Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2010/032 (UNAT 1633)
Judgment No.:	UNDT/2011/048
Date:	8 March 2011
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

CIENIEWICZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Ron Mponda

Counsel for Respondent:
Myriam Foucher, UNOG

Introduction

1. By application entered in the register of the former UN Administrative Tribunal on 17 July 2008, the Applicant contests the decision of 10 March 2008 whereby the Secretary-General refused to grant him a special post allowance ("SPA") to the P-4 level for the period from 21 February 2000 to 13 August 2001, during which he performed functions at the P-5 level at a time when his own level was P-3.

2. He requests the Tribunal to:

a. Order the Respondent to grant him an SPA to the P-4 level for the period from 21 February 2000 to 13 August 2001;

b. Compensate him for moral damage suffered as a result of the excessive delays by the Administration in dealing with his requests for an SPA.

3. The case, which was pending before the former UN Administrative Tribunal, was transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set forth in General Assembly resolution 63/253.

Facts

4. The Applicant entered the service of the United Nations on 25 October 1971 in Geneva, at the G-1 level. Having worked his way through the steps of the General Services category, he then obtained a Professional category post under the 200 series of the Staff Rules then in force, and his appointment was converted to a 100 series appointment with effect from 1 November 1998. At that time he was working as an Administrative Officer at the P-3 level in the Office for the Coordination of Humanitarian Affairs ("OCHA").

5. On 21 February 2000, he was designated by the Director of OCHA Geneva as Officer-in-Charge of the Financial and Administrative Unit, Geneva, following the reassignment of the holder of the post "to other functions with his [P-5 level] Post No 501245". He performed the duties of the said post for 18 months, until 13 August 2001.

6. At the end of 2000, the Financial and Administrative Unit, Geneva was reorganized. Henceforth known as the Administrative Office, it continued to be headed by a Chief of the Administrative Office at the P-5 level, the vacancy announcement for which post was posted on 9 July 2001. A P-4 post of Chief of the Finance Section of that Office was created at the end of 2001 and the vacancy announcement for that post was posted for the first time on 8 November 2001.

7. On 12 August 2001, another staff member was designated Officer-in-Charge of the Administrative Office until the post was filled.

8. The Applicant's certifying and administrative authority were suspended by the Controller from 14 November 2001 to 18 March 2002.

9. On 30 April 2002, the Director of OCHA Geneva informed the staff that the Applicant had again been designated Officer-in-Charge of the Administrative Office. He performed those functions until October 2002, when the post was finally filled.

10. On 27 September 2002 and 9 October 2002, the Deputy Director, a.i., OCHA Geneva asked the Human Resources Management Service ("HRMS") of the United Nations Office at Geneva ("UNOG") to grant the Applicant an SPA to the P-4 level for the periods during which he had been acting as Chief of the Financial and Administrative Unit and then Chief of the Administrative Office, in other words from 21 February 2000 to 13 August 2001 and from 30 April 2002 to 20 October 2002.

11. Starting in October 2002 and until June 2003, the Applicant performed the P-4 level functions of Chief of the Finance Section, until that post was filled.

12. On 31 March 2003, the new Chief of the Administrative Office, OCHA Geneva asked the Chief, HRMS, UNOG to respond to the request by OCHA on 9 October 2002 for the grant of an SPA to the Applicant. No reply was received to that or the previous request.

13. On 1 November 2003, the Applicant was appointed to the P-3 post of Chief, Mailing, Pouch and Inventory Section, Central Support Services, UNOG.

14. On 5 March 2004, the Applicant asked the Chief of the Administrative Office, OCHA for information about the action taken in response to the requests for the grant of an SPA and on 10 March 2004, the latter informed the Applicant that he had written that day to the Chief, HRMS, UNOG, asking what action had been taken on those requests.

15. On 25 May 2004, HRMS submitted the question of the grant of an SPA to the Applicant to the SPA Committee. The SPA Committee considered only the periods during which the Applicant had performed functions at the P-5 level.

16. After making a number of errors in previous memoranda, HRMS informed OCHA on 26 August 2004 that the Applicant would be granted an SPA to the P-4 level for the period from 30 April to 20 October 2002, but that the SPA for the period from 21 February 2000 to 13 August 2001 had been refused because the functions performed were those of a non-vacant post, as the holder of the post had been reassigned to other functions together with his post.

17. By letter of 20 October 2004, the Applicant requested that the Secretary-General review the decision to refuse him an SPA for some of the periods during which he had assumed the responsibilities of higher-level posts.

18. On 3 February 2005, in the absence of a reply to his request for review, the Applicant submitted an appeal to the Geneva Joint Appeals Board ("JAB").

19. On 7 March 2007, the SPA Committee ruled on the Applicant's request for an SPA for the period from 21 October 2002 to 30 June 2003. It proposed

granting him an SPA to the P-4 level from 5 March to 30 June 2003, which proposal was adopted by HRMS, UNOG on 4 April 2007.

20. On 14 December 2007, the JAB submitted its report to the Secretary-General. It concluded that, while the rules prohibited the grant of an SPA to the Applicant for the period from February 2000 to August 2001, he should, on the other hand, have been granted an SPA for the period from 21 October 2002 to 4 March 2003. It recommended that the Secretary-General compensate the Applicant for the delays in processing his requests for SPA by paying him an amount equivalent to the SPA to the P-4 level that he should have received for the latter period. The JAB report was forwarded to the Applicant on 31 January 2008.

21. On 10 March 2008, the Secretary-General gave his decision following the JAB report, the conclusions of which he accepted for the two periods mentioned above. He decided to award the Applicant "an SPA to the P-4 level for the period from 21 October 2002 through 4 March 2003", but impliedly refused to grant it for the period from 21 February 2000 to 13 August 2001.

22. On 25 March 2008, by email to the secretariat of the former UN Administrative Tribunal, the Applicant requested clarification of the procedure and time limits for filing an application following the Secretary-General's decision of 10 March 2008, which he said he had received on 25 March 2008.

23. On 26 March 2008, the secretariat of the former UN Administrative Tribunal replied to the Applicant that he must submit his application within 90 days of receipt of the decision of the Secretary-General and that, if he needed more time, he could make a request within the 90-day time limit for an extension of time.

24. On 27 May 2008, the Applicant was taken ill, requiring him to be hospitalised and to convalesce until 22 June 2008.

25. By letter dated 3 July 2008, posted on 4 July and registered by the secretariat of the former UN Administrative Tribunal on 17 July 2008, the

Applicant submitted his application to the Tribunal, explaining that he had been unable to submit it earlier because he had been taken ill on 27 May 2008.

26. By letter of 23 July 2008, the secretariat of the former UN Administrative Tribunal informed the Applicant that his application did not meet the formal criteria laid down in article 7 of the Rules of the Tribunal, and invited him to correct his application by 23 September 2008.

27. On 2 October 2008, the secretariat of the former UN Administrative Tribunal registered the Applicant's corrected application. This was forwarded on 16 October 2008 to the Respondent, who filed his answer on 28 April 2009, having obtained three extensions of time. The Applicant submitted observations on 26 June 2009.

28. As the case could not be decided by the UN Administrative Tribunal before its abolition on 31 December 2009, it was transferred to the United Nations Dispute Tribunal on 1 January 2010.

29. On 12 January 2011, the Tribunal requested additional information from the Respondent to enable it to rule on whether the application was time-barred, as alleged. It also asked both parties if they had any objection to the case being decided without a hearing, on the basis of the written submissions. The Respondent and the Applicant replied to the Tribunal's questions on 21 and 27 January 2011 respectively, and stated that they had no objection to the Tribunal deciding the case on the basis of the written submissions.

Parties' contentions

30. The Applicant's contentions are:

a. His application is not time-barred as he was prevented by exceptional circumstances from filing it within the time limit. On 27 May 2008, he suffered an illness that required him to be hospitalised until 31 May 2008, followed by a period of convalescence until 22 June 2008.

Subsequently, having returned to work, he was obliged to take annual leave as a result of the same illness;

b. From February 2000 to 13 August 2001, when he was at P-3 level, he was designated as acting Chief of the Financial and Administrative Unit, a P-5 level post. He should thus have received an SPA to the P-4 level for that period, and he was wrongfully denied it on the grounds that the former holder of the post had been moved to other functions with the post in question;

c. It is abnormal for a staff member no longer exercising the functions of the post to which he has been appointed to continue to be considered as the legitimate holder of the post in question, the effect of which is to prevent the person actually exercising the functions from receiving the associated allowance. The appointment of the holder of the post to other functions makes that post vacant as long as it has not been abolished or another staff member appointed to it;

d. Both the SPA Committee and the JAB were in error in their interpretation of administrative instruction ST/AI/1999/17. The Tribunal must necessarily examine whether the post he occupied was vacant or temporarily vacant within the meaning of section 1.2 of the instruction, or whether it was a subterfuge for denying him his entitlement to an SPA. The post in fact existed, but there were no funds allocated for it;

e. The post in question was not abolished, as the functions specific to the post had to be performed, and the Applicant was officially designated to discharge them. The budgetary condition put forward by the Administration is not one that appears in the applicable texts, and it is up to the Administration to ensure that there is funding for a post;

f. That situation could have been avoided if the Administration had shown more “creativity” and avoided reassigning the holder of the post together with his post. The course chosen by the Administration is

contrary to administrative instruction ST/AI/1999/17, to the principles contained in staff regulation 103.11 and to usual practices. It goes against the ethics and values of the Organization and against the interests of its staff members;

g. The excessive delays by the Administration in dealing with his claims for an SPA have caused him moral damage justifying an award of compensation.

31. The Respondent's contentions are:

a. The application is not receivable on the grounds that it is time-barred, since it was not submitted within 90 days from the date on which the Applicant received the Secretary-General's decision. The Applicant received the decision on 10 March 2008, but only on 3 July 2008 did he send his application to the former UN Administrative Tribunal. In addition, the Administrative Tribunal asked the Applicant to submit a corrected application not later than 23 September 2008. In fact, the Applicant did so only on 2 October 2008, without having requested an extension of time;

b. The grant of an SPA is not an entitlement for staff members who occupy a post at a higher level than their own. It is a matter for the discretionary powers of the Secretary-General, and the former UN Administrative Tribunal has recalled in its case-law that the role of the Tribunal is limited to examining whether the staff member's claim to an SPA has been given proper consideration;

c. For the period still in dispute, the post occupied by the Applicant was not vacant or temporarily vacant within the meaning of administrative instruction ST/AI/1999/17, an essential condition for the grant of an SPA. Both the SPA Committee and the JAB took the view that the P-5 post the Applicant was performing was technically occupied as the holder had been transferred with his post. The contested decision is therefore unassailable;

d. The Secretary-General accepted the recommendation of the JAB to grant the Applicant compensation for the unjustified delays by the Administration in processing his claims for an SPA and decided to award him an SPA for the period from 21 October 2002 to 4 March 2003. The Applicant has therefore been properly compensated for the delays that occurred.

Consideration

32. With the agreement of the parties, the case was decided without a hearing.

Receivability

33. The Tribunal must first decide on the receivability *ratione temporis* of the application.

34. Article 7 of the Statute of the former Administrative Tribunal stipulates:

> …
> 2. In the event of the joint body's recommendations being favourable to the application submitted to it, and insofar as this is the case, an application to the Tribunal shall be receivable if the Secretary-General has:
> (a) Rejected the recommendations;
> (b) Failed to take any action within thirty days following the communication of the opinion;
> (c) Failed to carry out the recommendations within thirty days following the communication of the opinion.
> 3. In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and insofar as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous.
> 4. An application shall not be receivable unless it is filed within ninety days reckoned from the respective dates and periods referred to in paragraph 2 above, or within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant …

35. The Applicant maintains, and the Respondent does not seriously dispute, that he received on 25 March 2008 the Secretary-General's decision of 10 March 2008 refusing to grant him an SPA to the P-4 level for the period from 21

February 2000 to 13 August 2001. The Applicant thus had 90 days from 25 March 2008 to contest that decision before the former UN Administrative Tribunal. However, on 27 May 2008, in other words before the deadline for appeal had expired, the Applicant was taken seriously ill, requiring hospitalisation and convalescence until 22 June 2008. The Applicant returned to work on 23 June 2008 and, by letter of 3 July 2008, posted on 4 July 2008 and registered by the secretariat of the former Administrative Tribunal on 17 July 2008, he submitted an application to that Tribunal specifically contesting the Secretary-General's decision.

36. This Tribunal must therefore consider whether the serious illness that befell the Applicant constitutes an exceptional circumstance that justifies the delay in sending his application to the former Administrative Tribunal on 4 July 2008. The short interval between the end of the Applicant's medical leave and the sending of his application to the Tribunal shows, in fact, that the Applicant acted promptly as soon as his medical leave came to an end.

37. It remains for this Tribunal to examine whether the Applicant's delay in submitting a corrected application can result in its not being receivable.

38. By letter of 23 July 2008, the Applicant was informed by the secretariat of the former UN Administrative Tribunal that he must submit his corrected application, in other words in the form prescribed by article 7 of the Rules of the Tribunal, by 23 September 2008. In fact, the application was registered by the secretariat of the former Administrative Tribunal only on 2 October 2008. This Tribunal holds that failure to comply with the forms laid down by the abovementioned article does not result in inadmissibility. Therefore, although it is desirable for applications to be filed in standard form, the Tribunal is unable to take the view that the present application is, for that reason alone, not receivable.

39. The application must therefore be held to be receivable.

Merits

40. The Applicant contests, first, the Secretary-General's decision refusing to grant him an SPA to the P-4 level for the period from 21 February 2000 to 13 August 2001, during which he occupied functions at the P-5 level as Officer-in-Charge of the Financial and Administrative Unit of OCHA Geneva.

41. Administrative instruction ST/AI/1999/17 applicable during the period in question provides:

> **Section 1 Scope and definitions**
> …
> *Definitions*
> 1.2 For the purposes of the present instruction, the following definitions shall apply:
> (a) "Temporarily vacant post" shall refer to a post which is blocked for a staff member on mission detail, special leave, secondment, temporary assignment or loan, who was previously selected for the post under established recruitment or placement and promotion procedures;
> (b) "Vacant post" shall refer to a post approved for one year or longer which is not blocked for the return of a staff member under the conditions set out in subsection 1.2 (a) above and is to be filled under established procedures for recruitment or placement and promotion.
>
> **Section 2 General provisions**
>
> 2.1 Under staff rule 103.11, staff members are expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher-level posts. Nevertheless, payment of a non-pensionable SPA is authorized by the same rule in exceptional cases when a staff member is called upon to assume the full duties and responsibilities of a post which is clearly recognizable at a higher level than his or her own for a temporary period exceeding three months.
> 2.2 Payment of an SPA is a discretionary grant, for which staff members may be considered when the conditions set out in staff rule 103.11 and section 4 below are met. …
>
> **Section 3 Temporary assignments**
>
> *Temporary assignments to temporarily vacant posts*
> Temporary assignment to a post that is temporarily vacant shall be made in accordance with section 2.4 of ST/AI/1999/8 on the

> placement and promotion system, and section 2.2 of ST/AI/1999/9 on special measures for the achievement of gender equality, which require that the department or office concerned inform its staff of temporary vacancies expected to last for three months or longer so as to give staff members the opportunity to express their interest in being considered.
>
> *Temporary assignments to vacant posts*
> 3.2 In addition to the requirements set out in section 3.1 above and in order to implement paragraph 10 of section III.B of General Assembly resolution 51/226, in which the Assembly requests the Secretary-General "to take effective measures to prevent the placement of staff members against higher-level unencumbered posts for periods longer than three months", temporary assignments to vacant posts shall require that the department or office concerned has already initiated the proper procedures for filling the post on a permanent basis.

42. The texts cited above, taken together, clearly show that in order to be eligible for an SPA, among the other conditions to be met, the staff member concerned must have performed all the functions attaching to a vacant or temporarily vacant post at a level higher than his own. It is not disputed that the holder of the P-5 level post whose functions were entrusted to the Applicant was assigned elsewhere, and the Administration maintains that he was transferred "with his post".

43. The issue the Tribunal must decide is what the consequences are of that transfer of the post holder "with his post". Having regard to the budgetary rules that require that there must be a budgetary post in order for a staff member to be paid, the transfer of a staff member with his post from one service to another can only be interpreted as the abolition, at least temporarily, of the financing of the post in the staff member's original service, in other words the abolition of the post itself.

44. In the present case, the P-5 post the functions of which the Applicant assumed from 21 February 2000 to 13 August 2001 was neither vacant, at least up to 9 July 2001, the date it was advertised, nor temporarily vacant within the meaning of the administrative instruction cited above. Therefore, the Applicant did not meet the conditions laid down in the said administrative instruction to be

eligible, during that period, for an SPA, and the Administration was within its rights in refusing to pay it.

45. While the Applicant maintains that by reserving the option to transfer a staff member together with his budgetary post from one service to another, the Administration is, in effect, preventing the person actually assuming those functions from obtaining the associated allowance, it is not for the Tribunal to rule on the appropriateness or otherwise of decisions taken by the Administration in the redeployment of budgetary posts from one service to another. The Applicant's argument can therefore not succeed.

46. The Applicant's claim to be granted an SPA to the P-4 level for the period from 21 February 2000 to 13 August 2001 must, therefore, be rejected.

47. The Applicant has also sought compensation from the Tribunal for moral damage resulting from the delays by the Administration in dealing with his claims for an SPA. The Tribunal would note at the outset that, contrary to what the Respondent maintains, the Secretary-General did not compensate the Applicant for unjustified delay, but granted him an SPA for the period from 21 October 2002 to 4 March 2003.

48. That said, in the absence of particular circumstances, which have not been alleged in this case and which are not apparent from the record, the Tribunal considers that the fact that the Administration delayed in dealing with a claim from a staff member for an SPA, however regrettable that might be, is not such as to cause moral damage giving rise to compensation. In practice, damage caused by delay in paying a sum of money is usually a head of material damage compensated by the payment by the Administration of interest running from the date on which the debt fell due. In the present case, however, the Tribunal is bound to find that the Applicant has not claimed payment of such interest, and, therefore, that it may not award it.

49. Based on the foregoing, the application must be dismissed.

Conclusion

50. For these reasons, the Tribunal DECIDES:

The application is dismissed.

(*Signed*)

Judge Jean-François Cousin

Dated this 8th day of March 2011

Entered in the Register on this 8th day of March 2011

(*Signed*)

Víctor Rodríguez, Registrar, Geneva