Introduction

1. The Applicant, a Records Clerk at the GS-4 level in the Field Personnel Division , Department of Field Support , in New York, filed an application contesting the decision appointing him as a Clerk at the GS-3 level in 1997 against an unclassified post (Post No. QSA-02861TOL041) in the Department o

Records Clerk at the GS-5 level, had the post been classified at the GS-5 level prior to 2000.

Factual and procedural history

Agreed facts

4. In their jointly signed submission of 17 February 2017, the parties outline the following agreed facts (footnotes omitted):

> In August 1992, the Applicant commenced work with the Organization on a temporary appointment for a period of three months. At the end of 1996, apart from a five month break in service, he had served with the Organization for four years.
>
> ... In June 1997, the Applicant commenced work as a Clerk in the Department of Peacekeeping Operations at the G-3 level.
>
> ... In 23 May 2000, the Applicant was promoted to the GS-4

him to a post that was not classified; b) the decision to not classify this post until January 2000; and c) the decision to not correct his pay grade to GS-5 following the classification of the post at GS-5 level in January 2000. He sought placement at the GS-5 pay grade retroactive from 16 June 1997, the date of his entry on duty in the post.

On 17 September 2014, the MEU responded to this request, advising that it was premature as no decision had yet been taken by the administration.

Between October 2014 and September 2015, the Applicant communicated with senior management of the department regarding the issues outlined in his management evaluation request.

On 24 September 2015, the Applicant requested the amendment of his 11 September 2014 management evaluation request to reflect that he had attempted to pursue the matter with the Administration without resolution.

On 4 February 2015, the Dispute Tribunal issued its decision with respect to the Applicant s request for SPA while performing higher level functions (*Hosang*, UNDT/2015/012). In that decision, the Dispute Tribunal ordered that the Applicant receive SPA from the GS-4 to the GS-5 level from 25 January 2000 until the date that he ceases to perform such duties at the GS-4 level.

8. By email dated 28 October 2014, and in response to a follow-up email from

> the UNDT, should you wish to do so, will start to run from **24 October 2015**, or the date on which the management evaluation

17. On 13 January 2016, the MEU wrote to the Applicant with reference to his request for management evaluation dated 11 September 2014, as amended on 24 September 2015. The management evaluation was not receivable, *inter alia*, stating:

> Given the findings of the MEU that this matter has been thoroughly considered and adjudicated by the [Dispute and Appeals Tribunals], the MEU considered that the principle of res judicata was applicable to this case and thus, it could not find this matter receivable.

The proceedings before the Dispute Tribunal

18. The Applicant filed the application in the present case on 8 April 2016.

19. On 12 May 2016, the Respondent filed his reply.

20. On 25 January 2017, the Applicant filed a submission addressing the directed by Order No. 1 (NY/2017), dated 5 January 2017.

21. On 10 February 2017, the parties filed a joint submission pursuant to Order No. 21 (NY/2017), dated 2 February 2017, informing the Tribunal that they did not agree to attempt informal resolution.

22. On 17 February 2017, the parties filed a joint submission also pursuant to Order No. 21 (NY/2017), informing the Tribunal that they agreed for this matter to be decided on the papers. The parties also submitted a list of agreed and contested facts and issues, as well as of the documentary evidence they requested to be produced.

23. an annex submitted by the Respondent appended to ted that this annex, (consisting of tables setting out education, tests, and minimum experience required

for the various grades and which is part of a Personnel Directive PD/1/94 on Guidelines for the Recruitment and Promotion of General Service staff at HQ), had To the motion, the Applicant appended

24. On 22 February 2017, by Order No. 37 (NY/2017), the Tribunal directed the Respo

25. On 24 February 2017, Counsel for the Respondent submitted comments as directed by Order No. 37 (NY/2017) stating that the Respondent provided the copy of Personnel Directive PD/1/94 that [he had] on record. This copy contains annotations and highlighting, which may have unintentionally obscured the text Counsel further noted that he had since obtained a clean copy of the document, which he then appended.

26. On 27 February 2017, the Applicant filed a motion seeking leave to file a

27. On 6 June 2017, by Order No. 104 (NY/2017), the Tribunal granted the file a rebuttal instructing the Applicant to file his

28. On 15 June 2017, the Applicant filed his submission pursuant to Order No. 104 (NY/2017) together with annexes indicating *inter alia* that

specimen as an annex of the page in issue, which illustrates

The Applicant identifies no prejudice from the filing error. A complete copy of PD/1/94 has been available to the Applicant since at least the date of the

Consideration

Preliminary matters—apparent

. In the Application, he submits that he first became aware of the contested decision on 23 July 2014, during the course of proceedings before the Tribunal in Case No. UNDT/NY/2012/060, introduced into evidence an agreed court bundle of 142 pages of documents, one of which revealed that the post was not previously classified prior

37. The Tribunal notes that art. 8.4

receiving. With reference to the dissenting opinion in *Auda*; which accords with the *ratio decidendi* in the case of *Babiker*; it is also clear that the record does not clearly and unambiguously demonstrate with sufficient *gravitas* a reasonable finding that, in any possible way, the Applicant received the contested decision in January 2000.

43. is time-barred under art. 8.4 of its Statute is rejected.

Did the Applicant fail to file a request for management evaluation within 60 days from receiving the contested the decision?

44. Staff rule 11.2(c) provides that:

> A request for a management evaluation shall not be receivable by the Secretary-

the Applicant again approached the MEU,

challenge the administrative decision . It is also clear from *Hosang* UNDT/2015/012 and 2015-UNAT-605 that no judicial determination has been made regarding such matter essentially because, under art. such decision would firstly require that an administrative decision had in fact been taken.

53. As not taking an administrative decision (or, in other words: an omission) is an appealable decision in itself under the consistent jurisprudence of the Appeals Tribunal, the failure to make a decision on retroactively classifying the level of the is therefore appealable (see, for instance, *Schook* 2010-UNAT-013, *Tabari* 2010-UNAT-030, *Fedorchenko* 2015-UNAT-499 and *Terragnolo* 2015-UNAT-566). Regarding the applicable date, in *Survo* 2016-UNAT-644, the Appeals Tribunal found that the date of an implied decision, and thereby also an omission, is based on objective elements that both parties can accurately determine, i.e., when the staff member actually knew or should reasonably have known about it.

54. Considering the several contradictory communications he received from the different sections of the Administration, it is only reasonable to conclude that the Applicant only realized on 14 September 2015 that the Administration did not intend to take any decision regarding the retroactive classification of the post, when

Hosang UNDT/2015/012. By filing the second request for management evaluation on 24 September 2015, the Applicant was therefore well

the GS-5 [level] retroactive from the date of his appointment on 16 June ;

k. Third, the cause of action in both cases is the same. While the Applicant attempts to characterize the contested decisions differently, the foundation in law in both cases is the same. The foundation in law in both cases is the Secretary- staff regulation classification procedures set out in ST/AI/1998/9 (System for the classification of posts), and the principle ofT/AI/1998/9

the
the exceptional nature of the case:

> (a) Compensation in the form of a monetary equivalent of SPA from the G-4 level to the G-5 level, retroactive from 25 January 2000 until such time as the Applicant may cease to perform these duties at the G-4 level, plus interest at the US Prime Rate from the date that the sum of money would have been properly due, subject to a deduction of the two-year SPA already paid to him;
>
> b) The sum of USD 1,000 for loss of opportunity and chance of applying, and being considered, for promotion to the post he encumbered for a period of over 11 years.

61. In *Hosang* 2015-UNAT-605, the Appeals Tribunal affirmed these parts of the

> 22. We dismiss the Secretary-
> prospective compensation of the

64. It is evident that the Dispute and Appeals Tribunals made no orders regarding the possible retroactive classification of the relevant post based on the documentation that fortuitously found its way into the Dispute Tribunal court bundle, apprising the Applicant for the very first time that his post was unclassified. From a comprehensive perusal of *Hosang* UNDT/2015/012 and 2015-UNAT-605, this is perfectly logical as the issue does not appear to have been considered at all. Indeed, the Presiding Judge in the Dispute Tribunal in *Hosang* UNDT/2015/012, according to the Applicant, had found
the hearing conducted on 7 August 2014 after a document submitted into evidence by the Respondent revealed that the post was not previously classified prior to the classification exercise held in January 2000 contention stands undisputed by the Respondent. Furthermore, it is clear from para. 16 of the Appeal Tribunal judgment in *Hosang* 2015-UNAT-605
case was that: -G
the classification of the post or of level was not an issue. The issue was whether [the Applicant] .

65. Accordingly, the Tribunal rejects the Respo *res judicata* as the issue in the present case is still a live and unresolved matter.

Conclusion

66. In all the above circumstances, the Tribunal finds that the application is receivable.

67. The Tribunal observes that the various issues in connection with the non- dating back to 1997 have no doubt cost the Organization and its justice system an excessive amount of time and resources to date. At this stage, in light of the present judgment, the particular circumstances of this case including the passage of time, as well as the findings in *Hosang* UNDT/2015/012 and 2015-UNAT-605, the Tribunal therefore strongly encourages the parties to explore amicable and informal resolution for final closure of this matter.

If this is not possible, the Tribunal will direct the parties to file their closing statements on the merits of the case, including submissions on the issue of remedies, and thereafter decide the case on the papers before it unless otherwise requested. In this regard the Tribunal directs that:

a.
efforts to find an amicable resolution to the present case;

b. By **5:00 p.m. on Monday, 14 May 2018**, the parties shall inform the Tribunal as to whether the case has been resolved; in which event, the Applicant shall confirm to the Tribunal, in writing, that his application is withdrawn fully, finally and entirely, including on the merits. In case the parties consider that additional time is needed for the settlement negotiations, the parties shall request a further suspension of the proceedings by also stating a time limit;

c. If the parties fail to reach an amicable solution, they are to file their closing statements, including a submission on remedies, by **5:00 p.m. on Monday, 21 May 2018**.

(Signed)

Judge Ebrahim-Carstens

Dated this 13th day of April 2018

Entered in the Register on this 13th day of April 2018

(Signed)

Morten Albert Michelsen, Registrar, New York, Officer-in-Charge