



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/062

Judgment No.: UNDT/2023/069

Date: 7 July 2023

Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NAQUIB

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Shubha Suresh Naik, OSLA

Counsel for the Respondent:

Saidou N'Dow, UN-Habitat

Introduction

1. The Applicant, a Programme Management Officer (“PMO”), at the P-3, step 9 level, working with the United Nations Human Settlements Programme (“UN-Habitat”) and serving on a continuing appointment,¹ is challenging a decision to deny her an *ex-gratia* payment for the period October 2015 to February 2020 and special post allowance (“SPA”) for the period February 2020 to April 2021 for carrying out higher level functions.²

Facts

2. The Applicant joined UN-Habitat on 1 August 2006 as an Associate Programme Officer at the P-2 level. On 1 May 2013, she was promoted to the position of PMO at the P-3 level at the Regional Office for Africa (“ROAf”).³

3. On 1 July 2015, one of the Applicant’s colleagues, Mr. JS left ROAf at the P-3 level and he was reassigned to UN-Habitat’s Regional Office for Arab States (“ROAS”). Upon Mr. JS’s departure, the Applicant took over some of the countries that Mr. JS handled.⁴

4. The Applicant states that the post she encumbered of PMO was at the P-3 level, while all other regional PMOs were at the P-4 level. The regional PMO for the Regional Office for Latin America and the Caribbean (“ROLAC”) was at the P-3 level but was later upgraded to the P-4 level.⁵ On 29 September 2016, the Applicant’s First Reporting Officer, while undertaking her performance evaluation, stated in the overall End-of-Cycle Rating and Comments for the 2015-2016 e-Performance document that the Applicant acted as the Officer-in-Charge (“OiC”) PMO for the ROAf.⁶

¹ Application, section I.

² *Ibid.*, at section V.

³ *Ibid.*, at annex 10, p. 1.

⁴ Reply, section II, para. 6.

⁵ Application, para. 2.

⁶ *Ibid.*, at annex 1, p. 9 (ePAS 2015-2016).

5. The Applicant states that over the years, she requested on several occasions, and in official meetings for the post to be classified to its correct level of P-4, which was acknowledged, and the Administration had admitted that the post had to be reclassified upwards, however, it was never effected.⁷ According to the Applicant, for a period of over five years, she continued to perform higher level functions.⁸

6. By a memorandum dated 30 April 2021, the Director *ad interim* (a.i.), Management, Advisory and Compliance Service, (“MACS”), informed all PMOs in ROAf, of the distribution of their roles effective 1 May 2021. By the same memorandum, the Applicant, supported by Ms. W K, was responsible for Ghana, Nigeria, Zambia, Zimbabwe, Cameroun, Tanzania, Botswana.⁹ It should be noted that the said memorandum did not designate or indicate that the PMOs would be performing higher-level functions.

7. On 11 May 2021, the Applicant submitted a request for *ex-gratia* payment and SPA. She stated:

I was assigned as the Regional PMO for the Regional Office of Africa (ROAf) in 2015, which was at the P-3 level to be reclassified at the correct P-4 level (as all other regional PMOs). The other Regional PMO’s were classified at P-4 level except for ROAf until the Habitat restructuring in 2020. Therefore, I have been carrying out higher level functions than my post for almost six years. Over these years I have requested on several occasions, and in official meetings for the post to be classified to its correct level of P-4, which was agreed, however not effectively pursued by the administration.

8. By the same request, the Applicant further stated:

considering that I was carrying out higher level functions and the role of other Regional PMOs, I should be compensated for the same (until the upgradation of post i.e Feb 2020) on the principle of ‘equal pay for equal work’ (which has been recognized by UN Tribunals ‘*Chen 2011-UNAT-107*’). I also request that since the post has been recognized at a P4 level from February 2020 (MACs to confirm the exact date) and I

⁷ *Ibid.*, at para. 4.

⁸ *Ibid.*, at para. 5.

⁹ Reply, annex 2.

have been carrying out the functions of this upgraded post, I'm entitled to Special Post Allowance from that date till now. I request that: (1) my case for *ex-gratia* payment for the period 15th October 2015 – Jan 2020 by making an exception under Staff Rule 12.3(b) may please be taken up, for the higher-level functions I have been carrying out; (2) I am paid SPA for the period Feb 2020 – to date, since the post was recognized as a P4.¹⁰

9. On 10 January 2022, the Acting Chief of Staff (“ACoS”), Office of the Executive Director, replied to the Applicant informing her that her request for *ex-gratia* payment and SPA was not granted. Among others, the ACoS indicated that the Applicant’s request would not be granted due to the following reasons: (a) the post was not classified; (b) the post was not advertised and there was no official communication designating her as Acting PMO Regional Office at the P-4 level; and (c) there was no competitive process to fill the post.¹¹

10. On 17 February 2022, through her Counsel, the Applicant wrote to ACoS seeking clarification and urged the Administration to reconsider the matter.¹²

11. On 12 March 2022, the Applicant requested management evaluation challenging the contested decision.¹³ On 18 April 2022, the Management Evaluation Unit upheld the contested decision.¹⁴

12. On 18 July 2022, the Applicant lodged the application mentioned in para. 1 with the Tribunal.

13. The Respondent filed a reply on 17 August 2022, in which he requests the Tribunal to dismiss the application in its entirety.

14. By Order No. 089 (NBI/2023), the parties were directed to file their closing submissions by 14 June 2023.

¹⁰ Application, annex 6.

¹¹ *Ibid.*, annex 7.

¹² *Ibid.*, annex 8.

¹³ *Ibid.*, annex 9.

¹⁴ *Ibid.*, annex 10.

15. The Applicant filed the submissions on 14 June 2023 and the Respondent did not file anything.

Submissions

Applicant's submissions

16. The Applicant's contention is that she is entitled to an *ex-gratia* and SPA payment.

17. The Applicant submits that for the period from October 2015 to January 2020, she successfully performed the clearly recognized higher-level functions of a Regional PMO. She contends that, although the criteria/conditions laid down in ST/AI/1999/17(Special post allowance) were not met, the particular circumstances of her case warranted a favorable exercise of the Administration's discretionary power, pursuant to staff rule 12.3 to grant her an *ex-gratia* payment.

18. Relying on *Banguora*¹⁵, she argues that while the Administration enjoys broad preference in such matters, that authority is not absolute. She maintains that in her case, the Administration failed to exercise its discretion and erroneously considered the request for *ex-gratia* under the Administrative Instruction pertaining to SPA. The Administration gave no explanation as to why the exception could not be granted nor does it seem like the discretion was exercised at all. Further, under circumstances in which an able, successfully performing staff member was executing clearly recognized higher functions of Regional PMO, such a failure to consider the request is an improper application of administrative discretion.

19. The Applicant equally seeks to rely on the principle of Equal Pay for Work of Equal Value. She states that when exercising its discretion, the Administration needs to consider this principle. This principle is articulated in art. 23(2) of the Universal Declaration of Human Rights. Similarly, art. 7(a)(i) of the International Covenant on

¹⁵ 2012-UNAT-268.

Economic, Social and Cultural Rights requires state parties to ensure fair wages and equal remuneration for equal work without distinction of any kind.

20. The Applicant further underscores that the principle of Equal Pay for Work of Equal Value has been relied on and applied by the United Nations Administrative Tribunal in *Tabari*¹⁶ and by the United Nations Appeals Tribunal (“UNAT”) in *Chen*.¹⁷

21. In the spirit of the Equal Pay for Work of Equal Value, the Applicant emphasizes that her supervisor in her multiple ePASes¹⁸ admitted that she has been the OiC Regional PMO. Further, a comparative analysis of the functions that she carried out as seen in the ePASes and the Job Opening of the Regional PMO/Administrative Officer¹⁹ also shows that she carried out functions akin to a P-4 Regional PMO. In such circumstances, it is, therefore, reasonable to expect that a staff member who carries out the responsibilities of higher-level functions which also has managerial responsibility should be properly remunerated to reflect this unique circumstance. Evidence of the fact that she was carrying out the functions of a P-4 post can also be noted from the fact that the functions which the P-4 currently is performing are the same as those which she was performing before she was reassigned in 2021.

22. The Applicant further states that she is entitled to SPA for the period from February 2020 until April 2021. To her knowledge, the post she encumbered was recognized as a P-4 level post in February 2020 as part of the UN-Habitat organizational restructuring.²⁰ The Applicant recalls that one of the reasons why her request for SPA was denied by the Administration is because the conditions for the grant of SPA, including the post being classified, advertised and filled through a competitive process, were not met. She avers these conditions were not met due to the failures of the Administration in taking the necessary action, and she should not be punished for that. She submits that this should be viewed as Administration taking

¹⁶ 2010-UNAT-030, para. 17.

¹⁷ 2011-UNAT-107.

¹⁸ Application, annexes 1 and 2.

¹⁹ *Ibid.*, at annex 3.

²⁰ *Ibid.*, at annex 4.

advantage of its own failures. To the best of her knowledge, until to date, the post has not been advertised or competitively filled without any explanation by the Administration.

23. The Applicant contends that if such actions of Administration are condoned, staff members could be exposed to the risk of having to carry out functions at a higher level of vacant posts and the Administration would delay the advertisement of the post to deny SPA to the affected staff.

24. In view of the above, the Applicant requests the Tribunal to order:

- a. *Ex-gratia* payment to her for the period 15 October 2015 until the post was upgraded after restructuring.
- b. Payment to her of SPA for the period after the post was upgraded after restructuring until 30 April 2021.

Respondent's submissions

25. The Respondent's position is that the contested decision was lawful and consistent with the relevant regulations, rules, policies and procedures of the Organization. The Respondent avers that contrary to the Applicant's assertion that she was assigned as OiC Regional PMO and that her position was at the P-3 level whilst all other Regional PMOs were at the P-4 level, she has not provided any evidence to support this assertion. The Applicant's contention that all Regional PMOs are at the P-4 level does not justify her position being at the P-4 level as there is no official communication or policy to this effect. The practice at UN-Habitat is that the grades of staff at the different regional offices are specific to the requirements of the office. For example, the senior-most PMO in the Regional Office for Asia and the Pacific, ("ROAP"), serves at the P-3 level and provides PMO functions for the entire ROAP region.²¹

²¹ Reply, para. 17.

26. Citing the UN-Habitat organigram²², under the “Operations Support Unit”, there are two PMO positions at the National Officer (“NO”) level, three PMO positions at the P-3 level and, eight PMO positions at the P-4 level. Moreover, it specifically states that the Applicant serves at the P-3 level.²³

27. The Respondent maintains that throughout the period October 2015 to date, the Applicant continues to carry out the same functions. What changed in the job description was the portfolio of countries allocated to her as outlined in the memorandum dated 30 April 2021 from the Director *ad interim* (a.i.), MACS.²⁴

28. The Respondent further submits that, contrary to the Applicant’s assertion that the Regional PMO post was already established at the P-4 level under the restructuring of UN-Habitat, the Respondent maintains that there is no such evidence, documentary or otherwise, to support the Applicant’s assertions. The burden of proof remains on the Applicant. There was no official communication or policy to the effect that the position of Regional PMO at the P-4 level was established at ROAf. The position of Regional PMO is nowhere reflected in the organigram.

29. In specific response to the Applicant’s claim for *ex-gratia* and SPA, the Respondent contends that the Applicant has not met the relevant requirements. Further, given the discretionary nature of the grant of such payments, the Respondent submits that a decision granting the Applicant’s request would be inconsistent with the relevant regulations and rules including the interest of the Organization. Additionally, the Applicant has not provided any evidence to confirm that she was ‘formally’ appointed to carry out the functions of a ‘Regional PMO’ or that the post of a ‘Regional PMO’ was classified or meant to be classified at the P-4 level. Her view that she was performing ‘higher-level functions’ is unsupported by the evidence.

30. The Respondent submits that the conditions for SPA are laid down in ST/AI/1999/17. SPA can only be granted if the conditions of ST/AI/1999/17 are met,

²² Retrievable at <https://www.unhabitat.org>.

²³ Reply, para. 18.

²⁴ *Ibid.*, at annex 2.

inter alia, that staff members have been assigned to and have discharged the full functions of a post which has been both classified and budgeted at a higher-level. It is undisputed that the prerequisite for SPA were not met during this period. At the relevant time, between October 2015 and January 2020, there was no classified nor budgeted higher-level post to the functions of which the Applicant could have been assigned. In fact, the Applicant admits in her application that she may be ineligible for SPA, on the basis that the criteria/conditions laid down in the administrative instruction were not met.

31. Pursuant to staff rule 12.3(b), *ex-gratia* payments are exceptional and discretionary on the part of the Organization. Further, regulation 5.11 of the United Nations Financial Rules and Regulations provides that “the Secretary-General may make such *ex-gratia* payments as are deemed to be necessary in the interest of the Organization ...”. In this regard, the Applicant has failed to adduce any evidence to support her assertions, *ex gratia* payment would be an exception that would be inconsistent with the Staff Regulations and Rules, and prejudicial to the interests of other staff members and that of the Organization given its precarious financial situation and the risk of opening the flood gates to similar future requests.

32. The Respondent seeks to rely on the jurisprudence²⁵ of the Appeals Tribunal and asserts that the Applicant is not entitled to either *ex-gratia* payment or SPA as requested, and that the administration exercised its discretion lawfully in rejecting her request.

33. The Respondent further highlights that pursuant to section 1.3 of ST/AI/1998/9 (System for the classification of posts), incumbents, who consider that their duties and responsibilities “have been substantially affected by a restructuring within the office”, may request the Office of Human Resources or the local Human Resources Office to review the matter for appropriate action under section 1.1(d). The Applicant has not

²⁵ *Alquza* 2020-UNAT-1065, para. 32; *Tabari* 2011-UNAT-177.

provided any evidence to show that she followed the applicable procedure required for a classification review.

34. Finally, the Respondent maintains that the Administration exercised its discretion lawfully by not granting the Applicant's request for *ex-gratia* and SPA payments. Moreover, the Applicant has failed to adduce any substantiated evidence of unlawfulness, arbitrariness or extraneous motives that vitiates the decision. Therefore, the application and the remedies she seeks should be rejected in their entirety.

Considerations

As to the payment of the ex-gratia payment

35. The Applicant claims that the Administration's failure to reclassify her post from the P-3 to the P-4 level was unlawful.

36. The Tribunal is aware that there was no official communication or policy to the effect that the position of Regional PMO at the P-4 level was established at ROAf in those years.

37. The Tribunal notes that the Applicant was assigned the functions as OiC PMO (ROAf) (referred to as a Regional PMO [ROAf] in the application and by her supervisors] in 2015; later on, in the Applicant's ePAS 2019-2020, her FRO in the end of cycle goal summary also stated:

*[The Applicant] has successfully achieved the goals set out in the reporting cycle. The scope of her workplan as **the Regional PMO** saw her support the New director of ROAF.'* **(Emphasis added).**

38. The Applicant alleges that the post was upgraded in February 2020 (see also email on 11 May 2021 in records, annex 6 to the application) and limits her request for *ex-gratia* till this moment. The Respondent contests the Applicant's contention and more specifically in paragraphs 21, 24 and 43 of the reply. The Tribunal observes that the Applicant's allegation on this point has not been proven in these judicial proceedings.

39. It results however that later on, the Administration removed the Applicant from the post and assigned a P-4 PMO, thereby directly confirming the fact that it was indeed a P-4 post (see application, annex 5- memo of reassignment).

40. Indeed, on 30 April 2021, Ms. SM, who was a PMO at the P-4 level was selected as OiC for a period of three months until recruitment was done for the post of PMO (ROAf). This was the very post whose functions until then were performed by the Applicant.

41. Therefore, evidence of the fact that the Applicant was carrying out the functions of a P-4 post can be noted from the fact that the functions which the P-4 currently is performing are the same as those which the Applicant was performing before she was reassigned in 2021.

42. In addition, the fact that many posts of PMO, if not all, were at the P-4 level is not specifically contested by the Respondent; it is true that the practice at UN-Habitat is that the grades of staff at the different regional offices are specific to the requirements of the office, but the Respondent did not show the different level of the other similar posts in comparison to the post at stake.

43. The Tribunal considers 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 since October 2015, functions which, according to the acknowledgment of the Administration itself, corresponds to the P-4 level.

44. It is, indeed, on the one hand, undisputed that the Applicant has been carrying out the same functions for a long time. What changed in the job description was the portfolio of countries allocated to her as outlined in the memorandum dated 30 April 2021 from the Director *ad interim* (a.i.), MACS. The Respondent, however, did not demonstrate that the portfolio assigned in 2021 was more important than the previous one assigned.

45. The case is, therefore, similar to *Hoxha*,²⁶ where the Administration gave directly a remedy, although after some years, to the lower classification of the position, and the Tribunal acknowledged that the Administration violated the staff member's right to equal pay for equal work, and in particular the right to be compensated for her functions at the proper level and granted a retroactive payment of salary as a result of the delayed reclassification.

46. 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 Ms. 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".

47. In Judgment No. 2011-UNAT-107, para. 21, the Appeals Tribunal upheld the judgment, stating that the 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".

48. The acknowledgement of a right to a correct and fair classification of the functions performed leads this Tribunal to rescind the challenged decision, as lacking proper reasoning in the mentioned circumstances.

49. The Administration did, indeed, 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 because of the delayed reclassification.

50. Therefore, the Applicant is entitled to the economic differences between the two levels since November 2015 onwards, including the equivalent of the loss in contributions to pension. The delay shall be compensated for by monetary interest on

²⁶ UNDT/2023/058.

the said differences at a rate equal to the rate of inflation in the country of service.

51. The Applicant requests the *ex-gratia* payment only till January 2020 (on the assumption, remained undemonstrated in these proceedings, that in February 2020 the post was formally upgraded). The Tribunal, although acknowledging that the Applicant has the right to compensation for the whole period she performed the upper functions, is bound by the Applicant's request and cannot allow more than requested, pursuant the general principle of law "*ne judex extra petita*."

As to the payment of SPA

52. The Tribunal is aware that staff rule 3.10(a) on SPA provides that

(a) 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.

53. Staff rule 3.10(b) provides also as follows:

[w]ithout prejudice to the principle that promotion under staff rule 4.15 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member holding a fixed-term or continuing appointment who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level.

54. The Respondent submits that the conditions for SPA are also laid down in ST/AI/1999/17, which provides in relevant part:

Eligibility: *Staff members who have been temporarily assigned to the functions of a higher-level post in accordance with the provisions of section 3 above shall be eligible to be considered for an SPA when they meet all of the following conditions: (a) They have at least one year of continuous service under the 100 series of the Staff Rules or, in the case of staff members who have been reappointed from the 300 series to the 100 series, at least one year of continuous service under the 300 series and/or the 100 series of the Staff Rules; (b) They have discharged for a period exceeding three months the full functions of a post which has been (i) classified, and (ii) budgeted at a higher level than their own*

level. Such period may be part of the one year required by subsection 4 (a) above; (c) They have demonstrated their ability to fully meet performance expectations in all the functions of the higher-level post.

55. Therefore, SPA can only be granted if the conditions of ST/AI/1999/17 are met, *inter alia*, that staff members have been assigned to and have discharged the full functions of a post which has been both classified and budgeted at a higher-level.

56. It is undisputed that the prerequisite for SPA were not met during the period the Applicant performed the higher functions. At the relevant time, between October 2015 and January 2020, there was no classified nor budgeted higher-level post to the functions of which the Applicant could have been assigned. For this period, the fact that the P-4 post was not budgeted is the main obstacle which impedes to allow any SPA. The Applicant, who did not ask the allowance for the said period, is well aware of that.

57. For the following period, the Applicant alleges that the post was recognized as a P-4 level post in February 2020, as part of the organizational restructuring and, therefore, from the following month onwards she should be entitled to SPA payment (until April 2021, as required). As mentioned above, the Respondent contests the Applicant's averment, specifically in paras. 21, 24 and 43 of the reply.

58. The Tribunal observes that the Applicant's allegations on this point have not been demonstrated at all in these judicial proceedings.

59. It follows that the Applicant is not entitled to SPA for the period at stake, for the same reasons already stressed in paras. 55 and 56.

Conclusion

60. The application is partially granted.

61. The Administration shall pay to the Applicant the *ex-gratia* payment from November 2015 to January 2020, plus monetary interest at a rate equal to the rate of inflation for the same period in the country of service.

62. 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.

63. The claim for the SPA is dismissed.

(Signed)

Judge Francesco Buffa

Dated this 7th day of July 2023

Entered in the Register on this 7th day of July 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi