



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2015/170  
UNDT/NBI/2016/072  
Judgment No.: UNDT/2019/020  
Date: 11 February 2019  
Original: English

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**Before:** Judge Nkemdilim Izuako  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

HAILOU

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
George Irving

**Counsel for the Respondent:**  
Nicole Wynn

## **The Application and Procedural History**

1. At the time of this application, the Applicant served as a Field Administrative Officer at the FS-5 level at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

2. On 18 November 2015, the Applicant filed an application contesting the administrative decisions not to grant her retroactive promotion to the FS-6 level and the denial of her request for Special Post Allowance (SPA). This application was registered as Case No UNDT/NBI/2015/170. On 21 September 2016, the Applicant filed a second application contesting, *inter alia*, the consequences of her removal from her post following its reclassification to P-3, which was registered as Case No UNDT/NBI/2016/072.

3. By Order No. 010 (NBI/2017), dated 19 January 2017, the parties were informed that Case No. UNDT/NBI/2015/170 had been transferred to the docket of Judge Alexander W. Hunter, Jr.

4. At a case management discussion held on 7 March 2017, the Applicant moved for consolidation of UNDT/NBI/2015/170 with UNDT/NBI/2016/072 because both matters arise from the same set of facts.

5. On 9 March 2017, following discussions with Judge Nkemdilim Izuako who was presiding over Case No. UNDT/NBI/2016/072, Order No. 051 (NBI/2017) was issued consolidating UNDT/NBI/2015/170 with UNDT/NBI/2016/072. The parties were also provided with a scheduled timeline for the filing of their respective witness statements and closing submissions. The parties filed their closing submissions on 10 April 2017.

6. Judge Hunter's deployment with the UNDT in Nairobi ended on 13 April 2017.

7. On 7 June 2017, the Tribunal issued Order No. 107 (NBI/2017) transferring the consolidated case to the docket of Judge Izuako.

### **Case for the Applicant**

8. The Applicant's case is summarized below:

9. In May 2006, the Applicant was selected for the position of Field Operations Manager in Mbuji-Mayi Regional Office in MONUSCO at the FS-5 level. She resigned from her parent office at United Nations Headquarters in New York in November 2006 and received a new appointment from the Department of Peacekeeping Operations (DPKO) at the level and title of FS-5 Administrative Assistant. The Applicant was performing functions at the FS-6 level.

10. In 2012, a classification exercise was undertaken to review the classification of certain posts in MONUSCO including the post encumbered by the Applicant. On 28 September 2012, the Director of Mission Support (DMS) sent a memorandum to the Chief Civilian Personnel Officer (CCPO) stating that because of the classification review at the Mission, 14 posts were reclassified as Field Administrative Officers at the FS-6 level. The Applicant's post was one of the 14 posts reclassified upwards.

11. MONUSCO did not implement the reclassification decision as it never requested budgetary approval from the General Assembly for the said 14 posts reclassified upwards. Instead, the Mission advertised a Temporary Job Opening (TJO) at the FS-6 level for a Field Administrative Officer. The Applicant was selected for the post through a competitive process. The Applicant was then granted SPA for the period February 2012 - January 2014. She continued thereafter to perform the FS-6 level functions but no job opening for a fixed-term appointment was advertised and therefore the Applicant substantively remained an FS-5 level officer.

12. On 10 January 2015, MONUSCO announced that it would recruit substantive Field Operations Managers from the Administrative Officer or Logistic Officer rosters

at the P-3/P-4 levels. Since applicants for P-3 posts were limited to those formally recognized at the FS-6 level by 19 June 2015, the Applicant formally asked her section Chief to exercise his discretion to regularize her status by formally designating it at the FS-6 level through a retroactive promotion and to grant her an SPA for the entire period she performed duties at the higher level. This was refused.

13. The Applicant sought management evaluation of the refusal and after receiving unfavourable management evaluation decisions approached the Tribunal on 18 November 2015 challenging the administrative decisions not to grant her a retroactive promotion and to refuse her SPA from the period after January 2014.

14. While still awaiting the prosecution of her case at the Tribunal, on 14 July 2016, the Applicant was asked to step down from her functions and to hand over to another officer appointed as a substantive incumbent of her post. She was placed against a borrowed post from the electoral unit and given no assignment or job description.

15. The Applicant submits that the Respondent has the discretionary power to grant retroactive promotions:

(a) Staff rule 12.3 provides that the Secretary-General may make exceptions to the Staff Rules where such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly. Since the grant of a retroactive promotion is not inconsistent with any Staff Regulations or General Assembly decisions, it follows therefore that the Secretary-General has the discretion to grant a retroactive promotion to rectify irregularities in the status of a staff member.

(b) Although a decision to grant a retroactive promotion is at the discretion of the Respondent, the exercise of that discretion is not absolute. In *Bangoura*,<sup>1</sup> the former UN Administrative Tribunal held that even though staff members

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<sup>1</sup> UNAdT Judgment No.1029 (2001)

are not as a matter of right entitled to a favourable exercise of discretionary power, they have a right to fair and equitable treatment and the Tribunal monitors the way in which discretionary power is exercised.

(c) Also in *Sabet and Skeldon*,<sup>2</sup> the same Tribunal granted retroactive promotions to two staff members when the Respondent failed to implement a lawful classification decision.

16. The Applicant also submits that the failure of the Respondent to grant her a retroactive promotion and requested SPA is unlawful.

(a) The Respondent acted unlawfully when he failed to implement the upward reclassification of the Applicant's post to the FS-6 level. In choosing not to implement the reclassification decision taken in 2012 in respect of the Applicant's post, the Respondent acted in both an arbitrary and inequitable manner. Thus, he contravened the basic principle of the Organization's classification system which is to correct anomalies in the classification of posts at the wrong level.<sup>3</sup>

(b) Additionally, the Respondent contravened the provisions of ST/AI/1989/9 that when a reclassification decision has been made by a review committee, a request for reclassification shall be submitted for budgetary approval.<sup>4</sup> Having failed to comply with that legislation, the Respondent instead resorted to the misuse of the system of temporary appointments provided for in ST/AI/2010/4/Rev.1<sup>5</sup> whose purpose is to enable the Organization to manage its short-term staffing needs.

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<sup>2</sup> UNAdT Judgment No.1217 (2003)

<sup>3</sup> Ibid. page13.

<sup>4</sup> Section 4, ST/AI/1989/9

<sup>5</sup> See section 1.1

(c) By failing to exercise its discretion to grant the Applicant a retroactive promotion and award her commensurate SPA, the Respondent failed to rectify its unlawful decisions which had a direct and negative impact on her. The Respondent has also violated the principle of equal treatment of staff members with identical duties and responsibilities.

17. The Applicant claims that she was effectively exploited and demoted when she was ordered to step down from the functions she had performed for over ten years.

(a) It was unfair to order the Applicant on 14 July 2016 to step down from her functions as the Acting Field Operations manager/Administrative Officer and to hand over her duties, office accommodation and motor vehicle to another officer. It amounted to a *de facto* demotion and exploitation since her assignment to higher duties for over ten years lacked transparency and fairness in the circumstances.

(b) The Respondent's lone witness, who was not in the Mission in 2006, denied in his witness statement, the Applicant's claims that she was performing higher level functions since 2006 even though he is contradicted by the written records. He stated also that it was the Applicant's obligation to apply for FS-6 positions to receive Field Central Review Board clearance. Before the clearance requirement of FCRB became the rule in 2010, the Applicant was technically cleared for FS-6 positions in 2006 and this was reflected on the Nucleus roster. Even after 2010, the post the Applicant encumbered was never advertised and she never had opportunity to compete and get on the roster.

18. The Applicant further claims that her right to get equal pay for equal work was violated.

(a) The Applicant had worked for MONUSCO at the level of an FS-6 Field Operations Manager for more than ten years. Under Article 3(2) of the

Universal Declaration of Human Rights, “everyone without discrimination has the right to equal pay for equal work.” The Appeals Tribunal has affirmed that this principle applies to United Nations staff.<sup>6</sup> UNAT recognized also that receiving an SPA in lieu of proper promotion to higher-level results *inter alia*, in loss of pension benefits that violates the concept.<sup>7</sup>

(b) The payment of non-pensionable SPA to cover part of the period when the Applicant worked at the FS-6 level does not provide a remedy. UNAT held in *Chen*<sup>8</sup> that there is no discretion to violate the principle of equal pay for equal work. It held also that budgetary considerations cannot justify the inequality of treatment

19. The Applicant seeks the following remedies:

(a) An order of retroactive promotion against the Respondent and compensation for loss of income and opportunity representing the difference in pay between the FS-5 and the FS-6 levels from 2006 to 2012 and from 2012 through her anticipated date of retirement between the FS-6 and the P-3 levels, including pension contributions.

(b) Compensation for moral damages in the amount of 18 months’ net base pay for discriminatory treatment for extended periods causing her undue stress, anxiety and professional dislocation.

### **Case for the Respondent**

20. The Applicant is an FS-5 level Administrative Assistant who was temporarily assigned to the FS-6 level from 2012 until 2016 whilst encumbering post number 75359 (the post). She has been awarded the relief she sought through the payment of SPA for

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<sup>6</sup> Tabari v Commissioner-General of UNRWA, Judgment No. 2010-UNAT-030

<sup>7</sup> Elmi 2016-UNAT-704

<sup>8</sup> 2011-UNAT-107

over four years - February 2012 until June 2016 which is the entire period she performed higher level FS-6 level functions.

21. The Applicant is contesting the General Assembly decision to convert the post from one in the Field Service to a Professional category. This aspect of her claim is not receivable because the Dispute Tribunal lacks jurisdiction to review General Assembly decisions. Even if the claim is receivable, the Secretary-General had broad discretion in the organization of work and had legitimate business reasons for proposing the conversion of the post.

22. The claim by the Applicant that she could have been selected for the P-3 level post is without merit because she was not eligible for competitive selection.

23. The Respondent submits that the Applicant has been awarded all the SPA to which she is entitled.

(a) The Applicant received SPA payment for 24 months for the period February 2012 to January 2014. The Applicant has also been paid SPA for the period February 2014 until 30 June 2016 as an exception to the two-year limitation allowed in SPA payment under ST/AI/2003/3. The Applicant is not entitled to any further relief.

(b) The Applicant's claim that the post should have been classified before 2012 at the FS-6 level is without merit. If a staff member disagrees with the classification of a post she encumbers, she may ask that the classification be reviewed. She never challenged the classification of the post and never requested an upward reclassification of it.

(c) Even if the post was reclassified upwards before 2012, the Applicant would not have been entitled to a promotion since the post would have been advertised for competitive selection. MONUSCO would have recruited for it from the Field Central Review Board (FCRB) roster of FS-6 level candidates

under section 9.5 of ST/AI/2010/3, *the Staff Selection System* and in line with the standard practice in Field Missions. The Applicant was not on the FCRB roster at the FS-6 level. Even though the Applicant was technically cleared at the FS-6 level some years' prior, the Organization no longer uses the system of technical clearance.

24. The Respondent further submits that the Applicant was not entitled to be selected for the P-3 level position.

(a) MONUSCO recruited a P-3 level candidate from the FCRB roster and the Applicant was not considered for the P-3 level position because she was not on the FS-6 roster or the P-3 roster.

(b) The Applicant knew that her assignment to the FS-6 level Field Administrative Officer position was temporary and that she would retain her FS-5 level, as stated in the 16 November 2006 letter notifying her of the assignment. It was therefore reasonable to expect that upon the conversion of the post to the P-3 level and the recruitment of a P-3 level Field Operations Manager, her temporary assignment would end.

(c) Although the post was not advertised for regular recruitment, the Applicant could have applied for other FS-6 level job openings in MONUSCO or elsewhere to be promoted or rostered for an FS-6 level position while she encumbered the post on a temporary basis and received SPA. As stated in the memorandum of 28 September 2012 requesting authorization to issue a TJO for the post, the Applicant was "responsible for applying to positions at the FS6 level to receive relevant FCRB clearance at the earliest opportunity."

(d) The Applicant is not entitled to any remedies. Her job security is intact and she is not serving on a borrowed post and her fixed-term appointment has

been renewed. She now serves at her substantive grade of Administrative Assistant at the FS-5 level.

### **Issues**

25. The Tribunal will seek to determine: (1) whether the Respondent can grant discretionary retroactive promotions and whether under the prevailing circumstances, it was fair and equitable to do so in the Applicant's case. (2) Whether the Applicant had been adequately compensated by the Respondent for performing higher level functions at the FS-6 level.

### **Considerations**

*Can the Respondent grant discretionary retroactive promotions and, under the prevailing circumstances, would it have been fair and equitable to do so in the Applicant's case?*

26. The crux of the Applicant's case is that she seeks to be granted retroactive promotion starting from November 2006 because although recruited by MONUSCO as an FS-5 level staff member, she claims to have performed functions at the FS-6 level.

27. Many legal authorities have been cited by both parties in support of the case made out by each of them. However, the facts and principles applicable in the case of *Elmi* 2016-UNAT-704 are similar and almost on all fours with the facts and principles that must be considered in the present case. In *Elmi*,<sup>9</sup> the applicant had performed duties as Chief of Human Resources Management Services (HRMS) at the United Nations Office at Nairobi (UNON) at the substantive level of a P-5 staff member. The post was reclassified upwards to the D1 level at the end of 2011, advertised in January 2012 and the applicant was selected and promoted on 1 June 2013. The applicant who was due to retire from the Organization in October 2014 received SPA at the D1 level from

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<sup>9</sup> 2016-UNAT-704.

January 2012 when the selection process started until his promotion. He subsequently requested a discretionary retroactive promotion for pension purposes only as an exception under staff rule 12.3(b) but this was refused.

28. The UNDT decided in favour of the applicant and held that the respondent was wrong to assume that the said applicant had received equal pay for work of equal value since SPA payments which he received did not include pension contributions.<sup>10</sup> In reversing that decision, the United Nations Appeals Tribunal (the Appeals Tribunal) held that the denial of retroactive promotion to Elmi was in full accord with staff rule 3.10 which governs the grant of SPAs.

29. The Appeals Tribunal also held that under the applicable legal framework, promotions do not go into effect retroactively. It further noted that under section 10.2 of ST/AI/2010/3 (*Staff Selection System*), the earliest possible date on which a promotion may become effective shall be the first day of the month following the promotion decision. About Mr. Elmi's submission that an exception could be granted under staff rule 12.3(b), the Appeals Tribunal continued that the respondent had exercised discretion in respect of whether to grant him a retroactive promotion when it declined the applicant's request to do so.

30. The Appeals Tribunal further held that since Mr. Elmi received SPA at the reclassification of his post, he had already obtained a higher remuneration than generally allowed under staff rule 3.10(b). Granting him a retroactive promotion would have the same effect as granting him pensionable SPA which is not permitted and denying him retroactive promotion did not constitute discrimination against him because there is a lawful and convincing reason for it. That lawful and convincing reason is the extant provisions of staff rule 3.10 on the grant of SPA payments.

31. An application of the Appeals Tribunal's reasoning in *Elmi* to the present case means in effect that the Respondent cannot grant the Applicant, who had received SPA

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<sup>10</sup> UNDT/2016/032.

payments, a retroactive promotion covering the period of the payments since doing so would be in contravention of staff rule 3.10(b). Moreover, under section 10.2 of ST/AI/2010/3, promotions do not go into effect retrospectively. Regarding the exercise of his discretion to grant the retroactive promotion as requested, the refusal by the Respondent to do so already amounted to an exercise of the discretion sought by the Applicant.

32. As to whether it is fair and equitable to grant the Applicant a retroactive promotion under the prevailing circumstances, the Appeals Tribunal's decision in *Elmi* extinguishes any such considerations. Since the Applicant had received non-pensionable SPA payment for the period when she performed functions at a higher level following the upward reclassification of her post, and since section 10.2 of ST/AI/2010/3 provides that a promotion decision can only become effective in the month after the decision, the Applicant has received fair and equitable treatment. The only distinction between this case and *Elmi* is that Mr. Elmi was promoted after the recruitment process whereas the Applicant here was not qualified to be considered as a candidate in the recruitment process for the post she had encumbered.

*Was the Applicant adequately compensated by the Respondent for performing higher level functions at the FS-6 level?*

33. By the same token and applying the same reasoning in *Elmi*, the Applicant had unusually received SPA for the more than the four-year period she performed functions at a higher level (February 2012 – June 2016). The post she encumbered was reclassified upwards to the FS-6 level in 2012, not 2006. The Tribunal therefore refuses her claim that she was performing higher-level functions between 2006 and 2012 when those functions were not recognized through an upward reclassification as higher-level functions. Additionally, under section 6.2(c) of ST/AI/2003/3 (Special post allowance for field mission staff), in respect of posts reclassified upwards at established missions, an SPA may not become effective before the effective date of the reclassification

decision. Accordingly, the Tribunal finds and holds that the Applicant was not entitled to payment at the FS-6 level either by way of SPA or promotion before 2012.

34. The Tribunal holds further that the Applicant was adequately compensated for performing higher-level functions at MONUSCO. Regarding the contention of the Applicant that her ineligibility for FCRB rostering and consideration for promotion to the FS-6 level was the fault of the Respondent because he did not advertise the post she encumbered for recruitment, the claim is entirely without merit. It was up to the Applicant who had successfully improved her academic qualifications to similarly seek other opportunities within the Organization to get on the FCRB FS-6 roster.

***Conclusion/Judgment***

35. This consolidated Application fails.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 11<sup>th</sup> day of February 2019

Entered in the Register on this 11<sup>th</sup> day of February 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi