace the whereabouts" of the document for several months after it was submitted.

23. In February 2014, the Applicant and her colleague were asked by the Chief/SSU to provide clarifications sought by OHRM. They did so promptly.

24. In December 2014, the Chief/HRSS met with the Applicant and her colleague and suggested mediation through the Ombudsman. He informed them that the classification outcome found the functions to be at the P-4 level. He told them he did not wish to pursue classification and sign the document and would rather have the dispute mediated.

25. In January 2015, the then Chief/HRSS left ECA for a different posting. A new Chief/HRSS was appointed in February 2015.

26. In April 2015, the new Chief/HRSS told the Applicant that he would like the FRO and the Applicant to redraft the classification document.

⁶ *Ibid.* annex 11.

⁷ *Ibid.* annex 12.

27. On 8 June 2015, the Applicant, her colleague and an HR Officer were called to a meeting with the Chief/HRSS. They were informed that a classification request had not been submitted to OHRM. He asked that a new classification document be drafted by the FRO. The Applicant and her colleague informed the new Chief/HRSS that not only was there evidence of submission of a classification request, the former Chief/HRSS had even informed them of the outcome before he left.

28. The Applicant and her colleague wrote to OHRM on 26 June 2015. They referred to the classification request of 21 October 2013 and asked that it be finalised.⁸

29. On 2 September 2015, the Applicant wrote to OHRM to follow-up on their previous request and on 16 September 2015, OHRM informed the Applicant and her colleague that it would be responding to ECA shortly.⁹

30. On 21 October 2015, the Applicant wrote to OHRM on the same matter. OHRM responded that they were waiting for a completed classification document from the Chief/HRSS; as his signature was missing from the request.

31. On 27 October 2015, the Chief/HRSS wrote to OHRM and informed them that the classification process was on hold as HRSS was proposing an 'internal resolution'.¹⁰

32. This again surprised the Applicant because the Chief/HRSS had, on 8 June 2015, asked that the classification document be redrafted.

33. On 21 January 2016, the Applicant wrote to OHRM for clarification on the status of the classification. There was no movement on the informal resolution that was purportedly being pursued.

34. The Chief/HRSS responded on 22 January 2016. He said that a proposal had

⁸ *Ibid.* annex 14.

⁹ *Ibid.* annex 15.

¹⁰ *Ibid.* annex 16.

been submitted to ECA Administration in November 2015.

35. On 25 January 2016, the Applicant wrote to the Chief/HRSS and asked that the details requested by OHRM be provided by 31 January 2016. She also received a verbal assurance on the informal settlement.

36. On 10 March 2016, the Chief/HRSS wrote to the Applicant and her colleague to inform them that ECA had withdrawn and cancelled the request for classification because there was a substantive error in the description of duties. He asked their FRO to redraft the classification document.

37. On 9 May 2016, the Applicant sought management evaluation of the decision to withdraw and cancel the classification, which was pending before OHRM because of the absence of the (then) Chief/HRSS' signature.¹¹

38. On 10 June 2016, the Applicant's FRO sent her a new classification document and asked that she review and sign it.

39. On 5 July 2016, the Applicant responded to her FRO and copied MEU. The Applicant declined the invitation to sign the new classification document, provided reasons for so doing, and informed the FRO that she had submitted a request for management evaluation to challenge the decision of 10 March 2016.¹²

40. There is on record a HRSS/SSU Task Allocation document, which shows the Applicant as a certifying officer and a team leader, and that her duties and responsibilities are equal to that of her colleagues at the Professional level.¹³

41. The Applicant's performance appraisals are also on record to show that she has, for the four years preceding this application, consistently exceeded performance expectations.¹⁴

¹¹ *Ibid.* annex 18.

¹² *Ibid.* annex 19.

¹³ *Ibid.* annex 20.

¹⁴ *Ibid.* annex 21.

DELIBERATIONS

Receivability.

a) The claim for retrospective payment of SPA.

