
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:
-Habitat

Case No. UNDT/NBI/2022/062

Judgment No.: UNDT/2023/069

have been carrying out the functions of this upgraded post, 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 Co., 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 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

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 in *Chen*.¹⁷

21. In the spirit of the Equal Pay for Work of Equal Value, the Applicant emphasizes that

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 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 c

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 Staff Regulations and Rules 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 are beyond their current classification, may request the Office of Human Resources or the local Human Resources Office to

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 *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. 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

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

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 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 staf 1 2Qqh0000912 0 612 t>109g/F1 12 Tf1 0 0 1 31..000dqh000rd in parc68(upwa9

level. Such period may be part of the one year required by subsection 4

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