



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

FRANCO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, who holds a continuing appointment as a Finance and Budget Assistant (GS-4) with the United Nations Global Service Centre (“UNGSC”) in Brindisi, contests the decision not to grant him a Special Post Allowance (“SPA”) for higher-level functions performed since 1 May 2015 (“contested decision”).

Facts and procedural background

2. The Applicant, who joined UNGSC on 1 November 2005 as Personnel-Registry Clerk (GS-3), was promoted to the position of Finance and Budget Assistant (GS-4) on 1 November 2008.

3. In June 2013, following the restructuring of the Finance Section, the Applicant was assigned to the Cashier Unit and his then First Reporting Officer (“FRO”) was a Finance and Budget Assistant at the GS-6 level.

4. As of 1 May 2015, following his former FRO’s retirement, the Applicant was assigned additional cashier-related duties. On 5 May 2015, the Applicant was appointed as a bank signatory.

5. In May 2015, UNGSC advertised the Applicant’s former FRO’s position of Finance and Budget Assistant (GS-6). On 1 November 2015, UNGSC selected a staff member for the advertised position.

6. From May 2015 to December 2017, the Applicant reported to the Chief Finance and Budget Officer (“CFBO”), Head of Finance Section, who acted both as his FRO and Second Reporting Officer (“SRO”). From April 2015 to March 2017, the Applicant’s performance was assessed as “exceeding expectations” (see Electronic Performance Appraisal System (“e-PAS”) 2015/2016 and 2016/2017).

7. In 2016, the Finance and Budget Section was restructured from six units to three units, namely Finance Controlling and Reporting Unit, Operations Unit, and Budget Unit. UNGSC assigned the Applicant to the Operations Unit.

8. On 6 September 2016, following an entity wide classification exercise, UNGSC notified the Applicant of the decision to maintain the classification of the post he encumbered at the GS-4 level.

9. On 4 November 2016, the Applicant appealed the classification decision to the Classification Appeals Committee in accordance with the procedure set out in ST/AI/1998/9 (System for the classification of posts).

10. In January 2018, UNGSC appointed a new Finance and Budget Assistant (GS-6), who was designated as the Applicant's FRO while the CFBO continued to be the Applicant's SRO.

11. The Applicant's performance for the period from 1 April 2017 to 31 March 2018 was assessed as "meeting expectations" (see e-PAS 2017/2018).

12. On 21 December 2018, the Applicant requested a review of the grade level assigned to his post in order to "ascertain whether the classification standards [had] been correctly applied ... [and] whether an SPA at the GS-6 level should be granted retroactively for the period of time during which [he has] been performing duties at a higher level".

13. By report dated 22 January 2019, the Classification Appeals Committee rejected the Applicant's appeal, finding that the post he encumbered had been accurately classified at the GS-4 level while acknowledging that he had performed higher level functions, which were not associated with those of the post he encumbered, as reflected in his e-PAS for the 2015/2016 and 2016/2017 performance cycles.

14. By email dated 24 January 2019 addressed to the Chief Human Resources Officer ("CHRO"), UNGSC, the Applicant requested retroactive payment of SPA for higher-level functions performed since 1 May 2015.

15. On 4 February 2019, the Assistant Secretary-General for Human Resources notified the Applicant of the decision to accept the recommendation of the New York General Service Classification Appeals and Review Committee that the post encumbered by him was accurately classified at the GS-4 level.

16. By email dated 6 June 2019, the CHRO rejected the Applicant's request for retroactive payment of SPA on the ground that he did not fulfil the full duties and responsibilities of a higher-level post.

17. On 16 July 2019, the Applicant requested management evaluation of the contested decision.

18. By letter dated 26 September 2019, the Under-Secretary-General for Management Strategy, Policy and Compliance decided to uphold the contested decision while expressly reserving the right to raise the issue of receivability in subsequent proceedings.

19. On 19 December 2019, the Applicant lodged with this Tribunal the application mentioned in para. 1 above.

20. On 20 January 2020, the Respondent filed his reply to the application.

21. On 26 January 2021, the present case was assigned to the undersigned Judge.

22. By Order No. 47 (GVA/2021) of 16 February 2021, the Tribunal informed the parties of its finding that the matter could be determined on the papers without holding a hearing and ordered them to file closing submissions, which they did on 26 February 2021.

Parties' submissions

23. The Applicant's principal contentions are:

- a. All the requirements for retroactive payment of SPA are met, at least for the period from August 2015 until January 2018; the Applicant is also entitled to SPA after January 2018 because he continued to perform the higher-level functions of the GS-6 post after it was filled; and
- b. The contested decision reflects the Administration's failure to ensure equal pay for equal work.

24. The Respondent's principal contentions are:

- a. The application is not receivable *ratione materiae* because the Applicant does not challenge an administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute and he did not submit a request for SPA in a timely manner;
- b. Should the Tribunal find the application receivable, it is without merit because the requirements for granting SPA have not been met: the Applicant has not been temporarily assigned to a higher-level vacant post, and he has not been performing the full higher-level functions of a vacant post; and
- c. The Administration did not violate the principle of equal pay for equal work.

Consideration

Whether the application is receivable

25. The Tribunal considers that the issues concerning the eligibility of SPA and the timeliness of its request are questions for the merits and have no bearing on receivability. Thus, the core receivability issue before the Tribunal is whether the contested decision falls within the scope of art. 2.1(a) of its Statute.

26. Art. 2.1(a) of the Tribunal’s Statute limits its jurisdiction to hearing appeals against “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”. In determining what constitutes an administrative decision within the scope of art. 2.1(a), the Appeals Tribunal has adopted the definition developed by the former UN Administrative Tribunal in Judgment No. 1157, *Andronov* (2003), namely that:

[i]t is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. ... (see, e.g., *Al Surkhi et al.* 2013-UNAT-304, para. 26; *Lee* 2014-UNAT-481, para. 48).

27. The Tribunal is of the view that the contested decision fulfils the test of *Andronov*. Specifically, the contested decision dated 6 June 2019 is a unilateral decision made by the CHRO, UNGSC, applicable to the Applicant’s case only, which carries direct legal consequences for him in rejecting his request for retroactive payment of SPA; indeed, it has been “shown to adversely affect the rights or expectations of the staff member” (see *Michaud* 2017-UNAT-761, para. 50), and thus has a direct legal effect.

28. Accordingly, the Tribunal concludes that the contested decision constitutes an administrative decision within the scope of art. 2.1(a) of its Statute, and thus finds that the application is receivable.

Whether the contested decision is lawful

29. The present case concerns a decision on whether the Applicant is entitled to SPA for performing certain higher-level functions at the GS-6 level while encumbering a GS-4 Finance and Budget Assistant post with UNGSC in the Department of Field Support in Brindisi.

The applicable legal framework governing the granting of SPA

30. The applicable legal framework governing the granting of SPA in the present case includes staff rule 3.10, entitled “Special post allowance”, and Administrative Instruction ST/AI/2003/3 (Special post allowance for field mission staff), that implements staff rule 3.10 for staff members working in field locations. Staff rule 3.10 provides in its relevant part that:

(a) Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts.

(b) Without prejudice to the principle that promotion under staff rule 4.15 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member holding a fixed-term or continuing appointment who is called upon to assume the **full duties and responsibilities** of a post **at a clearly recognizable higher level** than his or her own for a temporary period **exceeding three months** may, **in exceptional cases**, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level (emphasis added).

31. ST/AI/2003/3 sets forth the requirements for granting SPA to field mission staff members, providing in its relevant part that:

Section 3
Temporary assignments within a specific mission

3.1 Temporary assignment to a vacant post or a temporarily vacant post in the Professional, Field Service or General Service category shall be made by the head of mission or the chief of administration after considering all mission staff possessing the qualifications, experience and capabilities required for the post. Due regard shall be given to the need to broaden career development opportunities for women. For that purpose, when there are one or more women candidates, the temporary assignment shall be filled by one of those candidates, provided that her qualifications meet the requirements of the post and are substantially equal or superior to those of competing male candidates.

3.2 The personnel section of each mission shall identify positions that may be filled temporarily for a period expected to last for three months or longer through the internal assignment of staff within the mission, and shall notify staff of such vacancies so as to provide eligible staff with the opportunity to compete for these positions. The procedures for eliciting interest in temporary vacancies may vary, taking into account the size and operational requirements of the individual mission. Normally, the notification should be posted through e-mail or electronic bulletin board to all mission staff or, if that is not possible, in areas easily accessible to all personnel. Staff should be allowed a minimum of one calendar week from the date of posting of the vacancy to express their interest in the position. Staff members may express their interest in the vacancy by e-mail reply, or by fax or memorandum to the chief civilian personnel officer, briefly stating why they believe that they are qualified for the position under consideration. In all cases, the chief civilian personnel officer shall maintain a roster of staff interested in being considered for higher-level positions that are to be filled through the temporary internal reassignment of staff within the mission.

3.3 The supervisor of the functions to be performed shall prepare a written comparative review of the candidates and recommend one of the submitting candidates to the head of mission or chief of administration for the selection of a candidate for temporary reassignment.

Requirement to inform the Department of Peacekeeping Operations of changes of assignment

3.4 The mission shall inform the Department of Peacekeeping Operations of the proposed assignment or reassignment of a staff member to higher-level functions prior to the assumption of higher-level duties.

...

Section 4
Eligibility for special post allowance

Staff members who have been temporarily assigned to the functions of a higher-level post in accordance with the procedures set out in section 3 above shall be eligible to be considered for an SPA when they meet all of the following conditions:

- (a) They have at least one year of continuous service with the Organization under either the 100 or the 300 series of the Staff Rules;

(b) They have performed, or are expected to perform for a period exceeding three months, the full functions of a post that (i) has been duly classified pursuant to a job classification notification (for established missions), or has been determined by the Department of Peacekeeping Operations to be at a higher level than their own level on the basis of the job description (for special missions) and (ii) is budgeted at a higher level than the staff member's own level;

(c) They have demonstrated their ability to fully meet performance expectations in all the functions of the higher-level post.

32. Moreover, staff rule 3.17 governing retroactivity of payments sets forth the timeline for requesting SPA, providing that:

A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made written claim:

(i) In the case of the cancellation or modification of the staff rule governing eligibility, within three months following the date of such cancellation or modification;

(ii) In every other case, within one year following the date on which the staff member would have been entitled to the initial payment.

33. It follows that SPA can be granted to field mission staff members if the requirements in the Staff Rules and ST/AI/2003/3 are met, *inter alia*, that the staff member be temporarily assigned to the functions of a higher-level post in accordance with procedures set forth in section 3 of ST/AI/2003/3; and that the staff member must have discharged the full functions of a post classified and budgeted at a higher level than the staff member's own level. Moreover, a staff member shall submit his or her written request for SPA within one year following the date on which the staff member would have been entitled to the initial payment.

34. At this juncture, the Tribunal notes that the Respondent invokes an incorrect legal framework for the present case, namely the provisions of Administrative Instruction ST/AI/1999/17 (Special post allowance). Considering that the Applicant is a staff member with UNGSC in the Department of Field Support in Brindisi, and therefore a field staff member, the legal framework applicable to the Applicant's case is ST/AI/2003/3. Having reviewed the relevant provisions contained in both Administrative Instructions, the Tribunal notes that the eligibility requirements contained therein are largely the same. The Tribunal will, nevertheless, consider the Respondent's submissions in this respect.

Whether the requirements for granting SPA have been met in the Applicant's case

35. The Applicant argues that all the requirements for retroactive payment of SPA are met at least for the period from August 2015 to January 2018, and that he is also entitled to SPA after January 2018 because he continued to perform the higher-level functions after the GS-6 post was filled. In particular, the Applicant argues that there is a presumption that he has been performing the full functions of the GS-6 Finance and Budget Assistant post since May 2015.

36. The Respondent contends that the requirements for granting SPA have not been met because first, the Applicant has not been temporarily assigned to a higher-level vacant post, and second, he has not been performing the full higher-level functions of a vacant post.

37. Recalling the requirements for eligibility to SPA referred to in the previous section, as well as considering that the Applicant holds a continuing appointment and has at least one year of continuous service with the Organization, the Tribunal is of the view that his eligibility for SPA arises essentially at the occurrence of the following conditions: (i) he was formally temporarily assigned to a higher-level post; (ii) he discharged the full functions of the higher-level post; (iii) the performance of the duties is satisfactory; and (iv) the duration of this performance is over three months.

38. With regard to the first requirement of a formal assignment by the Administration, given that the higher-level functions are related to an unencumbered higher-level post, it should be considered as met if the Administration is fully aware that the Applicant has been performing higher-level functions and it takes full advantage of this performance. This indeed excludes that the performance of the higher-level functions in the present case was only *de facto*, without legal effects.

39. Turning to the second requirement of having discharged the full functions of the higher-level post, the Tribunal is of the view that this does not mean that if one or more of the higher-level functions are not performed, there is no right to SPA; otherwise, the rule would be almost inapplicable. What is relevant is that the core higher-level functions be performed.

40. In the present case, it is uncontested that the Applicant performed all the cashier-related duties and responsibilities of the GS-6 post. Although the Respondent contests that other functions of the post were performed by the Applicant (such as those related to the development of budget proposals and administration of approved budget), he does not indicate by whom they were performed.

41. The Tribunal considers that the Applicant, who certainly performed all the cashier-related GS-6 level functions, took over all the responsibilities of the Cashier Unit from May 2015 until the GS-6 post was filled, being called upon to perform the functions of his own post together with the core functions of the vacant GS-6 post, and directly reporting to the CFBO, UNGSC.

42. In this respect, the evidence on record shows that the UNGSC Cashier Unit included only two positions, i.e., a GS-4 level post that the Applicant encumbered and a GS-6 level post of Finance and Budget Assistant, and that until 1 May 2015, the latter position was encumbered by the Applicant's former FRO but became vacant following her retirement and separation from the Organization. Based on the organigrams provided by the Respondent, no other staff member was in charge of the Unit and of the functions previously performed by the Applicant's

former FRO; nor did the Administration allege that these functions were not performed at all. From the moment the Applicant's former FRO retired, until January 2018 when the GS-6 post was filled, it is uncontested that all the ordinary activities in the Unit continued to exist and that the Applicant was the only person assigned to the Unit, without any superordinate and directly reporting to the CFBO.

43. The Respondent alleges that UNGSC advertised the G-6 position of Finance and Budget Assistant in May 2015 and selected a staff member for the advertised position on 1 November 2015. The evidence on record, more specifically Annex 4 to the Reply, seems to suggest that for the financial year of 2015 to 2016, another staff member encumbered the G-6 position of Finance and Budget Assistant in the Cashier Unit. The Respondent adds that the organization of the Finance and Budget Section evolved in 2016 and that, following the implementation of UMOJA in 2016, the Section was restructured from six units including the Cashier Unit to three units including Finance Controlling and Reporting Unit, Operations Unit, and Budget Unit, and that UNGSC assigned the Applicant to the Operations Unit.

44. The Tribunal finds the observations by the Respondent not decisive for many reasons. Firstly, the Respondent did not indicate who the person selected for the GS-6 position of Finance and Budget Assistant was; and, moreover, he did not show that the position in the Unit was effectively covered.

45. Secondly, for what it is going to be said in the following paragraph, a specific role by another Finance and Budget Assistant (GS-6) towards the Applicant could—in abstract—be referred only to the year 2015 (which is the general period of the recalled organigram); however, no evidence has been provided as to the specific moment of the year when said Finance and Budget Assistant was assigned to the Unit, or on the fact that this Finance and Budget Assistant performed the functions at stake or supervised the Applicant's activity in any way.

46. Thirdly, the organizational structure of the Finance and Budget Section for the years 2016 to 2018, as per the organigrams provided by the Respondent, suggests that the Applicant was in charge of the previous Cashier Unit activities absorbed by the new Operations Unit and that, in the new Unit, the Applicant kept performing the functions described in para. 41 above without any direct superordinate and instead directly reporting to the CFBO.

47. Accordingly, the Tribunal assumes that, absent contrary evidence, the core functions of the GS-6 post were performed by the Applicant for the period when he was the only person in the Cashier Unit and also, later on, when the Applicant continued performing the same functions with no direct superordinate in the Operations Unit.

48. This case is thus different from the one examined by the Administrative Tribunal of the International Labour Organization (“ILOAT”) in its Judgment No. 3370, where the applicant was never involved in a temporary assignment to a post held by another person.

49. In addition, the present case is different from the one examined by the ILOAT in its Judgment No. 3569, where after the retirement of the applicant’s supervisor, the supervisor’s duties were distributed among several persons and the applicant was called upon to perform only some of them, which ILOAT found insufficient to support the granting of SPA. However, in the present case, the higher-level duties and all the activities of the (previous) Cashier Unit were performed by the Applicant himself.

50. Nevertheless, with the arrival of the new FRO, the presumption in para. 47 above cannot stand any longer because the Applicant’s new FRO undertook the functions at the GS-6 level. Nor did the Applicant provide any specific evidence of having performed the higher-level functions after January 2018.

51. Regarding the third requirement of the performance of the duties being satisfactory, the Applicant's performance evaluation documents show that for the period from 1 April 2015 to 31 March 2017, he exceeded the expectations in his functions and his performance was "outstanding", and that for the period from 1 April 2017 to 31 March 2018, his performance was rated "successfully meets expectation". The Tribunal assumes that the evaluation covers the Applicant's effective general performance, irrespectively of the specific activities explicitly mentioned in the performance evaluation documents.

52. As to the requirement concerning the duration of performance, the Tribunal notes that 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 positions. This, however, is only for a period of three months after which compensation is required not only to protect the staff member from being exploited, but also to respond to the need of the Organization to "ensure that priority be given to fill higher-level vacant posts under the established procedures by means of a competitive recruitment exercise, rather than temporary assignments" (see *Frehiwot Yabowork* 2020-UNAT-1037, para. 35).

53. In the present case, it is clear that the Applicant performed higher-level functions for more than three months, i.e., from 1 May 2015 to January 2018, a period during which the GS-6 post of Finance and Budget Assistant was not effectively filled. Indeed, it is only in January 2018 that the selected Finance and Budget Assistant became the Applicant's FRO. The Respondent, who had the burden to show the alleged modification in the situation of the Finance and Budget Section did not provide evidence of the specific date on which the selected Finance and Budget Assistant assumed the new functions within the Finance and Budget Section. As the Applicant recognized that this occurred in January 2018, the Tribunal therefore considers the last day of the month as the last day of performance by the Applicant of the higher-level functions.

54. Accordingly, the requirements for granting SPA have been met in the Applicant's case for the period of 1 August 2015 to 31 January 2018.

Whether the Applicant was time-barred from requesting SPA

55. The Tribunal recalls that pursuant to staff rule 3.17(ii), the Applicant is required to request SPA within one year following the date on which he would have been entitled to an initial payment. The Tribunal notes that the Applicant submitted his first written request on 21 December 2018, when for the first time he asked for “a review of the grade level assigned to [his] post ... in order to ascertain whether an SPA at the GS-6 level should be granted retroactively for the period of time during which [he has] been performing duties at a higher level”. This request by email, indeed, cannot be considered as a mere enquiry about whether he was entitled to any SPA, and is instead a polite and unequivocal claim for a reclassification of the post and a compensation for the higher-level functions performed.

56. The elapse of the year set out in the recalled rule since the date the Applicant was entitled to an initial payment excludes any rights for the allowances accrued before the year preceding the deadline, but does not prevent the staff member from requesting compensation for the last year and the following period. Indeed, after the third month, the right to the allowance arises day by day in relation to the performance of the higher-level functions, so the deadline is not fixed but mobile in nature: it continuously shifts with the performance of the higher-level functions.

57. Given the time-limit set forth for any claim for the allowance, the staff member is entitled only to allowances accrued in the year before the first request. In the present case, the Tribunal considers that the Applicant is entitled to SPA from 21 December 2017 onward, as his first request was only made on 21 December 2018.

58. In light of the foregoing, the Tribunal finds that the Applicant is entitled to SPA payment from 21 December 2017 until 31 January 2018, when the GS-6 vacancy was deemed to be filled, and that the contested decision is not lawful with respect to this period.

Whether the Applicant is entitled to any remedies

59. As a remedy, the Applicant requested retroactive payment of SPA since August 2015 and compensation for the harm suffered as a result of the Administration's unfair treatment.

60. Considering the Tribunal's above finding on the payment of SPA, the remaining matter relates to the compensation that the Applicant claims for alleged harm. First, the Tribunal notes that said compensation refers, in general terms, to the whole period of performing higher-level functions without the deadline applicable to the SPA. Second, the Tribunal observes that the Applicant did not adduce any evidence of the alleged harm as required under art. 10.5(b) of its Statute. Indeed, "compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact occurred" (see *Kallon* 2017-UNAT-742, para. 67). Therefore, the Tribunal rejects the Applicant's request for compensation for harm suffered.

Conclusion

61. In view of the foregoing, the Tribunal DECIDES that:

- a. The Respondent shall pay SPA to the Applicant for the period from 21 December 2017 to 31 January 2018; and
- b. All other claims are rejected.

(Signed)

Judge Francesco Buffa

Dated this 17th day of May 2021

Entered in the Register on this 17th day of May 2021

(Signed)

René M. Vargas M., Registrar, Geneva