42. The Respondent submits that the Applicant was notified of the decision to discontinue the payment of SPA on 10 September 2010. She should therefore have submitted her request for management evaluation of the impugned decision by 10 November 2010. She did not. Her application before the Tribunal is therefore not receivable.

43. It is common cause that the Applicant was notified about the discontinuation of SPA payment on 10 September 2010. The Respondent's argument that the claim is not receivable is based on that fact.

44. The Applicant's claim however is not the withdrawal of SPA per se, but rather the fact that in a memo dated 21 December 2010, which she received on 2 February 2011, she was assigned Certifying Officer functions for 2011 after SPA had been withdrawn.

45. The grievance arose after her request for reinstatement of SPA went unanswered until 25 July 2012 when the OIC HRSS notified her verbally about OHRM's decision denying the payment of SPA.

46. The Respondent's argument that the limitation period began to run from 10 September 2010 is not correct, since the decision against which the Applicant is complaining (the refusal to pay her SPA after certifying officer functions had been assigned to her) was communicated to her on 25 July 2012.

47. She submitted her case to MEU on 28 August 2012, within 60 days of receipt of the notification of 25 July 2012 denying her claim for payment of SPA.

48. The Tribunal finds that the claim for retrospective payment of SPA is receivable.

Merits

49. It is the Applicant's case that the decision to withdraw payment of the SPA and the administration's dilatory conduct in the handling of the classification request are unlawful.

50. The Respondent cites "substantive errors discovered in the classification request," for their withdrawal from the classification exercise. The stated errors include the fact that the duties and responsibilities in the classification document were extracted from that of a P-4 Human Resources Officer job description, which functions were not being performed by the Applicant. Moreover, the submission was not signed by the Applicant's Second Reporting Officer.

51. The Tribunal takes note of aspects of the Chief/HRSS, Mr. Amareswara Rao's, evidence (annex 7 to the reply) which show that the Applicant did not come to the Tribunal with clean hands. The most damning aspects of Mr. Rao's evidence which the Applicant does not dispute are that;

- a. She borrowed positions from organizational units of ECA, including substantive divisions in addition to higher level positions than the P-2, just to get paid SPA.
- b. The approval for her temporary placement was used as a pretext for payment of SPA to her for an extended period, from 1st December 2004 to 31st August 2010 and not in full compliance with the provisions of ST/A1/1999/17 (Special post allowance) for payment of SPA.
- c. She was placed against several vacant posts ranging from P-2 level to P-5 level, including posts belonging to other sections and divisions in ECA

purely for purposes of being paid SPA, yet she was not performing the functions of any of these posts.

d. The initial P-2 post in HRSS, the functions for which she was filling in for had been encumbered since 2006.

52. The Tribunal is in full agreement with Mr. Rao's observation that being at the highest level of General Services at GS-7 in human resources, the Applicant should have objected to being irregularly paid SPA, rather than continue to request for it.

53. The Applicant's suggestion that the Respondent is guilty of dilatory conduct and was not transparent in the way they handled her issues is incorrect and borders on dishonesty on her part. Mr. Rao's evidence (annex 7 to the reply) is that at meetings with HRSS, it was explained to her that SPA payment could not be extended because all professional posts in the section had been filled. This evidence was not disputed. Also not disputed is the evidence that her request was the subject of many formal and informal face-to-face verbal meetings which she attended.

54. The SRO's failure to sign the classification document, which is one of the key complaints the Applicant raises, was also sufficiently explained. Mr. Rao clarified that he signed the memo forwarding the classification document to the classification section in OHRM before he had an opportunity to review the content and substance of the job description submitted for classification. He signed it in advance because at the time it was brought to his attention he was preparing to travel away from the office and considering that the matter had delayed and needed to be moved forward urgently, he signed on the understanding that he would get an opportunity to review and sign the job description later.

55. When he got to review the job description he did not believe the duties and functions specified in the classification documents reflected the full functions and duties that the Applicant actually performed and so he did not sign off the classification document.

56. His further evidence was that the functions reflected in the classification document were much higher than what the Applicant actually performed. The above evidence only goes to show that the Applicant substantially contributed to the delay in evaluating and processing her claim.

57. Turning to the substantive issues of the application, key of which is that she performed higher level functions (the same functions she performed when she was paid SPA) and so she is entitled to SPA, sufficient explanation was given (in annex 7 of the Respondent's reply) in the following terms;

- a. There was no case for SPA for her since the certification and Team leader duties do not represent the full functions of P-2.
- b. HRSS found no reason to withdraw her Team leader and/or delegated certifying officer duties because such duties were normally within the functions of a G-7, Senior Human Resources Assistants like herself. The argument that Team Leader and Certifying officer duties were higher level functions for a G-7 human resources assistant is inaccurate.
- c. As the highest level in the GS category, G-7 functions could be that of a paraprofessional in nature and allow for certifying responsibilities and even managerial tasks including supervision of staff at lower levels. The HRSS/SSU Task Allocation document which the Applicant relies on to show that she performed certifying officer and a team leader functions, and that her duties and responsibilities are equal to those of her colleagues at the Professional level must be viewed in this light.
- d. It is a secretariat wide policy that general services staff members could perform certifying officer functions.
- e. The fact that she was performing certifying officer functions would not automatically mean that she was performing the full functions of a P-2.

58. The Tribunal did not believe the evidence that Mr. Rao informed the Applicant that the outcome of the failed classification exercise was at the P-4 level. The explanation (in annex 7 of the Respondent's reply) that he could not confirm the level of a position when he did not even agree with the content of the classification document is logical and must be believed. His explanation that he didn't put the classification process on hold and that it was stalled only because he refused to sign on duties which he knew she did not perform, and they would not agree to re-write the documents to reflect the appropriate statements of duties and functions they performed must also be believed.

59. In *Hamayel* 2014-UNAT-459, the United Nations Appeals Tribunal ("Appeals Tribunal") held that it is mindful of the principle that the Commissioner-General of UNRWA has an obligation to act in good faith and comply with applicable laws, and that mutual trust and confidence between the employer and the employee is implied in every contract of employment. Both parties must however act reasonably and in good faith. The Applicant, in the present case, failed in this.

60. There is credible evidence that the classification document indeed bore substantive errors. Paragraph 2 of annex 5 to the reply shows that there was a substantive error in the statement of duties and responsibilities that the Applicant alleged to have performed. Her FRO confirmed that the duties and responsibilities reflected in the classification request were extracted from a P-4 human resources officer job description and were in fact her (FRO's) functions. The request also indicated her functional title as Human Resources Officer and that she was encumbering that post under that title which was not the case.

61. The Tribunal agrees with the Respondent that given the errors in the submission, the Respondent had "a right and even an obligation to put an end to the illegal situation as soon as they became aware of them while preserving any rights acquired by staff members in good faith". The objective of the classification exercise was not to "place her at a higher level post;" rather it was to determine "whether the

duties and responsibilities” assigned and being performed by her were commensurate to that of a G-7 Human Resources Assistant.

62. On the basis of the evidence (annex 7 in para. 6) that SPA payment to the Applicant was stopped when two HR officers were recruited, and that the Applicant was not performing the full-time functions of their posts, also that the classification process stalled because the documentation submitted was missing the SRO’s mandatory second level signature which he could not give because the functions ascribed to the Applicant were higher than what she actually performed, the Applicant is not entitled to the remedies she sought.

63. Important to note is that the Applicant has over 25 years of service in providing HR services to ECA. She is expected as a Team Leader to provide guidance to her supervisees, managers and staff at large on HR policies, and should recognize, as is in evidence, that much part of the six years she received SPA was in fact not in accordance with the rules of the organization. She did not come to the Tribunal with clean hands.

JUDGMENT

64. The application is dismissed for lack of merit.

(Signed)

Judge Margaret Tibulya

Dated this 18th day of November 2019

Entered in the Register on this 18th day of November 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi