Introduction

1. The instant case, in summary, is an appeal by a group of applicants of the Secretary-General's decision about what can perhaps most usefully be described as a protracted classificati

Facts

5. The 24 applicants, for the purposes of this Judgment, are named herewith: Aziza Aly; Andrew Brown; José Cherian; Stephen W. Cone; Carl O. Corriette; Jorge Diaz; José F. Elizabeth; Amjad Ejaz; Anthony Gamit; Louis Giordano; José Golfarini; Asfaha Hadera; Emad Hassanin; San Htoo; Miguel Kauffman; Soe Naing Maung; Thomas McCall; Joseph Nemth;

9. On 14 January 2004, over three years after the original classification request was made, the Vice President of the Staff Union wrote to OHRM, enquiring about the outcome of the Classification Audit following the October 2000 reclassification request and requesting that the staff members receive a formal notification on the conclusion of the audit and the results concerning their respective posts.

10. On 3 February 2004, OHRM responded to the Staff Union Vice President and stated that "[s]ection 2.4 of ST/AI/1998/9 provides that a notice of classification results, including the final ratings and/or comments on the basis of which the decision was taken, shall be sent to the requesting executive or administrative office, which will keep in its records and provide a copy to the incumbent of the post". The letter further stated that the results had been previously sent to the staff members' Executive Office and that because the database did not associate classification actions against the names of the posts' incumbents or their index numbers, the applicants should redirect their request to their Executive Office.

11. Whether and when, in fact, the audit results had previously been sent to the staff members' Executive Office is not clear from the record evidence before the Tribunal.

12. At any rate, on 4 March 2004, the decisions related to the audit and classifications of posts were announced by email to the staff members, who were also

he was including a copy of the respective audited job descriptions received from the Executive Office.

14. At that point in the process, the appeal should have been referred for review to the ASG/OHRM, and if that official decided to maintain the original classification or to classify the post at a lower level, the appeal should have been referred to the CAC for further review and determination (ST/AI/1998/9, secs. 6.4, 6.6, 6.10 and 6.13).

15. In cases where the Administration has questioned the receivability of an appeal, the CAC would be the competent body to make a determination on that issue (ST/AI/1998/9, sec. 6.8). The CAC would make a decision and would inform the parties as to outcome (ST/AI/1998/9, sec. 6.10).

16. It is at this point in the process that each party contends that the other party is responsible for a breakdown in the CAC process: the respondent contends that the applicant failed to provide the necessary information to the CAC ("to show for each post that the classification standards were incorrectly applied, resulting in the classification of the post at the wrong level"), while the applicants contend that they had already submitted this information in the 8 May 2004 letter, and in a subsequent letter of 22 December 2004. The facts illustrating this are set out below.

17. On 9 September 2004, the Director for the Division of Organizational Development, OHRM, replied to counsel for the applicants and wrote, inter alia, as follows:

> …
>
> On the basis of the above, we conclude that procedures for the classification of posts set out in section 2 of ST/AI/1998/9 were fully observed, and that the process leading to the classification of the posts in question was fully consistent with the agreements reached with the staff.
>
> In closing we would wish to draw your attention to section 5 of ST/AI/1998/9, which defines the parameters for classification appeals. Should you wish to proceed on that basis on behalf of the staff

> members you represent, it would be necessary to show for each post that the classification standards were incorrectly applied resulting in the classification of the post the wrong level.

18. The Tribunal will address, infra, whether the 9 September 2004 letter constituted an "administrative decision" not to reclassify the applicants' posts or not to refer the matter to the CAC, whether such decision should have been made the subject of an administrative review outside the processes of ST/AI/1998/9 and, thus, whether the application is time-barred for failure to appeal within two months of notification of the decision to the staff members under former staff rule 111.2(a).

19. On 22 December 2004, the applicants' counsel again

Publishing Section to lead function posts, without prior advertising, that the 14 staff members had been encumbering and that had been reclassified at a higher level.

21. On 18 September 2006, counsel for the applicants wrote again to Ms. Beagle, Director for Organizational Development/OHRM to inquire as to the status of his 22 December 2004 request and the status of his clients' appeals before the CAC. He also drew her attention to the outcome of the above-mentioned appeal and requested that the JAB Report No. 1805 be added to the 8 June 2004 submission to the CAC.

