



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/049

Judgment No.: UNDT/2010/043

Date: 18 March 2010

Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

IHEKWABA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Barbara Lew

Counsel for respondent:

Alan Gutman, ALS

Introduction

1. The applicant is a general service staff member at the G-7 level, step X. She is receiving a special post allowance (SPA) to the P-2 (professional) level, step I, as a result of having successfully passed the 2007 English proofreader and editor exam. She alleges that her gross salary at the P-2 level was incorrectly calculated. The applicant claims that, although the applicant's net income has increased, her gross salary decreased as a result of her placement on the SPA, and this is detrimental to her. The applicant contests that the Organization's calculation of the income of staff in circumstances similar to hers is unfair to higher level general service staff members as they do not enjoy the same level of salary increase as lower level general service staff.

2. On 1 February 2010, the applicant filed an application with the Dispute Tribunal. On 26 February 2010, the respondent filed a motion to summarily dismiss the application arguing that it was not receivable under art. 2.1(a) of the Statute. The applicant's reply to the motion, as well as the respondent's reply to the application, were filed on 5 March 2010. I subsequently informed the parties that the issue of receivability will be addressed in this judgment. On 8 March 2010, the parties informed the Tribunal that they had no objections to this case being disposed of on the papers.

Facts

3. The applicant joined the Organization in 1994 and worked as a general service staff member in the Department for General Assembly and Conference Management until November 2009. In July 2008, the applicant was notified of her successful completion of the 2007 English proofreader and editor exam, pursuant to ST/IC/2007/24 (Information circular on 2007 competitive examination for English proofreaders/copy prepares/production editors), and

subsequently placed on a roster of qualified candidates. On 2 November 2009, she began working as an associate editor in the Treaty Section of the Office of Legal Affairs, having been selected from this roster. During the first two probationary years the applicant is placed on an SPA at the P-2 level (para. 14 of ST/IC/2007/24). Following successful completion of the two-year trial period, the applicant may be promoted (para. 16 of ST/IC/2007/24).

4. In November 2009, the applicant filed a request for management evaluation, contesting the reduction of her gross annual income and requesting “a review of the viability and applicability of form P.269/A in calculating the income of G to P staff who are coming from a very high G level”. The applicant explained that her former gross income at the G-7/X level was higher than her newly assessed gross income at the P-2/I level. The applicant alleged that she was informed in 2004 by an OHRM officer that under no circumstances should a promotion-related salary recalculation lead to a reduction in a staff member’s gross or net income.

5. The results of the management evaluation were communicated to the applicant by a letter dated 30 December 2009. The letter, signed by the Under-Secretary-General for Management, stated that the determination of the applicant’s SPA at the P-2/I level was made in accordance with the applicable rules.

Applicant’s submissions

6. The applicant’s submissions may be summarised as follows:
- a. Prior to starting her work on 2 November 2009, she received nothing in writing about the salary she would be given at the P-2 level. It was on 10 November 2009 that her SPA to the P-2 level

was processed. The applicant was surprised to discover that she had been given a salary level of P-2/I.

- b. The applicant's gross income at the G-7/X level was USD112,268 per annum. Now, at the P-2/I level, her annual gross income is USD105,948 per annum, which is USD6,421 lower than it used to be at the G-7/X level. Since this assignment is a promotion for the applicant, her gross annual income should increase, not decrease. The applicant never agreed to a voluntary reduction of her gross income.
- c. Form P.269/A (Computation sheet for salary on promotion on SPA), used in calculating her G to P income is flawed, arbitrary and outdated. It is also unfair to higher level general service staff and benefits those staff coming to the professional level from a lower general service level. Just because the applicant chose to work very hard over the last 15 years in the UN to attain the level of G-7/X, she is being punished with a reduced gross annual income, rather than an improvement in her financial circumstances.
- d. ST/IC/2007/24 states in para. 14 that staff who passed the language exam and who were already earning an income at the P-2 or P-3 levels would retain their levels during the trial period. Nothing in para. 14 suggests that this category of staff would suffer any loss in their gross annual income, and neither should the applicant be subjected to such loss.
- e. The reduction of the applicant's gross income is affecting her prejudicially in her financial obligations. Her bank reduced her credit line following her report that her gross annual income has been reduced. As a single parent, a negatively impacted credit

score and line can result in a reduced standard of living for the applicant and her children.

7. The applicant seeks a retroactive recalculation, effective 2 November 2009, of her new income to ensure that her new gross income is higher than her G-7/X gross income, plus an additional amount to indicate that her current assignment is a promotion and not a demotion; a declaration that form P.269/A is discriminatory towards G-7 level staff and should be used only in calculating the income of staff in the G-6 and lower categories; and that G-7 level staff be automatically placed at least at the level of P-2/X. As an alternative, the applicant requests that a new form be created to ensure that G-7 staff receive at least the level of P-2/X upon conversion to the professional grade.

Respondent's submissions

8. The respondent submits as follows:
- a. The application is not receivable because the applicant does not contest an administrative decision that violates the terms of her appointment within the meaning of art. 2.1(a) of the Statute. At the core of the applicant's submission is the decision by the applicant, not the respondent, as to whether she would continue working in the general services category, or would be placed in a professional position with a higher net salary but lower gross salary. While the applicant is dissatisfied with the financial results of her decision with respect to the trial placement at the professional level, the decision as to the promotion rests with the applicant and not the respondent. Applicant's contentions concerning form P.269/A amount to no more than generalised grievances over the perceived financial implications which arise from the application of provisional staff rule 3.4, and do not meet

the requirement of challenging an administrative decision. The applicant fails to meet the second requirement of art. 2 of the Statute, i.e., that the administrative decision violates the terms of her appointment or contract. The applicant neither alleges that form P.269/A does not accurately reflect provisional staff rule 3.4, nor challenges the form on any recognised normative or legal grounds. The application represents a policy matter over which the Tribunal does not have jurisdiction.

- b. The applicant's SPA at the P-2 level was correctly calculated in accordance with provisional staff rule 3.4, and form P.269/A which was used to calculate the SPA is an accurate representation of the requirements of provisional staff rule 3.4. The applicant has acknowledged that the SPA calculation was in accordance with current rules.
- c. The basis for the calculation of salary upon promotion under provisional staff rule 3.4 is net base salary, and not gross salary. Reference to gross salary is irrelevant to the calculation of the applicant's SPA. The applicant's net base salary increased by USD5,661 per annum (from USD88,032 at the G-7/X level to USD93,693 at the P-2/I level).
- d. The methodology used to calculate SPA upon appointment to a higher level reflects the long-standing practice of the Organization and leads to consistent and fair results among staff members who are promoted between different categories.
- e. The alleged statement by an OHRM officer can be hardly verified, and even if it were made, was not an accurate statement of the Organization's rules and would not bar or otherwise prevent the

correct application of provisional staff rule 3.4, promulgated in 2009.

- f. The Tribunal is not empowered to grant the relief requested by the applicant. The applicant requests the Tribunal to issue a judgment that ensures that all staff members at the G-7 level are placed at the P-2/X level upon conversion to the professional category, or in the alternative the issuance of a new form. Article 10 of the Tribunal's Statute states that the Tribunal may, in cases of non-compliance with the terms of appointment, grant rescission of a contested decision or specific performance. The applicant, by requesting a change in the application of provisional staff rule 3.4, is requesting the Tribunal to legislate, which is not a remedy provided for under the Dispute Tribunal's Statute.

Receivability

9. The respondent submitted that the application is not receivable as there is no administrative decision affecting the applicant's rights in this case. Further, the respondent submitted that because the applicant accepted the terms of her appointment, she therefore agreed to accept the respondent's calculation of her new salary on her assignment to SPA to the P-2 level. I do not accept this argument. Although it is of course true that the applicant accepted the assignment, this does not mean that all decisions taken by the Administration with respect to the applicant must be deemed correct and lawful. The applicant argues that the basis for the calculation of her salary was flawed and discriminatory against high step G-7 level staff. I am satisfied that the Organization's decision to base its calculation of the applicant's salary on her net income constitutes an administrative decision affecting her contractual right to proper remuneration and that the case is therefore receivable.

Consideration and findings

10. The applicant referred the Tribunal to para. 14 of information circular ST/IC/2007/24. This circular was issued to “invite applications from staff members of the Secretariat at the P-3 level and below who wish to take the competitive examination for English proofreaders/copy preparers/production editors”. Paragraph 14 of the circular states that “[s]taff members at the P-2 and P-3 levels will be assigned at their respective levels”. The applicant submitted that this provision was designed to protect the income of P-2 and P-3 level staff filling vacancies for English proofreaders and editors and that her income as a G-7 level staff member should enjoy similar protection. The applicant’s argument that her gross salary—as distinct from her net income—should be protected, finds no support in the relevant rules and issuances, as explained below. The applicant is further mistaken in her interpretation of the provisions of ST/IC/2007/24, as even a cursory review of the circular clearly demonstrates. The circular states:

2. . . . The purpose of this examination is to establish a roster from which present and future vacancies for English proofreaders/copy preparers/production editors . . . will be filled. When vacancies occur in a service, successful candidates will be recruited from the roster for that service, subject to the requirement in terms of expertise and language combinations.

14. Staff members selected to fill vacancies will be assigned as English proofreaders/copy preparers/production editors for a trial period of two years. *Staff members below the P-2 level or who are in the General Service category will receive a special post allowance to the P-2 level.* Staff members at the P-2 and P-3 levels will be assigned at the respective levels.

16. Staff members with a special post allowance to the P-2 level and those already at the P-2 level who complete the trial period successfully and are recommended . . . may be promoted to the P-3 level. [Emphasis added.]

11. Paragraphs 14 and 16 of the circular are based on secs. 4.1 and 4.3 of administrative instruction ST/AI/2000/1 (Special conditions for recruitment or placement of candidates successful in a competitive examination for posts

requiring special language skills, amended by ST/AI/2003/1), which provides as follows:

4.1 Internal candidates successful in a competitive language examination shall be assigned for a trial period of two years, during which the parent department or office shall block the post of the staff member. Staff members below the P-2 level shall be granted special post allowance to the P-2 level as of the date of commencement of the trial period. Staff members at the P-2 and P-3 levels shall be assigned at their respective levels.

...

4.3 Staff members with a special post allowance to the P-2 level or already at the P-2 level who complete the trial period successfully and are recommended for promotion by the department and the Office of Human Resources Management, shall be promoted to the P-3 level without referral to the Committee. . . .

12. The circular and the administrative instruction clearly articulate that all G-level staff will be receiving an SPA to the P-2 level. This is precisely what happened in the applicant's case. The applicant has submitted that her case was that of a promotion. I do not think this is correct. She is, in fact, "assigned . . . for a trial period of two years" on the SPA to the P-2 level, following which she could be promoted.

13. Pursuant to provisional staff rule 3.10(d), the calculation of the applicant's remuneration while she is on the SPA depends on the salary that the applicant would have received had she been promoted to the P-2 level. Provisional staff rule 3.10 (on SPAs) provides as follows:

(d) The amount of the special post allowance shall be equivalent to the salary increase (including post adjustment and dependency allowances, if any) which the staff member would have received had the staff member been promoted to the next higher level.

14. Accordingly, as was correctly submitted by the respondent, the calculation of the applicant's remuneration and step level are subject to provisional staff rule 3.4, which states:

(b) On promotion, a staff member who holds a fixed-term or a continuing appointment shall be placed at the lowest step of the level to which he or she has been promoted that provides an increase in net base salary equal to at least the amount that would have resulted from the granting of two steps at the lower level.

15. Under provisional staff rule 3.4, the calculation of the applicant's step level should have been based on the net base salary. It is agreed by the parties that this calculation was, in fact, based on the applicant's net base salary. It is clear from the submissions of both parties that, although the applicant's gross earnings decreased, they were accompanied by an even larger decrease in salary deductions, thereby resulting in a net salary higher than that of her previous post. It was submitted by the respondent and not contested by the applicant that this net increase was in line with the specific requirements of provisional staff rule 3.4.

16. The applicant's assertion that her *gross* income cannot be lower as a result of her being placed on SPA to the P-2 level finds no support in any regulation, rule, or administrative instruction put to the Tribunal in this case. It is not necessary to ascertain what kind of information was provided to the applicant by an OHRM officer in 2004. The alleged conversation took place several years before the applicant took the exam and was selected pursuant to ST/IC/2007/24. It is also clear that former staff rule 103.9, in force prior to July 2009, also referred to the net base salary, similarly to provisional staff rule 3.4.

17. Unfortunately, the applicant's position finds no support in the staff rules or other administrative issuances, which constitute part of the applicant's contract with the Organization. Nor has the applicant been able to show that the bases for the calculation of her salary, including provisional staff rules 3.4 and 3.10, are discriminatory against high step G-7 level staff or otherwise improper. I am

unable to find any merit in the applicant's arguments. Therefore, I do not need to decide on the propriety of the relief claimed by the applicant.

Conclusion

18. The application is dismissed.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 18th day of March 2010

Entered in the Register on this 18th day of March 2010

(Signed)

Hafida Lahiouel, Registrar, New York