



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/045

Judgment No.: UNDT/2023/058

Date: 21 June 2023

Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HOXHA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Shubha Suresh Naik, OSLA

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Fatuma Mninde-Silungwe, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Budget Assistant recruited at the FS-4 level with the United Nations Interim Force in Lebanon (“UNIFIL”), is contesting the Administration’s failure to classify the Budget Assistant post which she encumbered, from FS-4 level to FS-5level, “per facsimile from the Field Budget and Finance Division dated 14 November 2018”.

Procedural history

2. On 26 May 2022, the Applicant filed the application mentioned above.
3. On 27 June 2022, the Respondent filed his reply contesting the receivability of the application.
4. By Order No. 082 (NBI/2023) dated 17 May 2023, the Tribunal directed the parties to file closing submissions on or before Wednesday, 31 May 2023.
5. The Respondent file a motion for leave to file additional documents on 22 May 2023.
6. By Order No: 093 (NBI/2023) dated 25 May 2023, the Tribunal admitted the additional documents submitted by the Respondent and invited the Applicant to respond to the Respondent’s motion in his closing submissions and submit additional documents, if any, necessary to contrast those submitted Respondent.
7. Both parties complied with the directions in Order 082 (NBI/2023) on 31 May 2023.

Facts

8. On 11 November 2015, the Applicant was selected for the FS-4 level Budget Assistant position in the UNIFIL Security Section.¹

¹Reply, page 3, para. 7.

9. The Applicant had been placed on a roster of pre-approved candidates for the position of Finance and Budget Assistant at the FS-5 level.²

10. On 14 November 2018, the Director of the United Nations Headquarters -Field Budget and Finance Division (“UNHQ/FBFD”) advised by facsimile to all the United Nations peacekeeping missions, that the roles performed by international posts had evolved in recognition of their increasing complexity. Therefore, in the recent establishment of new missions, the “*lowest level entry*” point for international finance and budget posts has been set at the FS-5 level.³ With immediate effect, this was established as the minimum level of recruitment for international finance and budget posts across all United Nations field missions.⁴

11. The Director recommended a review to determine the correct classification for all Budget and Finance posts at the FS-4 level in missions.⁵

12. On 24 July 2019, the UNFIL Human Resources Section (“HRS”) requested to UNHQ a reclassification for the position no. 300646 associated to the Job description of Budget and Finance assistant at the FS-5 level.⁶

13. On 2 August 2019, UNHQ sought further justification for the reclassification of the post encumbered by the Applicant and requested UNIFIL to describe how the functions associated with this post changed. UNHQ explained that the facsimile from the Director of UNHQ/FBFD dated 14 November 2018 was not a “guaranteed upgrade” for the post.⁷

14. The OHR requested UNIFIL to give details and concrete examples of the change in functions against the FS-5 level Terms of Reference.⁸ The UNIFIL

²Application, page 4, para.2.

³*Ibid.*, at annex 1, *UNHQ.FBFD.FAX.13488.1. Finance and Budget function in the Field Service category.*

⁴*Ibid.*, at annex 2- E mail correspondence between Ms. Hoxha and mission.

⁵Reply, page 4, para. 6.

⁶Application, page 4, para.4.

⁷Reply, annex R/3.

⁸Application annex 3, *additional justification for reclassification.*

resubmitted its request on 16 August 2021.⁹

15. In September 2019, the UNIFIL sent the requested information to UNHQ.¹⁰

16. On 13 October 2021, the Applicant was informed by email that the status of her position would be considered again by UNIFIL and UNHQ.¹¹

17. On 13 January 2022, the Applicant concluded that the Administration did not intend to reclassify her post and filed a request for management evaluation contesting the decision not to reclassify her post.¹²

18. On 1 March 2022, the OHR wrote to UNIFIL HRS indicating the possibility of classifying the Post at Level FS-5 per the duties in the Standard Classified Job Description submitted with the case. However, they informed UNIFIL that it was unclear which of these duties fell under the post since the UNIFIL had a fully functional finance and budget section.

19. OHR requested clarification on whether the budget assistant in the security section was carrying out similar functions as those of the Finance and Budget Management Section (“FBMS”) FS-5 finance and budget assistants for the whole mission.¹³

20. On 4 March 2022, the Management Evaluation Unit (“MEU”) gave its recommendation concerning the failure to reclassify the Budget Assistant post encumbered by the Applicant from an FS-4 level to an FS-5 level and held that the request was premature as there was no final decision taken on the reclassification¹⁴.

21. On 30 March 2022, the UNIFIL HRS requested the Chief Security Officer to revise the original Job Description submitted with the request to add additional

⁹Reply, page 4, para 10.

¹⁰Application, annex 3, *additional justification for reclassification*.

¹¹*Ibid.*, at annex 2, *email correspondence between Ms. Hoxha and mission*, page1, email dated 13 October 2021.

¹²*Ibid.*, at annex 4, *MER Hoxha*.

¹³Reply, page 4, para. 11.

¹⁴Application, annex 5, *MEU decision 4 Mar 22*, page 3.

functions such as implementing International Public Sector Accounting Standards (“IPSAS”) left out in the original submission.¹⁵

22. UNIFIL submitted the revised Job Description to OHR on 20 April 2022.¹⁶

23. On 14 June 2022, OHR notified the UNIFIL HRS of the decision to reclassify the post from FS-4 Level to FS- 5.¹⁷

24. UNIFIL notified the Applicant of the OHR reclassification’s decision on 16 June 2022.¹⁸

25. Following the reclassification, from 2 to 16 August 2022, UNIFIL advertised the Post through a recruit-from-roster method.

26. On 12 September 2022, the hiring manager recommended the Applicant for selection.

27. On 28 September 2022, the Applicant was offered the FS-5 level position, which she accepted on the same day.

Applicant’s submissions

28. Following the UNHQ/FBFD Director’s facsimile dated 14 November 2018 to all United Nations peacekeeping missions, Budget Assistants at the FS-4 level were to be considered at the level of FS-5 level considering the increased complexity of their tasks.

29. The Applicant submitted that the functions attached to her post were like those carried out by all FS-5level Budget Assistants in other United Nations peacekeeping missions. She stated that the implied refusal was unlawful because it is in breach of art. 23.2 of the Universal Declaration of Human Rights which provides that everyone without any discrimination has the right to equal pay for equal work. She added that

¹⁵Reply, page 4 para. 12.

¹⁶*Ibid.*, at page 4 (second para 12); Reply, annex R/5.

¹⁷*Ibid.*, at page 4, para. 13.

¹⁸*Ibid.*, at page 5, para. 14.

the principle of equal pay for equal work provided for by art.23.2 of the Universal Declaration of Human Rights has its origins in gender inequality where women got less pay for doing the same work as men. In *Chen* (UNDT/2010/068, from para. 39), the Dispute Tribunal held that this principle is applicable in the United Nations system.

30. A detailed justification for reclassification provided by the Mission would show that the Applicant's post entailed additional responsibility progressively over the years, which justified a reclassification.

31. The Applicant submitted that since 24 July 2019, when the OHR request for reclassification was presented to UNHQ, the Administration has not given any reasons for the delay nor provided the status of the reclassification.

32. The Applicant relies on different judgments holding that the absence of a positive decision may also amount to a decision¹⁹. She states that the jurisprudence of the United Nations Appeals Tribunal ("UNAT") makes it clear that the absence of a response on the part of the Administration to a staff member's request may, in certain circumstances, constitute a denial of that request. This would constitute an appealable administrative decision since it may amount to an implied unilateral decision with direct legal consequences.²⁰

33. The Applicant's contentions are the following. An implied unilateral decision with direct legal consequences is an administrative decision under art. 2(1) of the Statute of the Dispute Tribunal. The Administration's implied decision had multiple direct legal consequences. First, the Applicant has not been paid according to the amount of work she has been carried out. Secondly, her career progression has been affected as she would have been eligible to apply for FS-6 level posts if her post was upgraded to the FS-5 level.

¹⁹*Kings* UNDT-2017-043.

²⁰*Tabari* 2010-UNAT-030; *Tabari* 2011-UNAT-177; *Nwuke* 2010-UNAT-099; *Christensen* 2012-UNAT-218; *Terragnolo* UNDT-2014-107.

Respondent's submissions

34. The Respondent in his reply, objects that the application is moot and not receivable.

35. The application describes the contested decision as failing to classify the Post from FS-4 to FS-5, while there is no such implied decision.

36. On the other hand, on 16 June 2022, UNIFIL notified the Applicant of the OHR decision to classify the Post at the FS-5 level. As a consequence, the Dispute Tribunal lacks jurisdiction to examine the merits of a substantive decision that the Administration's subsequent actions have superseded.

37. As to the merits, the Respondent states that the UNHQ/FBFD Director's facsimile did not require the reclassification from FS-4 level to the FS-5 level for the posts of Budget Assistants in peacekeeping missions. It recommended only that the classification of those posts be reviewed on a case-by-case basis to determine whether there had been a substantive change in the functions. The facsimile did not create a right for the Applicant to encumber an FS-5 level post. As the review resulted in the classification of the Applicant's post to a higher level, (FS-5 level), UNIFIL had to advertise a job opening for the position. The Applicant was required to compete for the position alongside others per section 4.3 of the Classification Administrative Instruction.

38. The application describes the contested decision as failing to classify the Post from FS-4 to FS-5 level. The OHR decision dated 16 June 2022 to classify the post from FS-4 to FS-5 level supersedes any claim that the Applicant may have in relation to the classification of the Post.

39. Finally, there has been no violation of the right to equal pay for equal work. The Respondent relies on the Appeals Tribunal in *Tabari* which decided that there was

no discrimination if the difference was motivated by the pursuit of general goals and policies and not designed to treat individuals or categories of them unequally.²¹

40. The change in the Applicant's functions was a result of operational changes in the budget and finance responsibilities across the Organization. When such changes occur, there is a procedure for addressing them and it was followed in this case. Accordingly, the Applicant's reliance on *Chen* is inapposite.²² In *Chen*, the staff member had requested upward classification which was denied for 10 years. Here, UNIFIL's request was approved two months after UNIFIL provided a revised job description.

Considerations

41. The Applicant claims that the Administration's failure to reclassify her post from FS-4 to FS-5 level was unlawful.

42. The application is receivable.

43. The jurisprudence of UNAT makes it clear that the absence of a response on the part of the Administration to a staff member's request may, in certain circumstances, constitute a denial of that request. This would constitute an appealable administrative decision since it may amount to an implied unilateral decision with direct legal consequences (*Tabari* 2010-UNAT-030; *Nwuke* 2010-UNAT-099; *Christensen* 2012-UNAT-218; *Terragnolo* UNDT-2014-107).

44. In *Zangmo* (UNDT-2015-056- not appealed), which had similar facts to the present case, UNDT held that it had jurisdiction to adjudicate in a matter where there was no decision on the request for reclassification for over a year.

45. In the case at hand, the failure of the Administration to address the Applicant's request for a reclassification of her post from FS-4 to FS-5 lasted more than four years

²¹*Tabari*, 2011-UNAT-177, paras. 26-27.

²²*Chen*, 2011-UNAT-107.

and could therefore be considered – at the moment the application was lodged with the Tribunal- as a refusal to do so.

46. It results from the additional documents filed by the Respondent that on 16 June 2022, the Chief Human Resources Officer (“CHRO”) for UNIFIL notified the Applicant of the decision to reclassify upwards the FS-4 Budget Assistant post to FS-5 Finance and Budget Assistant (“the Post”).

47. Following the reclassification, the Post was advertised and at the end of the selection process, the Applicant was offered the FS-5 level position, which she accepted on the same day.

48. The Respondent claims that the application is now moot since it has been superseded by the Administration’s subsequent action of upgrading the post in 2022.

49. The Tribunal is of the view that the application is not moot, as the matter of the dispute did not end in the case, nor did the Applicant lose her legal interest in the dispute, as there are remaining effects of the challenged decision.

50. As a matter of fact, the Applicant claims an acknowledgment of her function correspondent to the upper level also for the past.

51. The Tribunal notes that it took for the Administration more than four years to complete the process; the Applicant claims that, due to this delay, the Applicant - despite carrying out same functions as Budget Assistants in FS-5 level in other missions - remained on an FS-4 post and that she did not feel professionally fulfilled whilst performing her functions, knowing that for the very same functions all her other fellow Finance and Budget Assistant colleagues in all other missions were placed and paid at higher level positions compared to her.

52. In particular the document reads as follows:

1. I am writing to update you on the evolution of the finance and budget functions at the assistant level in the field service category.

2. As you are already aware, there has been significant change over the last five years with the transfer of transactional functions to shared service centers and a corresponding shift towards a strategic resourcing, business intelligence and risk management advisory function in missions.

3. In this context, the roles performed by international posts have also evolved in recognition of their increasing complexity while at the same time providing opportunities for nationalization within the overall finance and budget function.

4. As a result of these trends, in the recent establishment of new missions, the 'lowest level entry' point for international finance and budget posts has been set at the FS5 level. Effective immediately this will be established as the minimum level of recruitment for international finance and budget posts across all field missions.

5. While the majority of missions already meet this requirement following the field service classification exercise in 2015, there remains a small number of finance and budget functions still at the FS4 level in your collective missions. These legacy posts are located in both the core finance and budget function as well as in various operational units.

6. I would appreciate your support in reviewing the functions currently being performed by these FS4 posts with a view to determining what the appropriate post classification should be. I attach the approved terms of reference for the FS5 function for your reference in this exercise.

53. The Respondent correctly objects that the 14 November 2018 facsimile from the Director/FBFD did not create a right to encumber an FS-5 level post or to the classification of the FS-4 level post upwards.

54. The Tribunal considers, however, that the right for the Applicant to a correct level of classification of the post and a fair level of pay derives from the effective functions performed in the years, always the same at least from 2018, functions which - according to the acknowledgment of the Administration itself - corresponds to the FS-5 level.

55. It is, indeed, on the one hand, undisputed that the Applicant has been carrying out the same functions for a long time (after the global classification exercise).

56. On the other hand, the Respondent reclassified the post at the FS-5 level, but he did not demonstrate that the nature of the post changed.

57. The Tribunal notes that at least in November 2018, as it results from the facsimile on 14 November 2018 transmitted to all peacekeeping missions by the Director/FBFD (annex 1 to the application), the roles performed by international posts had evolved in recognition of their increasing complexity and that as a consequence, in the recent establishment of new missions, the ‘lowest level entry’ point for international finance and budget posts has been set at the FS-5 level and, effective immediately from the date of the facsimile, this would be established as the minimum level of recruitment for international finance and budget posts across all field missions.

58. The Applicant alleged, and the Respondent did not specifically contradict, that as per the UNHQ facsimile, the Applicant was perhaps the only Finance and Budget Assistant who remained at the FS-4 level.

59. The Administration did therefore violate the Applicant’s right to equal pay for equal work. The Applicant has the right to be compensated for her functions at the proper level, and therefore she has the right to retroactive payment of salary lost as a result of the delayed reclassification. Therefore, the Applicant is entitled to the economic differences between the two levels since November 2018 to September 2022, including the equivalent of the loss in contributions to pension. The delay shall be compensated by interest on the said differences at a rate equal to the rate of inflation.

60. In *Chen*, the staff member had requested upward classification, which was denied for 10 years, in that case for budgetary reasons (as opposed to the present case, where no justification at all was given for the delay in the reclassification). By Judgment No. UNDT/2010/068 issued on 22 April 2010, the UNDT found that the decision not to reclassify Chen’s post to the P-4 level was a breach of her rights under staff regulation 2.1, as well as her right to “equal pay for equal work”.

61. In Judgment No. 2011-UNAT-107, para. 21, UNAT upheld the judgment, stating that classification of posts is subject to management's discretion, but "like any discretion, it may not be exercised in an arbitrary, capricious, or illegal manner. There is no discretion to violate the principle of equal pay for equal work".

62. This is not a promotion alleging operating retroactively, as the Respondent opines, but instead the acknowledgement of a right to a correct and fair classification of the functions performed, that shouldn't have gone through a competitive selection process.²³

63. The Applicant also submits that since she was not promoted or recognized at the FS-5 level, she was deprived of numerous opportunities for career development where she could have been rostered or potentially selected at the FS-6 level through a competitive selection process, which obviously she was denied the opportunity even to participate.

64. While in theory the Applicant could have had a damage for loss of chance to participate for selection for an FS-6 level post, however, she did not demonstrate that in the relevant period there were selection exercises for the upper position which she could have applied to. Therefore, no damage can be awarded with regard to loss of chance.

Conclusion

65. The application is granted.

66. The Respondent is to pay to the Applicant a compensation calculated as the difference in salary, allowances, and other entitlements between the FS-5 level and the FS-4 level, for the period November 2018 to September 2022, plus interest at the rate correspondent to the rate of inflation, including the equivalent of the loss in contributions to pension.

²³See: *Tabari* 2011-UNAT-177, paras. 25-27; *Chen* 2011-UNAT-107, paras. 21-23.

67. The compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied at the United States of America prime rate 60 days from the date the Judgment becomes executable.

(Signed)

Judge Francesco Buffa

Dated this 21st day of June 2023

Entered in the Register on this 21st day of June 2023

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi