



Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

ALQUZA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Aleksandra Jurkiewicz, OSLA

Counsel for Respondent:

Melissa Bullen, UN Women

Introduction

1. On 22 January 2018, the Applicant, a former Operations Associate, filed an application in which she contests, “The Administration’s refusal to grant an *ex gratia* payment in lieu of Special Post Allowance”. The case was initially assigned to Judge Nkemdilim Izuako in Nairobi under Case No. UNDT/NBI/2018/009.
2. On 26 February 2018, the Respondent filed his reply in which he submits that the application is without merit.
3. By email of 19 July 2019, the Nairobi Registry informed the parties that Judge Izuako’s term with the United Nations Dispute Tribunal ended on 10 July 2019 and that “to balance the Tribunal’s case load and ensure judicial efficiency” it had been directed to transfer the case to the New York Registry with immediate effect.
4. On 15 December 2019, the case was reassigned to the undersigned Judge.
5. By Order No. 175 (NY/2019) dated 16 December 2019, the Dispute Tribunal ordered the parties to file their closing statements in the following sequence: the Applicant’ closing statement (6 January 2020); the Respondent’s response (13 January 2020); and the Applicant’s final observations (17 January 2019).

Facts

6. In October 2013, the Applicant joined the UN Women’s country office in Jordan as an Operations Associate at the G-7 level.
7. According to the Applicant, “Starting from January 2014, while still fulfilling all the responsibilities of an Operations Associate, [she] was increasingly assigned additional responsibilities, including: managing the Operations Team in Jordan, serving as a member of the senior management team with oversight responsibilities for all aspects of the Jordan country office operations and ended up with supervising

the work of seven personnel in the operations team. With these additional responsibilities, on 21 January 2014, [she] assumed the full responsibilities of an Operations Manager at the National Officer level”. The Applicant further submits that her first reporting officers had reflected the increase in responsibilities in her performance reports of 2014, 2015 and 2016.

8. The Respondent does not object to the assertion in the Applicant’s presentation of facts that she was assigned increasingly more responsibilities. Rather, the Respondent’s case is that those responsibilities were undertaken within her substantive post of Operations Associate only. There is no concurrence by the Respondent with the Applicant’s claim that she “assumed the full responsibilities of an Operations Manager at the National Officer level”.

9. In March 2017, the Applicant was informed that her post as Operations Associate would be abolished as of 31 December 2017.

10. A month later, in April 2017, the post of Operations Manager at the National Officer level in the Jordan country office was advertised. The Applicant applied for the position, but was eventually not selected.

11. On 22 July 2017, the Applicant submitted, by memorandum addressed to the Human Resource Director at UN Women, the request for an *ex gratia* payment in lieu of Special Post Allowance to compensate her for having undertaken higher level functions. She framed her request under staff rule 12.3(b), which allows the Secretary-General to grant exception to the Staff Rules under certain conditions.

12. UN Women rejected the request on 28 July 2017 on the grounds that the Applicant did not meet the requirements for granting a Special Post Allowance and that her request does not fall within the parameters for a request for grant of an *ex gratia* payment.

13. On 31 December 2017, the Applicant's post as Operations Associate was abolished, in keeping with the prior notice she had received. The Applicant was subsequently separated from service.

Consideration

Issues

14. Under the Appeals Tribunal's consistent jurisprudence, the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review" (see *Fasanella* 2017-UNAT-765, para. 20).

15. As a preliminary matter, the Tribunal notes that, in the present case, the decision the Applicant challenges is not in relation to a request for Special Post Allowance for undertaking functions above her level. Instead, she is challenging the decision made to reject her request pursuant to staff rule 12.3(b), for a retroactive *ex gratia* payment in lieu of such a Special Post Allowance, as also reflected in her request for management evaluation. It is therefore the denial of this specific request that the Tribunal is to review.

16. In light of the above, by Order No. 175 (NY/2019), the Tribunal delineated the principal issues of the present case, to which neither party subsequently objected, as follows:

- a. Was it improper for the UN Women to reject the Applicant's request for an *ex gratia* payment in lieu of Special Post Allowance?
- b. If so, what relief ought to be awarded to the Applicant?

Did UN Women improperly reject the Applicant's request for an ex gratia payment in lieu of Special Post Allowance?

17. The Applicant submits that in light of her dedicated service and performance of the higher-level duties for almost four years, the Administration violated the principle of equal pay for work of equal value when failing to consider granting her an *ex gratia* payment. In this regard, the Administration ignored the following facts: (a) the Applicant had been performing the duties of an Operations Manager for almost four years; (b) during this period, the Applicant's work as Operations Manager was fully recognized by two consecutive first reporting officers in her 2014, 2015, and 2016 performance reviews; (c) the need for an Operations Manager post in the Jordan country office was pressing for years, given that Syrian crisis operations and the influx of refugees were concentrated in Jordan since 2011, and that there was a need to align the Jordan Country Office with the regional practice of having Operations Managers at the National Officer level; and (d) the Administration relied on the performance of the Applicant in her *de facto* capacity of Operations Manager to avoid the necessity of creating such a position, which was subsequently only created following the abolition of the Applicant's post.

18. The Applicant contends that the principles of the Appeals Tribunal's judgment in *Chen* 2011-UNAT-107 apply to her case as the two cases are similar—the need for an Operations Manager post in the Jordan Office was clearly documented and pressing for years when the general practice of UN Women in the region was to have Operations Managers at the National Officer level, which is not denied by the Respondent. It was only because the Applicant was exceeding performance expectations and taking upon her higher functions and roles that UN Women was refusing to reclassify her post in the Jordan country office and simply saving money.

19. The Applicant submits that the Administration's discretion may not be exercised in an arbitrary, capricious, or illegal manner, and most importantly, there is no discretion to violate the principle of equal pay for equal work.

20. The Respondent's submission is based on the same facts as put forward by the Applicant save that her performance of the functions of an Operations Manager is denied. The Respondent accepts and expresses appreciation for the fact that the Applicant's performance evaluations reflect increasing responsibilities. However, the Respondent asserts that these evaluations assessed her role only as an Operations Associate. Accordingly, the said evaluations do not, according to the Respondent, provide evidence of performance of the higher-level functions of an Operations Manager.

21. The Respondent submits that at the time when the Applicant was evaluated as having undertaken increased responsibilities there was no post that was classified and budgeted at a higher level than the Applicant's post. It was not until March 2017 that the Operations Manager post was established. The Respondent further asserts that the Applicant was not, at the relevant time prior to the creation of the Operations Manager post, assigned to perform the full functions of Operations Manager: indeed, there was no such post to which she could have been assigned.

22. In light of the foregoing, the Respondent contends that there was no factual basis for a legal obligation for the Applicant to be granted Special Post Allowance. The Respondent recognizes that an *ex gratia* payment can be made where there is no legal obligation but instead there is a moral obligation. However, the Respondent's case is that there is no reasonable basis for the exercise of a discretion to grant an *ex gratia* payment in lieu of Special Post Allowance. This is so because, according to the Respondent, the grant of an *ex gratia* payment is entirely discretionary and is intended to address exceptional humanitarian or emergency cases hence a moral obligation. Further, the Respondent contends that the grant of an *ex gratia* payment in lieu of Special Post Allowance as a performance reward would not be a proper exercise of discretion. Additionally, the Respondent asserts that the Applicant was adequately compensated for her work in accordance with the "equal pay for work of equal value" principle.

23. The Tribunal observes that staff rule 12.3(b), which is the provision cited by the Applicant in her request for an *ex gratia* payment in lieu of Special Post Allowance, provides the Secretary-General with the authority to grant an exception to the Staff Rules if certain conditions are met. It does not necessarily bestow a right to a staff member to such exception as the provision states “may” and not “shall” (emphasis added):

... Exceptions to the Staff Rules *may* be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

24. In line herewith, the Appeals Tribunal has found that staff rule 12.3(b) only gives a staff member a right to have a request for an exception considered, but not to have it granted (see, for instance, *Hastings* 2011-UNAT-109 and *Benchebbak* 2014-UNAT-438). In *Wilson* 2016-UNAT-676, the Appeals Tribunal further elaborated that, “The three elements of Staff Rule 12.3(b) are: (a) Such an exception must be consistent with the Staff Regulations and other decisions of the General Assembly; (b) Such an exception must be agreed to by the staff member directly affected; and (c) Such an exception, in the opinion of the Secretary-General, must not be prejudicial to the interests of any other staff member or group of staff members” (see para. 47).

25. It therefore follows that the Administration is given a certain latitude of discretion under staff rule 12.3(b). In this regard, the Appeals Tribunal has consistently held that the Dispute Tribunal’s judicial review is limited to legal matters, in particular how the decision-maker reached her/his decision, and it is not to replace the decision-maker by assessing the correctness of the merits of this decision. For instance, in the seminal judgment of *Sanwidi* 2010-UNAT-084, the Appeals Tribunal held that:

38. Administrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion

40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

26. Regarding *ex gratia* payments specifically, the Staff Regulations and Rules contain no provision thereon. The Respondent contends that for UN Women, that matter is regulated by UN Women's Financial Regulations and Rules. The Applicant does not object to the applicability of those rules which, of relevance to the present case, provide as follows:

a. “*Ex gratia* payment shall mean a payment made where there is no legal liability but the moral obligation is such to make payment justifiable” (see the definition in “Financial Regulations and Rules”).

b. “The Under-Secretary General/Executive Director may make such *ex gratia* payments, not exceeding \$75,000 per year, as she or he deems necessary in the interest of UN Women” (see Regulation 20.6 (a));

c. “*Ex gratia* payments may be made in cases where, in the opinion of the legal adviser to UN Women, there is no clear legal liability on the part of UN Women and where such payments are in the interest of UN Women” (see Financial Rule 2008 (a)).

27. The Respondent submits that *ex gratia* payments are intended to address exceptional humanitarian or emergency cases, where there is a justifiable moral obligation, and further refers to staff rule 3.10(a), which states that, “Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts”. The Respondent contends that the only example of an *ex gratia* payment in UN Women history was a one-time rehabilitation grant after the earthquake in Nepal in 2015. The Respondent also refers to the judgment of the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) in *Hushiya UNRWA/DT/2013/009* in which it was held that an *ex gratia* payment “is not based on a right of the staff member or a legal obligation on the part of the Agency [...] but rather a gratia, a favor. An *ex gratia* payment is not based on positive law and as such, is a payment not legally required” (see para. 52).

28. The Applicant does not deny the Respondent’s interpretation of the cited UN Women Financial Regulations and Rules, which said interpretation underscored the discretionary aspect of such a payment. This was the same interpretation set out in the Administration’s response to the Applicant’s request for management evaluation.

However, the Applicant argues that the Respondent's analysis of how the discretion should be exercised is flawed. The Applicant contends that there is case law in support of the award of an *ex gratia* payment as compensation for performance of higher level functions for a considerable period of time. The case of *Svedling* UNDT/2016/054 cited by the Applicant includes the comment by the presiding Judge that "the Applicant, having been denied his request for [Special Post Allowance], ought to have filed a request for an *ex gratia* payment. The rule governing exceptions to the staff rules is staff rule 12.3(b)".

29. The Applicant has underscored the doctrine of equal pay for equal work, by virtue of which she essentially contends that the Administration has no discretion to deny the request for an *ex gratia* payment in lieu of a Special Post Allowance under staff rule 12.3(b).

30. With reference to Financial Rule 2008 (a), the Applicant submits that in the context of the UN internal justice system, clear legal liability stems from the Staff Rules and Regulations as well as from the accompanying administrative issuances. The principle of equal pay for equal work is a jurisprudential creation of both legal and moral value, intended to mitigate discrimination and unequal treatment, where administrative regulations fail to do so. In the present case, the Applicant contends that "the facts speak for themselves" and the Applicant should be compensated for performing the duties of an Operations Manager at the National Officer level for almost four years and supervising the work of seven colleagues, as documented by two consecutive first reporting officers in her 2014, 2015, and 2016 performance reviews.

31. The Applicant submits that it is outrageous if the Administration can simply ignore the extended years of service at a higher level and contend that no moral consequences stem from this abuse of authority. The Administration, the Applicant submits, used her to perform functions at a higher level without any intention to pay her what would be owed to a staff member performing similar functions. The

Applicant states that she was performing her functions so well that it was convenient for the Administration to delay reclassification of the post and benefit from her “cheap labour”. The Applicant submits that equal pay for equal work is a moral and legal obligation and that to artificially distinguish such a principle and only equate it to a legal right undermines the very principles that the notion espouses.

32. The Tribunal notes that the Appeals Tribunal has, in several cases, endorsed the doctrine of equal pay for equal work by reference to art. 23.2 of the Universal Declaration of Human Rights (see, for instance, *Tabari* 2011-UNAT-177 and *Chen* 2011-UNAT-107). In relation to the specific situation where a staff member undertakes functions at a higher level than her/his grade, in *Elmi* 2016-UNAT-704, the Appeals Tribunal has, however, held that the doctrine would not apply as this would otherwise render staff rule 3.10(a) and (b) unlawful and that the Dispute and Appeals Tribunals do not have the power to overturn these provisions:

33. We uphold this jurisprudence and clarify that the principle “equal pay for work of equal value” forbids discrimination; but it does not prohibit every form of different treatment of staff members. Such different treatment constitutes discrimination only when there is no lawful and convincing reason for the different treatment of staff members, e.g. when it is based on an a priori unlawful criterium such as gender or race, or when there are no significant differences between the categories of staff members being treated differently.

...

35. It does not follow from the principle “equal pay for work of equal value” that a staff member who exercises higher level functions has a right to receive the same salary and pension benefits as a staff member at a higher level exercising the same or similar functions. If this were the case, Staff Rule 3.10(a) and (b) would be unlawful in itself as it states expressly that staff members, for a certain amount of time, must exercise higher functions as a normal part of their customary work and without any pecuniary reward in the form of higher salary or pension and, afterwards and if certain criteria are met, may receive only non-pensionable [Special Post Allowance]. As Staff Rule 3.10(a) and (b) regulates the interests of staff members of lower grades exercising higher level functions in a consistent and reasonable way, it lawfully embodies the principle of “equal pay for work of

equal value” into the United Nations’ system. It is not within the authority of the Appeals Tribunal or [the Dispute Tribunal] to overturn such a legal framework. [reference to footnote omitted]

33. The case of *Svedling* cited by the Applicant as precedent for grant of an *ex gratia* payment did not substantively address that issue. The point was made in passing by the Judge having determined that the Applicant’s case was not receivable. It was not receivable because the issue of an *ex gratia* payment had not been raised in the management evaluation request. The comment by the Judge in that case was in relation to circumstances that differ from those in the instant case. There was no question in *Svedling* as to the fact that he claimed to have performed higher level functions in a post that existed.

34. In all the circumstances of this case, the Tribunal finds that UN Women, in denying the Applicant’s request for an *ex gratia* payment in lieu of Special Post Allowance, did not exceed its authority. More particularly, UN Women did not fail to properly apply staff rule 12.3(b) as the requested *ex gratia* payment was a matter that could not be treated as an exception to the Staff Rules by applying staff rule 12.3(b). Additionally, under UN Women’s Financial Regulations and Rules, the request made by the Applicant does not fall within the parameters for an *ex gratia* payment.

What relief ought to be awarded to the Applicant?

35. The second issue identified for determination need not be further considered in light of the foregoing findings. It must be accepted though, that the Applicant has performed at an exemplary level. That has been recognized and appreciated by UN Women. It is clear from the filing of this application and the submissions made that the Applicant feels that this appreciation has not truly been reflected in positive action by the Respondent. Accordingly, there is a perception on her part that her willingness to serve beyond the call of her assigned duties has been abused.

36. However, the Respondent has in fact reflected recognition and appreciation for the Applicant's sterling efforts in her positive performance evaluations and by waiving certain qualification requirements for her initial application to be selected for the new Operations Manager position.

37. This recognition by the Respondent of the valuable contribution made by staff members like the Applicant is to be encouraged in fostering the relationship of mutual trust and confidence between the Administration and staff members. Yet there is no basis within the regulatory framework for further reward by way of *ex gratia* payment. The Applicant is not entitled to the relief claimed.

Conclusion

38. The application is rejected.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 23rd day of January 2020

Entered in the Register on this 23rd day of January 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York