22. To paraphrase simply what occurred between 8 May 2004 (the date of applicants' request to appeal the decision to the CAC) and 18 September 2006, the matter was never submitted to the CAC for review and, thus, no review by that body ever occurred. Under the provisions of ST/AI/1998/9, sec. 6.14, a "reasoned recommendation concerning the disposition of the appeal" would then be made by the CAC to the ASG/OHRM, who would take the final classification decision. It is only after a final classification decision of the ASG/OHRM has been made that an appeal may be made to the former United Nations Administrative Tribunal (the cases before which were transferred to the Dispute Tribunal).

23. On 8 November 2006, the applicants filed a request for an administrative review against the implied decision by OHRM to deny their right to have their reclassification requests submitted to the CAC.

24. The applicants received no response from the respondent to their 8 November 2006 request for administrative review. Thus, on 22 June 2007, they filed a statement of appeal with the JAB against the implied decision not to submit the classification appeals to the CAC under ST/AI/1998/9. The parties have not contended that there is a time-bar issue with regard to former staff rule 111.2(a)(ii) on the appeal of this decision and the Tribunal has accepted, in the circumstances of the instant case and what ensued, that this is not relevant to the instant proceedings.

25. On 27 December 2007, the respondent replied, stating that JAB was the incorrect forum and that the appeal was time-barred with respect to appealing to the CAC. The respondent wrote the following:

> …
>
> In view of this background, please note that, consistent with section 6 of ST/AI/1998/9, it would have been necessary to appeal OHRM's decision of 9 September 2004 to uphold the initial classification of the Appellants' post to the New York General Service Classification Committee ("CAC"), as Ms. Beagle advised in the penultimate paragraph of the 9 September 2004 letter. Moreover, pursuant to section 6.8 of ST/AI/1998/9, such an appeal to the CAC would have had to be filed by 9 November 2004, i.e., within sixty (60) days of OHRM's decision to uphold the classifications. [emphasis added]

The respondent further invited the applicants to submit their appeal directly to the CAC and pledged not to raise any issue of timeliness before the CAC.

26. On 8 January 2008, applicants' counsel wrote to OHRM, expressing appreciation for the waiver of the time-limits in order to allow the classification appeals of 18 of his clients to move forward at the CAC. With respect to the JAB case, counsel explained that the applicants were "not challenging the classification of posts", as their classifications had never changed. The applicants were appealing the Administration's failure to act in a timely fashion on their 2004 reclassification appeals to OHRM and CAC and the discrimination which they alleged had prevailed against them.

27. On 28 January 2008, the applicants filed their observations on the respondent's reply of 27 December 2007. They explained that they would agree to file their appeal directly to the CAC only if the following conditions were met: (a) compliance with procedures mandated by ST/AI/1998/9; (b) prior disclosure of the International Civil Service Commission ("ICSC") standards used by OHRM in the Distribution Unit classifications referred to by OHRM in the annex letter of 9

September 2004, and; (c) three-months' net salary in compensation and retroactivity of the CAC reclassification.

28. On 29 February 2008, the respondent filed comments on the applicants' observations. With respect to point (a) of para. 27 above, the respondent stated that it could not strictly comply with the provisions of ST/AI/1998/9 because the time to undertake certain actions had already lapsed. Regarding point (b), the respondent provided a chart of the ICSC standards used in the initial classification exercise. As for point (c), the respondent stated that the Administration was not in a position to award damages to applicants for alleged violation of their due process rights and that that was for the JAB to determine. Moreover, the "demand" for monetary damages was premature, as it prejudged both the outcome of the present appeal and the future one before the CAC. Furthermore, the retroactive recognition of a reclassification decision was envisaged under sec. 4.1 of ST/AI/1998/9, but the request in this case was in any event also premature, as it presupposed the outcome of the proceedings of the CAC, which was the competent body to grant upward reclassifications and decide when such classifications were to take effect.

29. The JAB appeal ultimately concluded with the JAB making the following recommendations:

> …
>
> 36. In light of the above analysis, the Panel unanimously concluded that appellants' due process rights had been violated by the Administration's failure to review their cases in a timely manner. Therefore, the Panel unanimously agreed to recommend for that moral injury suffered, Appellants be granted three months net-base salary at the rate in effect as at end August 2008, i.e., the date of this report.
>
> 37. The Panel further unanimously agreed to recommend that Appellants submit their cases to the CAC as expeditiously as possible and no later than 90 days from the date of the Secretary-General's decision on the [JAB Report].

Procedural background

30. The applicants herein contest the decision of the Secretary-General of 6 November 2008 following issuance of the JAB Report No. 2001. This decision can be split into two parts:

a. the Secretary-General's decision to accept the JAB's recommendation that the applicants submit the cases to the CAC and request that the applicants "take all appropriate action in this regard within 90 days from the date of this decision"; and

b. the Secretary-General's decision not to accept the JAB's recommendation of three months' net base salary compensation for delays because he considers that the Administration's offering in December 2007 to allow the applicants to file their cases directly with the CAC and to waive the timeline was fair. The respondent noted that any decision to reclassify would backdate payment to the date of the original classification request (October 2000) and therefore repair any financial harm.

31. On 22 September 2009, the respondent filed his reply with the former UN Administrative Tribunal.

32. On 18 October 2009, the applicants filed comments on the respondent's reply.

33. On 8 January 2010, by way of email, the parties were advised that the case had been transferred to the New York Registry of the UN Dispute Tribunal.

Legal provisions

34. ST/AI/1998/9 entitled "System for the classification of posts" of 6 October 1998, provides the following:

> 1.1 Requests for the classification or reclassification of a post shall be made by the Executive Officer, the head of administration at offices

away from Headquarters, or other appropriate official in the following cases:

(a) When a post is newly established or has not previously been classified;

(b) When the duties and responsibilities of the post have changed substantially as a result of a restructuring within an office and/or a General Assembly resolution;

…

2.1 Requests for classification or reclassification of posts shall be submitted to:

(a) The Assistant Secretary-General for Human Resources Management, in the case of:

(i) Posts in the Professional category and at the Principal Officer (D-1) and Director (D-2) levels, except when authority for classification of such posts has been delegated to the head of office, in which case the request shall be submitted to the head of that office;

(ii) Posts in the Field Service category;

(iii) Posts in the General Service and related categories at Headquarters;

…

2.3 The classification analysis shall be conducted independently by two classification or human resources officers on the basis of the classification standards set in section 3 below. The decision regarding the classification of the post will be taken by, or on behalf of, the Assistant Secretary-General for Human Resources Management, or the head of office. …

2.4 A notice of the classification results, including the final ratings and/or comments on the basis of which the decision was taken, shall be sent to the requesting executive or administrative office, which will keep it in its records and provide a copy to the incumbent of the post.

…

6.2 Appeals must be accompanied by the job description on the basis of which the post was classified.

6.3 Appeals must be submitted within 60 days from the date on which the classification decision is received.

6.4 The appeal shall be referred for review to:

(a) In the case of appeals submitted to the Assistant Secretary-General for Human Resources Management, the responsible office in the Office of Human Resources Management, which will submit a report with its findings and recommendation for decision by, or on behalf of, the Assistant Secretary-General;

…

6.6 If it is decided to maintain the original classification or to classify the post at a lower level than that claimed by the appellant, the appeal, together with the report of

Issues presented

36. By joint submission dated 1 June 2010, the parties submit that the issues before the Dispute Tribunal are as follows:

a. whether the applicants' claim regarding the Administration's decision not to reclassify their posts is receivable;

b. whether there are obstacles to the review of the applicants' appeal by the CAC;

c. whether the applicants' claim regarding the Administration's alleged refusal to submit their appeal of the decision not to reclassify their posts to the CAC is receivable; and

d. whether the remedies sought by the applicants in relation to these claims are appropriate and legally sustainable.

Receivability

37. The respondent raises receivability issues with regard both to the Administration's decision not to reclassify the applicants' posts and "the Administration's alleged refusal to submit the Applicants' appeal of the decision not to reclassify their posts to the NYGSCAC".

9 September 2004 letter

38. At this juncture, the Tribunal must briefly address the interpretation to be given to the 9 September 2004 letter from OHRM to counsel for the applicants: did that letter constitute an "administrative decision" that the applicants' posts would not be reclassified or that the respondent had decided not to refer the matter to the CAC? And if so, should the applican

39. The Tribunal finds that the 9 September 2004 letter does not constitute an administrative decision barred by failure to appeal within 60 days of that date under former staff rule 111.2(a), for the following reasons.

40. First, the respondent himself did not ascribe a "rule 111.2(a)" meaning to the 9 September 2004 letter. In fact, the respondent made specific statements and gave the applicants direct instructions to the contrary: the respondent's only legal arguments before the former Administrative Tribunal make clear that the argument regarding receivability was as to applicants' compliance with procedures under ST/AI/1998/9 alone. Moreover, the text of the letter of 27 December 2007 (see para. 25 above) shows that the respondent explicitly accepts the correct appeal procedure is to the CAC.

41. Second, the language of the letter itself, at best, is ambiguous as to what the letter meant. The respondent in its 27 December 2007 letter argued that the 9 September 2004 letter conveyed a "decision to uphold the initial classification of the Appellants' posts" but, in fact, the 9 September 2004 letter does not state this in any manner. The Tribunal finds that the 9 September 2004 letter does not put the applicants on notice that the letter constituted an administrative decision that counsel for the applicant should appeal under former staff rule 111.2(a). By referring the applicants' counsel back to procedures under ST/AI/1998/9, the letter strongly implies that the only process to be observed was under that administrative instruction. This instruction (to utilise ST/AI/1998/9 procedures) is all the more confounding since the applicants had already initiated an appeal on 8 May 2004 under CAC procedures A discussion in UN Administrative Tribunal Judgment No. 1329 (2000) regarding clarity of administrative decisions is worth noting:

> VI. In addition, it is a general principle of procedural law, and indeed of administrative law, that the right to contest an administrative decision before the Courts of law and request redress for a perceived threat to one's interests is predicated upon the condition that the impugned decision is stated in precise terms. Of course, there are situations where an applicant is not aware of all administrative decisions affecting him/her. …. However, nothing can repair the

51. The Tribunal accepts that a decision not to refer the matter to the CAC was taken at some pointfollowing the initial classification decision in 2000, but the letter of 9 September 2004 does not pinpoint this date or suggest it is of itself a final decision, because it implies that the process was still continuing, the doors were not shut and a further referral to the CAC could take place. The subsequent failure to refer the matter to the CAC means that the expert body on classification reviews and appeals has never, to date, considered the matter. Thus, at some point after the initial classification decision of 2000, there was an implied decision not to change the initial decision of 2000 as to these applicants, which could be termed a decision not to reclassify. The Tribunal also notes that the applicant has been given the opportunity to have the CAC review the cases and thatas1(h).lt a/0. ot a/0. nt thto

Applicants' submissions

54. The applicants submit, inter alia, that:

a. the composition and procedures of the current CAC are not clear and it has not met since 2003 for lack of a quorum;

b. the reform of the internal justice system has abolished or modified the jurisdiction of the CAC, replacing it with the new Dispute Tribunal which should deal with classification issues;

c. the decision to refer the matter to the CAC as proposed by the respondent cannot resolve the current situation as it can only make a ruling on classification if the posts in dispute can be reclassified against posts for which budgetary provision has been made and the only posts available for reclassification have already been assigned; and

d. the respondent has failed to implement General Assembly resolutions and apply standards of the ICSC.

55. The applicants request the Tribunal to:

a. declare that the respondent's repeated refusal, since 2000, to reclassify the applicants' posts constitutes an abuse of power and denial of justice;

b. order the respondent to confirm and produce evidence of the existence of the CAC, its regular composition, a representative quorum, its internal procedures, the relevant standards of the ICSC, and the budgetary posts against which the applicants may request reclassification of their posts;

c. order, in the interim, payment of three months' net base salary;

d. order the respondent, if he does not produce information about the CAC, to proceed directly to a retroactive reclassification of the applicants' posts, notwithstanding the availability of budgetary resources for that purpose;

e. order the respondent to pay the applicants two years' net salary for the

d. find that the applicant's request for retroactive reclassification or pay three years' compensation are inappropriate and legally unsustainable;

e. find that the applicants' request for compensation for the delays incurred in connection with the applicants' appeal to the CAC is inappropriate and legally unfounded;

f. find that the applicants' request for compensation for costs to be awarded to their counsel for vexatious measures and dilatory tactics is inappropriate and without basis;

g. find that the applicants' request for the Tribunal to recommend the Secretary-General recover compensation from negligent officials is unwarranted; and

h. reject the applicants' pleas in their entirety.

Considerations

Was the Secretary-General's decision to allow the applicants to resubmit their cases to the CAC within 90 days reasonable and fair?

57. It bears recalling at this point that the applicant's initial appeal on 8 May 2004 was to deal with the failure of the respondent to review the classification of the applicants' posts (ST/AI/1998/9, sec. 6.4) and, later, that the appeal was never referred to the CAC (ST/AI/1998/9, sec. 6.6). The crux of the issue now before the Tribunal is whether the matter should be returned to the CAC at this point in time, so that a decision on the classification can be taken, or whether the Tribunal itself is seized of the matter concerning the classification of applicants' posts.

58. The parties' submissions contain a great deal of argument as to whether the CAC was correctly constituted throughout the period in question and whether it was able to make a fair decision as to reclassification. The applicants have presented

information outlining—to choose a generic term—difficulties which the CAC appears to have faced during the past decade in forming a quorum; the applicant further questions the CAC's procedures and deliberations, including its use of the ICSC standards for classification. The respondent counters that the CAC is functioning and that the applicant has been provided with the information pertaining to its composition.

59. The Tribunal is of the view that, while these concerns may require adjudication in future cases, the Tribunal currently is unable to render judgment based on the general problems which hypothetically may be faced by the CAC.

60. The applicants also have raised budgetary issues and generally contend that by reclassifying the 14 staff members with "lead functions", the respondent cannot at the same time fail to make a budgetary request for the applicants' 28 posts in question. The applicants argue:

> [T]he Respondent did not have the right to delay consideration of the Applicants' requests for reclassification by invoking budgetary considerations. Since 2000, the Respondent has recognized the Applicants' right to reclassification and has had ample time to make the appropriate budgetary requests. In 2004, the Respondent had even short-circuited all the promotion and reclassification rules by favouring and directly promoting 18 colleagues who were doing the same work as the Applicants. Meanwhile, the Respondent has made no request for additional funds so that the Applicants' posts could be considered for reclassification. This failure to act or this negligence of the Respondent cannot now be imputed to the Applicants…
>
> The Tribunal is requested to order the Respondent to shed light on the administrative and budgetary aspect of the procedures that he should follow in relation to post reclassification, in order to avoid a meaningless referral to the CARC which would bring no result or resolution to the present dispute.

61. The Tribunal believes that a budgetary request is not a pre-requisite for decision-making by the CAC and that the CA

Carstens, in Jaen UNDT/2010/098, of the procedures under ST/AI/1998/9 regarding reclassification of posts and budgetary submissions:

> 25. The general procedure for reclassification of posts, including those requiring budgetary submission, is as follows. The executive officer of the department requests a proposed reclassification if he or she is satisfied that one of the criteria in sec. 1.1 of ST/AI/1998/9 has been met. The department will then submit to OHRM a job description for the posts suggested for reclassification. Next, OHRM will review the request and provide the department with a classification advice pursuant to ST/AI/1998/9. If the department concerned decides to proceed further, the Proposed Programme Budget is finalised by the offices involved in the process, with the participation of the OPPBA and the Controller, and is submitted by the Secretary-General to the General Assembly for its review and approval. Formal notices of classification are only issued after the General Assembly approves the budgetary proposal that includes the proposed reclassification (see the Instructions for Proposed Programmer Budget for the Biennium 2008–2009 (16 October 2006) as well as the Instructions for Proposed Programmer Budget for the Biennium 2010–2011 (1 October 2008)). Following approval of the related post proposal by the General Assembly, a formal notice of

effect retroactively to the first of the month following receipt of the classification request in October 2000" and that financial compensation would be payable. The Tribunal believes that this should assuage the applicants concerns in this regard. The Tribunal is unable to ascertain whether budget is required, but from the open possibility of appeal to CAC, it appears that either the budget was approved for this or that no approval was necessary.

63. The applicants have contended that with the establishment of the new system of justice within the UN, the CAC has been abolished or has had its jurisdiction modified. Clearly, however, ST/AI/1998/9 remains in place unaltered, and its provisions are to be recognised and respected. The Tribunal agrees with the respondent that there are no obstacles to submission of the applicants' appeal to the CAC.

64. Finally, in the absence of an administrative decision having been taken by the CAC, the Tribunal finds that it may not, and should not, engage in a retroactive reclassification of the 28 posts involved in this case.

65. For all of the foregoing reasons, the Tribunal finds that the CAC is the legitimate and appropriate body to hear the applicants' request for a review of a reclassification decision. Once a classification decision is recommended by the CAC and taken by the ASG/OHRM or the head of office as the final decision on classification, the applicants are, of course, at liberty to file a new appeal within the new system of internal justice if they are not satisfied with the outcome.

66. With regard to length of time granted to do so, the usual time limit to request a review of a classification decision is 60 days, as per sec. 6.3 of ST/AI/1998/9; 90 days is, in comparison, generous.

67. The Tribunal considers that the Secretary-General's decision to uphold the

68. The Tribunal will make the necessary order, under art 10.5(a) for specific performance of the Tribunal's Statute, that the case shall be remanded to the CAC for decision by the CAC within 180 days, on the proviso that the applicants submit the cases for review within sixty days.

Compensation for delay

69. On the issue of compensation for the reclassification delay, the JAB unanimously concluded "that Appellants' due process rights had been violated by the Administration's failure to review their cases in a timely manner. Therefore the Panel unanimously agreed to recommend that for the moral injury suffered, Appellants be granted three months' net-base salary at the rate in effect as at end August 2008, i.e. the date of this report". The JAB's analysis of this issue, whilst recognising a "lack of follow-through on both sides" was as follows:

> 35. As to compensation for moral damage, the Panel was mindful of its obligation to take account the Administrative Tribunal's rulings on delays. The-.0002 ra7ljTc.1d1.1e/,.095 02 take e-.0

70. Following this conclusion and recommendation of the JAB, the Secretary-General's decision with regard to the issue of compensation was as follows:

> The Secretary-General, however, has decided not to accept the JAB's recommendation that you be granted three months net-based salary as compensation for the delays. In this respect, the Secretary-General considers that the Administration offering, in December 2007, to allow you to file your cases directly with the CAC and offering to waive the time-line, is a fair and reasonable way to address any delays that may have occurred. Additionally, the Secretary-General has taken note of Section 6.15 of ST/AI/1998/9 which stipulates, "[i]n those cases where the appeal is successful, the effective date of implementation of the post classification shall be, subject to the availability of a post, the same effective date as that of the original decision as defined in section 4.1 […]". Section 4.1 stipulates that "[c]lassification decisions shall become effective as of the first of the month following receipt of a classification request fulfilling the conditions of section 2.2 above […]". Consequently, the Secretary-General notes that if your

respondent should have responded to the applicant. On the other hand, there was nothing to prevent counsel for the applicant—a seasoned counsel in such disputes—to have submitted his cases to the CAC and then to have followed-up with his questions on the CAC's composition.

82. The Tribunal further notes that counsel for the applicant for a second time appears to have made an informed decision not to submit the cases to the CAC: in addition to the decision under review, the applicants were also afforded the same opportunity by the Administration in 2007–2008.

cases for review within sixty days of the date this Judgment becomes executable;

b. for all cases submitted to the CAC within sixty days of the instant Judgment, the CAC shall render decisions within 180 days of the date this Judgment becomes executable; and

c. the respondent shall make payment of USD20,000 to each of the applicants within sixty calendar days of the date this judgment becomes executable, failing which interest is to accrue to the date of