



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-102

Chen
**(Respondent/Applicant and
Appellant on Cross-Appeal)**
v.
Secretary-General of the United Nations
**(Appellant/Respondent and
Respondent on Cross-Appeal)**

JUDGMENT

Before: Judge Mark P. Painter, Presiding
Judge Jean Courtial
Judge Inés Weinberg de Roca

Judgment No.: 2011-UNAT-107

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Yunhua Chen: Bart Willemsen/Roy Anderson

Counsel for Secretary-General: Phyllis Hwang

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. As stated in Article 23(2) of the Universal Declaration of Human Rights, “[e]veryone, without any discrimination, has the right to equal pay for equal work”. Of course this principle applies to the United Nations staff.¹ “Budgetary considerations” may not trump the requirement of equal treatment. The Secretary-General’s arguments to the contrary are bizarre and feckless.

Facts and Procedure

2. Not long after Yunhua Chen (Chen) started working in the Chinese Unit of the Copy Preparation and Proofreading Section (CPPS) as a copy preparer, she assumed additional duties as acting Chief of Unit in April 1996. She was promoted to the P-2 level in 1997.

3. Chen was Chief of Unit from at least 1997. She was not paid accordingly.

4. In 1999, the Department of General Assembly and Conference Management (DGACM) submitted a request for reclassification of the positions of Chief of Unit in the CPPS. As a result, three posts of Chief of Unit (English, French, and Arabic), which were available and encumbered, were reclassified to the P-4 level. Subsequently the post of Spanish Chief of Unit was also reclassified to the P-4 level. But the posts of Chinese and Russian Chiefs of Unit were not so reclassified.

5. Chen was promoted to the P-3 level in September 1999. Although the Chief of the Spanish Unit made a request for, and was granted, in November 1999, a Special Post Allowance (SPA) to the P-4 level for that position, Chen’s request for SPA to the P-4 level was refused.

6. On 17 August 2006, Chen submitted a formal request for reclassification of her post to the P-4 level to the Chief of CPPS, who fully supported it. In the Proposed Programme Budget for 2008–2009 submitted in April 2007, the Under-Secretary-General for DGACM (USG/DGACM) suggested taking the necessary steps to put in place a more equitable

¹ See, e.g., *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-030.

situation regarding the Chinese and Russian Chiefs of Unit by creating two new P-4 posts for them, citing General Assembly resolution 42/207C and the principle of equal pay for equal work.

7. On 25 May 2007, the Assistant Secretary-General, Controller, Office of Programme Planning and Accounts, Department of Management, responded that flexibility in managing resources could address the issues; that the six official languages had varying specifications and therefore varying workloads; and that the budget had been finalized and submitted. He essentially rejected the USG/DGACM's request. The USG/DGACM replied on 11 June 2007 reiterating the uniformity of treatment of the six official languages to reflect the quality of the duties and responsibilities of the posts of the Chiefs of Unit and denied that the problem could be addressed by an internal solution.

8. On 6 October 2008, DGACM advised Chen that her request could not be granted. Chen requested an administrative review of the decision not to reclassify her post at the P-4 level on 7 October 2008. On 17 November 2008, the Administrative Law Unit of the Office of Human Resources Management (OHRM) informed Chen that the decision had been properly made.

9. Chen appealed to the Joint Appeals Board (JAB) in December 2008. After the abolition of the JAB on 30 June 2009, Chen's appeal was transferred to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal).

Trial Court Judgment

10. The UNDT issued Judgment No. UNDT/2010/068 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". Judge Shaw wrote that "[t]he Secretary-General is obliged to make appropriate provision for classification". In Chen's case, "[t]he budgetary considerations effectively supplanted the proper considerations that should have been brought to bear on the applicant's application to have her post classification implemented at a P-4 level". The UNDT ordered the payment of compensation to Chen calculated by the difference in salary, allowances, and other entitlements between her current level of P-3 and P-4 level, for the period from 17 August 2006 (date of Chen's request) until December 2010 (date of her retirement),

including the equivalent of the loss in pension rights. The UNDT also awarded compensation in the amount of six months' net base salary at the P-4 level for the non-material damage of frustration and humiliation compounded by the delays she was subject to. Finally, the UNDT ordered the payments to be made within 60 days, after which interest of eight per cent would accrue until payment.

11. The Secretary-General filed an appeal of the Judgment on 7 June 2010, alleging that the UNDT had exceeded its competence in finding for Chen and awarding any damages. Chen filed a reply to the appeal on 26 July 2010. A cross-appeal was submitted with the reply. In the cross-appeal, Chen sought further damages. The Secretary-General submitted an answer to the cross-appeal on 20 September 2010.

Submissions

12. The Administration basically argues that when deciding whether the post should have been reclassified, the trial court should have looked only to the internal rules and procedures of the United Nations, not the Universal Declaration of Human Rights or the International Covenant on Economic, Social and Cultural Rights—both of which mandate equal pay for equal work. And that even if the post should have been reclassified, there was no money in the budget to fund it, and hence nothing could be done. At least, that is our understanding of the submissions.

13. The Administration is also concerned by the Dispute Tribunal's conclusion that, by taking such considerations into account, the Controller breached [Chen's] rights under Staff Regulation 2.1. Notably, the Dispute Tribunal does not take issue with the Controller's assessment that the proposal for the reclassification of [Chen's] post would have been rejected by the General Assembly. The Dispute Tribunal simply considered that the Controller should not have 'invoked budgetary considerations' at all when making his decision.

14. In her cross-appeal, Chen submits that the UNDT should have awarded damages from the first time the Administration denied reclassification, in January 1999.

Considerations

15. As stated in Article 23(2) of the Universal Declaration of Human Rights, “[e]veryone, without any discrimination, has the right to equal pay for equal work”. Of course this principle applies to the United Nations staff.² “Budgetary considerations” may not trump the requirement of equal treatment.

16. The Secretary-General first raises the issue of receivability of Chen’s cross-appeal. As there was ambiguity in the language of the original Article 9(4) of the Appeals Tribunal’s Rules of Procedure, which ambiguity has since been removed, Chen’s cross-appeal is allowed as timely filed.

17. Though allowing the cross-appeal to be filed, we decline to grant the relief sought. The UNDT gave damages from the correct date. We will not allow damages for almost a decade earlier. Though Chen did complain all along about her unequal treatment, she did not take steps to contest the issue until this case.

18. This Court has decided the basic issue: “Denial of pay is a violation of the principle of ‘equal pay for equal work’ which is a right granted under Article 23(2) of the Universal Declaration of Human Rights, which stipulates: ‘Everyone, without any discrimination, has the right to equal pay for equal work.’”³

19. We are puzzled that the Administration seems to contend that these documents do not apply, at least where funding is concerned. To follow the Administration’s logic, classification of posts is subject solely to management’s discretion, even to the extent that internationally acknowledged human rights may be violated. To state the issue thus is to supply the answer.

20. Not only did Chen seek redress, but she was supported by the USG/DGACM, who asked, in the Proposed Programme Budget for 2008–2009 submitted in April 2007, for necessary steps to put in place a more equitable situation regarding the Chinese and Russian Chiefs of Unit by creating two new P-4 posts for them, citing General Assembly resolution

² See, e.g., *Tabari*.

³ *Tabari*, para. 17.

42/207C and the principle of equal pay for equal work. As all previous requests, this was either ignored or denied because of lack of money.

21. The Administration's allegation that the UNDT has usurped the Secretary-General's discretion is misplaced. The Secretary-General has wide discretion in the reclassification of posts. 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. Of course, most decisions about post classifications would not implicate such mandates.

22. The Administration's arguments, which we have no doubt are put forward in good faith, ask this Court to construe the Staff Regulations and Rules into allowing a violation of the principle of equal pay for equal work. Just as did the UNDT, we refuse to do so. No amount of legal pettifoggery can obscure what happened here—Chen was denied equal pay for equal work for many years. Her immediate supervisors tried to remedy the situation, but ran into the bureaucracy and the perpetual lack of funds.

23. "Lack of funds" cannot justify discrimination. It is that simple. The failure to reclassify might be temporarily held up until funds could be found, but that delay cannot be unreasonable. As the former United Nations Administrative Tribunal stated in *Sabet & Skeldon*, "even if financial constraints had been the principal factor, 14 years of delay were still too long and too unfair to the staff members directly concerned. Such a lengthy delay in budgetarily reclassifying those posts deprived the staff members of the protection of the conditions of service."⁴ In that case, the reclassification had been included in many budgets, but not approved. When the JAB recommended compensation, the Secretary-General replied: "In considering the Board's recommendation that you should be compensated for the higher-level functions you performed, the Secretary-General observes that the decision to compensate staff for performing higher level functions is discretionary and subject to the availability of a post. In the absence of an available post in this case, there is no abuse of discretion in deciding not to pay such compensation."⁵

24. Of course the former Administrative Tribunal ruled otherwise: "However, even assuming that the Administration had made the necessary efforts, merely to tell the Applicants: 'We cannot remunerate your work respectively at the P-5 and P-4 levels because

⁴ Former Administrative Tribunal Judgment No. 1136, *Sabet & Skeldon* (2003), para. XII.

⁵ *Id.*, p. 5.

we only have enough money to pay you respectively at the P-4 and P-3 levels' is incompatible with the principle of equal pay for equal work."⁶ We confirm that 2003 decision.

25. And the Administration is really appealing on the facts—whether Chen was doing “equal work”. If Judge Shaw’s finding that Chen was doing equal work as four of her colleagues who were paid more is correct, then no amount of regulations, rules, or argument can undo that. And we believe that Judge Shaw’s finding was not only correct—it was the only possible conclusion on these facts. The Administration has an obligation to prevent such a violation. It did not, and must pay the damages.

26. The Administration did not appeal the issue of interest, so we do not disturb that part of the Judgment.

27. The Administration contends that the UNDT also erred in awarding compensation in the amount of six months’ net base salary at the P-4 level for the non-material damage of frustration and humiliation compounded by the delays she was subjected to. Chen was at a level below her colleagues—all also chiefs of their units—doing the same work for more than a decade. As previously stated, we will not go back to 1999, but we will certainly consider Chen’s humiliation, distress, and disappointment for four years. Since there was no reason for the discrimination (is Chinese a less important language?), the humiliation is aggravated. We agree with Judge Shaw’s assessment.

28. Judge Shaw of the UNDT heard the facts, considered the law, and rendered an excellent decision. We affirm it in all respects.

⁶ Id., para. XI.

Judgment

29. We affirm the UNDT Judgment in all respects.

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Painter, Presiding

(Signed)

Judge Courtial

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar