UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-704

Elmi

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Deborah Thomas-Felix Judge Dimitrios Raikos
Case No.:	2016-938
Date:	28 October 2016
Registrar:	Weicheng Lin

Counsel for Mr. Elmi:	Daniel Trup, OSLA
Counsel for Secretary-General:	Wambui Mwangi

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2015/013 (Judgment on Receivability) and Judgment No. UNDT/2016/032 (Judgment on Liability and Relief), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 11 February 2015 and 18 April 2016, respectively, in the case of *Elmi v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 17 June 2016, and Mr. Suleiman Elmi filed his answer on 30 June 2016.

Facts and Procedure

2. The following facts are uncontested:[1]

> ... [Mr. Elmi] assumed the post of P-5 Chief of Human Resources Management Services (HRMS) at [the United Nations Office at Nairobi (UNON)] from 1 January 2005.
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> ... In April 2008, [the Office of Human Resources Management (OHRM)] commissioned an independent consultant to conduct a comprehensive review of the post and grade structure of UNON's Division of Administrative Services to ensure that its resource structure is commensurate with its role as the central provider of human resources management.
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> ... The comparative report concluded that:
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> > [T]he Chief position of the Human Resource Management Service should be upgraded to a D-1; both [the United Nations Office at Geneva (UNOG)] and [the United Nations Office at Vienna (UNOV)] have D-1 Chiefs of [Human Resources (HR)], and the diversity of work, the difficulty [of] recruiting and retaining staff in this duty station, and diversity of appointment types and location, in addition to the volume of work, justifies a D-1 level position.
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> ... Following that conclusion reached in the said report, the UNON Administration put forward a budgetary proposal to the United Nations Headquarters in New York at the end of 2008 requesting additional funds for the D-1 position but the request was refused by the Controller.
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> ... In 2011, a new request for upgrading the UNON Chief of HRMS position to the D-1 level was resubmitted in the Secretary-General's 2012/2013 budget to the General Assembly. At the end of 2011, the General Assembly approved the request.
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> ... The newly upgraded D-1 position was then advertised on 9 January 2012. [Mr. Elmi] applied for this post. The written test was conducted in September 2012. The interviews took place in April 2013 and he was selected for the post on 1 June 2013.

[1] Judgment on Liability and Relief, paras. 7-16.

> [During the whole length of the selection process, Mr. Elmi received Special Post Allowance (SPA).]
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> ... On 5 November 2013, [Mr. Elmi] wrote to the [Assistant Secretary-General for Human Resources Management (ASG/OHRM)] to request retroactive promotion to the D-1 level as Chief of HRMS/UNON from 1 January 2012. He got no response at that time.
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> ... On 6 February 2014, [Mr. Elmi] then filed a request for management evaluation seeking that the Administration consider[...] his application for retroactive promotion from 1 January 2012.
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> ... On 27 February 2014, the ASG/OHRM responded in writing to [Mr. Elmi]'s 5 November 2013 request for retroactive promotion. In the said response, the ASG/OHRM declined the request. In her letter, the ASG/OHRM reasoned and concluded:
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> > [I have taken note of your comments and carefully considered your request.
> >
> > (...)
> >
> > Regarding any retroactive promotion, under Article 25(a) of the [United Nations Joint Staff Pension Fund (UNJSPF)] regulations and rules, contributions by the participant and by the employing member organization shall be payable to the Fund concurrently with the accrual of contributory service under article 22(a).] We have been informed by the Pension Fund that any retroactive promotion would give rise to actuarial costs and interest payable by the Organization [to the UNJSPF, as the pension contributions would not have been paid concurrently.]
> >
> > (...)
> >
> > I noted that as you had received a special post allowance to the D-1 level prior to the completion of the selection process, you received equal pay for work o[f] equal value. Bearing this and the above in mind and in the absence of any administrative error, I regret that I am not in a position to agree to your request to retroactively promote you to the D-1 level effective 1 January 2012 for pension purposes only.
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> ... By letter dated 6 March 2014, the Chief of the Management Evaluation Unit (MEU) informed [Mr. Elmi] that his request for management evaluation was moot.

3. On 29 September 2014, the UNDT issued Order No. 215 (NBI/2014) informing the parties that it would rely on their pleadings and written submissions in determining the preliminary issue of receivability.

4. On 11 February 2015, the UNDT issued the impugned Judgment on Receivability, finding Mr. Elmi's application receivable. In reaching its decision, it stated:[2]

> ... The [Secretary-General] challenges the receivability of this Application on the grounds that the ASG/OHRM's written decision of 27 February 2014 to deny [Mr. Elmi]'s request for retroactive promotion constituted a separate administrative decision which must be the subject of a separate management evaluation request under staff rule 11.2(a). This is notwithstanding the fact that in his management evaluation request of 6 February 2014, [Mr. Elmi] had asked the Administration to consider his application for retroactive promotion to 1 January 2012.
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> ... The [Dispute] Tribunal has carefully considered the parties' pleadings including the authorities cited by [Mr. Elmi] and finds that the [Secretary-General]'s submissions on receivability have no merit and are logically incoherent. The Tribunal does not consider it a mere coincidence that the ASG/OHRM delayed her response to [Mr. Elmi] from 5 November 2013 to 27 February 2014. The ASG/OHRM's response came only 21 days after [Mr. Elmi]'s request for a management evaluation. Were it not for the request, it appears that [Mr. Elmi] would have had to continue waiting for a response.
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> ... The [Dispute] Tribunal is of the view that in such circumstances, to require [Mr. Elmi] to submit a new management evaluation request regarding the same subject matter of his retroactive promotion would amount, as correctly argued by [Mr. Elmi], to a waste of time and resources for both [Mr. Elmi] and the Administration. The [Secretary-General] is essentially asking the Tribunal to sacrifice substance on the altar of form! [Mr. Elmi] has to all intents and purposes complied with the requirements of art. 8.1(c) [of the UNDT Statute]. The Administration has had an opportunity to evaluate his request and has refused it. [Mr. Elmi] is now entitled to come before the [Dispute] Tribunal.

5. On 18 April 2016, the UNDT issued the impugned Judgment on Liability and Relief pursuant to which it found, *inter alia*, that the ASG/OHRM was "incorrect in assuming that [Mr. Elmi] had received equal pay for work of equal value ... because she failed to take into account the fact that for the period of time in which [Mr. Elmi] had worked as a P-5 officer on a D-1 post, his pension contributions were omitted. This state of affairs gave rise to [Mr. Elmi] earning a lower pension than he was properly entitled to."[3] In reaching its determination, the UNDT concurred with Mr. Elmi's argument that "the principle of the inclusion of pensions into the concept of equal pay for work of equal value [was] applicable in the present case".[4] It also

[2] Judgment on Receivability, paras. 35-37.
[3] Judgment on Liability and Relief, para. 58.
[4] *Ibid.*, para. 59.

noted that the Secretary-General "ha[d] not challenged that assertion [and that the] ASG/OHRM's exercise of discretion failed to take account of that critical fact and [Mr. Elmi] ought to be compensated for it".[5]

6. The UNDT granted Mr. Elmi's alternative remedy of 12 months' net base salary.[6] In doing so, the UNDT noted it had "no reason to discount [Mr. Elmi's] calculation".[7] It also noted the Secretary-General's submission that he was "unable to obtain an accurate actuarial calculation from the UNJSPF without incurring substantial costs".[8]

Submissions

The Secretary-General's Appeal

7. The UNDT failed to consider all aspects of receivability in the matter before it and therefore exceeded its competence because Mr. Elmi's application was non-receivable *ratione temporis*. Contradictions in Mr. Elmi's application and pleadings aside, the 27 February 2014 letter from the ASG/OHRM can only be interpreted as an explanation of two previous administrative decisions taken with respect to Mr. Elmi's pension contributions between 1 January 2012 and 31 May 2013. On 6 March 2013, Mr. Elmi was sent a Personnel Action form, which indicated that he had been granted SPA effective 1 February 2012; so by 6 March 2013, if not earlier, Mr. Elmi "was aware" that the SPA to D-1 was not pensionable, and on 1 June 2013, he was aware that his promotion would commence on that date. The 5 November 2013 letter Mr. Elmi wrote to the ASG/OHRM seeking "exceptional approval" was a request for revision of the two prior administrative decisions. In accordance with the established jurisprudence, this does not reset the clock, and Mr. Elmi's request for management evaluation on 6 February 2014 was long overdue; hence, his application was time-barred.

8. The UNDT erred on a question of law and of fact when it concluded that Mr. Elmi had earned a pension lower than that which he was "properly entitled to". This was the case because the UNDT failed to apply the relevant legal framework. It thereby failed to acknowledge that Mr. Elmi had been granted a non-pensionable SPA for the period in question in accordance

[5] *Ibid*., para. 59.
[6] *Ibid*., paras. 60-62.
[7] *Ibid.*, para. 61.
[8] *Ibid*.

with the applicable Staff Rules and administrative issuances and that Mr. Elmi's selection for and subsequent promotion to the D-1 post was not a foregone conclusion. Mr. Elmi accrued the pension benefits he was entitled to during the period in question, and the ASG/OHRM's denial of Mr. Elmi's request for "exceptional approval" was in line with the applicable Staff Rules and administrative issuances.

9. The UNDT erred when it concluded that the Administration's exercise of discretion did not take into account the principle of equal pay for work of equal value. Mr. Elmi's rights were not negatively affected by unlawful reasons, nor was his non-pensionable SPA award a discriminatory act. On the contrary, Mr. Elmi's rights under the SPA regime were fully respected and all procedures and processes correctly followed and, in accordance with the principle of equal pay for work of equal value, Mr. Elmi was awarded SPA to ensure he was compensated for the performance of higher level responsibilities for that specific period. Mr. Elmi only became entitled to accrue a pension at the D-1 level upon his promotion effective 1 June 2013.

10. The UNDT exceeded its competence when it awarded compensation in the absence of evidence of harm and by not explaining how it arrived at the amount awarded, in contravention of Article 10(5) of the UNDT Statute, as amended. The statements presented by Mr. Elmi's pleadings before the UNDT do not constitute evidence and, therefore, could not have formed the basis for an award of compensation. There was no information on record for the UNDT to assess and, thus, no factual finding or clear judicial reasoning.

11. The Secretary-General requests that either both impugned Judgments be vacated in their entirety or, alternatively, that the Judgment on Liability and Relief be vacated in its entirety.

Mr. Elmi's Answer

12. The Secretary-General's challenge that Mr. Elmi's application was time-barred is not properly before the Appeals Tribunal. It was not raised before the UNDT, nor was the evidence known and readily available to the Secretary-General presented to the Dispute Tribunal. The Secretary-General has effectively waived his right to raise this new argument as he previously only challenged receivability on the grounds of *ratione materiae*.

13. Should the Appeals Tribunal admit this new argument, it is without merit. The two dates posited by the Secretary-General simply correspond to the dates of administrative processes, mandated under the Staff Rules, to give effect to Mr. Elmi's SPA and promotion. There is

no evidence that the Administration considered granting Mr. Elmi a retroactive promotion for pension purposes at any time prior to Mr. Elmi's letter of 5 November 2013. Contrary to the Secretary-General's argument, the Administration's denial on 27 February 2014 constitutes the administrative decision upon which Mr. Elmi's application before the UNDT was timely filed, and there was no error for the UNDT to conclude that Mr. Elmi's application was receivable.

14. Contrary to the Secretary-General's assertions, the UNDT applied the correct legal framework in evaluating the Administration's exercise of discretion. Mr. Elmi's request for retroactive promotion for pension purposes was made on the basis of the exercise of discretion under Staff Rule 12.3(b). Mr. Elmi was not seeking to challenge the provisions governing SPAs contained in Staff Rule 3.10(b).

15. The UNDT did not err when it concluded that the Administration had failed to take into account its obligations under the principle of equal pay for work of equal value. As the UNDT correctly found, the Secretary-General did not challenge the principle of including pensions into the concept of equal pay for work of equal value—a principle supported in other jurisdictions. As the Appeals Tribunal has noted, this principle applies in its totality; it does not lend itself to partial application and the Administration's discretion cannot operate to violate it.

16. This principle was triggered in this case. Mr. Elmi's pension benefits were computed on the basis of the average of his highest three years of pensionable remuneration during the last five years of service prior to his separation on 31 October 2014; thus, the SPA did not remedy the loss of valuable pensionable entitlements. Also, the Secretary-General has failed to demonstrate how granting an exception under Staff Rule 12.3(b) would be prejudicial to other staff members.

17. The UNDT did not err in awarding compensation. Mr. Elmi highlighted before the UNDT how his pension entitlements were calculated, and the UNDT did not err when it found that the Administration's inaction and the resulting loss of pension entitlements were evidence of clear compensable harm; nor did it err when it granted Mr. Elmi's alternative request for relief. The award was within the UNDT's authority under Article 10(5)(*b*) of the UNDT Statute, based on available evidence before it, and was in no way manifestly unreasonable.

18. Mr. Elmi requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

Receivability

19. The Secretary-General submits that previous administrative decisions of March and June 2013 taken with respect to SPA and promotion already notified Mr. Elmi that there would be no retroactive effect to his pension benefits. In his view, Mr. Elmi's request of 5 November 2013 cannot "reset the clock" and the 27 February 2014 letter from the ASG/OHRM can only be interpreted as an explanation of these prior administrative decisions; as Mr. Elmi requested management evaluation as late as 6 February 2014, his application was not receivable *ratione temporis*.

20. In its Judgment on Receivability, the UNDT declared Mr. Elmi's application receivable. Though explicitly only examining receivability *ratione materiae*, it is implied that the application was also receivable *ratione temporis*. We find no fault in this implied finding, nor do we find that the UNDT exceeded its competence.

21. Notwithstanding the question as to whether the Secretary-General is estopped from raising the issue of receivability *ratione temporis* on appeal, his assertions are without merit. Neither the 6 March 2013 granting of SPA nor the promotion of Mr. Elmi effective June 2013 are the relevant administrative decisions for the statutory time limits in this case. Rather, the relevant administrative decision triggering the time limits is the ASG/OHRM's letter of 27 February 2014.

22. The Secretary-General, on appeal, cannot claim that this letter does not constitute a new administrative decision and that it must be interpreted "as an explanation of the two administrative decisions taken with respect to [Mr. Elmi's] pension contribution between 1 January 2012 and 31 May 2013". This assertion is inconsistent with his reply from 15 May 2014 to Mr. Elmi's UNDT application where he expressly stated that "the ASG/OHRM's decision to deny the joint request constituted a separate administrative decision". After having informed Mr. Elmi and the Dispute Tribunal that the 27 February 2014 letter constitutes an administrative decision, the Secretary-General cannot and may not change his mind on this matter.

23. Furthermore, in our view, the 27 February 2014 letter from the ASG/OHRM is in fact a new and fresh administrative decision. By its content, it is obvious that the ASG/OHRM did not simply refer to earlier (SPA or promotion) decisions. If this were the case, it would have been sufficient to tell Mr. Elmi that the earlier SPA and promotion decisions had already decided the matter and that there was no need or room to examine his request for retroactive promotion "for pension purposes". However, this is not what the ASG/OHRM did. Not only did she "consider" Mr. Elmi's request "carefully" but she even consulted the Pension Fund on the consequences of a retroactive promotion and clarified whether or not Mr. Elmi had received SPA; additionally, she gave full and thorough reasoning as to why she would not agree to his request. It is evident to this Tribunal that by her letter of 27 February 2014, the ASG/OHRM exercised discretion as to whether or not to grant Mr. Elmi retroactive promotion "for pension purposes" and thus issued a new administrative decision.

24. Hence, although the Applicant's request of 5 November 2013 for a retroactive promotion could not "reset the clock",[9] the new administrative decision of 27 February 2014 can. When the Administration decides to release a fresh administrative decision, new time limits are triggered.

Did the UNDT err on a question of law or fact when it concluded that Mr. Elmi had earned a pension lower than that which he was "properly entitled to"?

25. Having carefully considered both parties' submissions, we conclude that the UNDT erred on a question of law and fact and exceeded its competence when it held that Mr. Elmi was entitled to be granted a retroactive promotion with effect from 1 January 2012 in order to ensure that the time of the selection process from January 2012 to May 2013 be considered as "D-1-time" for the purpose of his pension benefits. The denial of this request by the ASG/OHRM was in line with the applicable Staff Rules and administrative issuances and did not violate the principle of equal pay for work of equal value.

[9] *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 31; *Samuel Thambiah v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-385, para. 40; see also *Sethia v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-079, paras. 19-20.

26. Under the applicable legal framework, promotions do not go into effect retroactively. On the contrary, Administrative Instruction ST/AI/2010/3, entitled "Staff selection system", Section 10.2 specifically provides that "[w]hen the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision, subject to the availability of the position and the assumption of higher-level functions."

27. However, Mr. Elmi claimed that in his case, an exception must be granted under Staff Rule 12.3(b), which reads:

> (b) Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

28. As stated above, the 27 February 2014 letter clearly shows that the ASG/OHRM has exercised discretion in respect of whether or not to grant Mr. Elmi retroactive promotion. In *Sanwidi* we held:[10]

> ... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
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> (...)
>
> ... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision. This process may give an impression to a lay person that the Tribunal has acted

[10] *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40 and 42.

> as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

29. Applying these standards, we cannot find any fault with the ASG/OHRM denying such exception and refusing to grant Mr. Elmi retroactive promotion with effect from 1 January 2012 "for pension purposes".

30. It was legitimate for the ASG/OHRM to consider that a retroactive promotion would create technical problems and additional costs as pension contributions had not been paid concurrently. The clear purpose of ST/AI/2010/3, Section 10.2 stipulating that a promotion may only become effective on the first day of the month following the decision, hence in the future, is to avoid the costs and technical problems which would arise from any retroactive promotion with regard to salary and pension.

31. The denial is in full accord with Staff Rule 3.10 which states:

> (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.

Under Staff Rule 3.10, staff members must, in general, exercise higher level functions even without any extra compensation, and only in exceptional circumstances may they be granted a non-pensionable special post allowance "from the beginning of the fourth month of service at the higher level". Since Mr. Elmi received such SPA from the moment of the reclassification of his post, he already obtained a higher "remuneration" than generally allowed under Staff Rule 3.10(b). Furthermore, granting Mr. Elmi a retroactive promotion would have the same effect as granting him pensionable SPA, which is not possible under Staff Rule 3.10(b).

32. The denial of retroactive promotion "for pension purposes" does not violate the principle of "equal pay for work of equal value". This principle derives from Article 23(2) of the Universal Declaration of Human Rights, and the Administration is bound to it with regard to the relationship to its staff members.[11] It means that no discrimination is allowed with regard to payments including pensions. In *Tabari*, we stated:[12]

> ... The general principle of "equal pay for equal work" enshrined as a right under Article 23(2) of the Universal Declaration of Human Rights does not prevent the legislative body or the Administration from establishing different treatments for different categories of workers or staff members, if the distinction is made on the basis of lawful goals.
>
> ... There is no discrimination when the non-payment of a special compensation for working in hazardous duty stations comes from a general consideration of a category of staff members, in comparison to another category of staff members. The different treatment becomes discriminatory when it affects negatively the rights of certain staff members or categories of them, due to unlawful reasons. But when the approach is general by categories, there is no discrimination, when the difference is motivated in the pursuit of general goals and policies and when it is not designed to treat individuals or categories of them unequally. Since Aristotle, the principle of equality means equal treatment of equals; it also means unequal treatment of unequals.

33. We uphold this jurisprudence and clarify that the principle "equal pay for work of equal value" forbids discrimination; but it does not prohibit every form of different treatment of staff members. Such different treatment constitutes discrimination only when there is no lawful and convincing reason for the different treatment of staff members, e.g. when it is based on an *a priori* unlawful criterium such as gender or race, or when there are no significant differences between the categories of staff members being treated differently.

34. Applying this standard to the present case, the denial of a retroactive promotion "for pension purposes" does not constitute any discrimination against Mr. Elmi. It is true that there is different treatment: While the pensions of D-1 staff members exercising D-1 functions are calculated on the basis of their D-1 salaries, the time of the selection process in Mr. Elmi's case, with regard to his pension, only counts as time at the P-5 level although he also exercised D-1 functions over the period of several months.

[11] *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107, para. 15.
[12] *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2011-UNAT-177, paras. 25 and 26.

However, this different treatment is not discriminatory because there is a lawful and convincing reason for it. In administrative bodies like the United Nations, salary and pension generally follow status and grade, not function. The reason and justification for the different treatment is the different grade of the staff members in question.

35. It does not follow from the principle "equal pay for work of equal value" that a staff member who exercises higher level functions has a right to receive the same salary and pension benefits as a staff member at a higher level exercising the same or similar functions. If this were the case, Staff Rule 3.10(a) and (b) would be unlawful in itself as it states expressly that staff members, for a certain amount of time, must exercise higher functions as a normal part of their customary work and without any pecuniary reward in the form of higher salary or pension and, afterwards and if certain criteria are met, may receive only non-pensionable SPA. As Staff Rule 3.10(a) and (b) regulates the interests of staff members of lower grades exercising higher level functions in a consistent and reasonable way, it lawfully embodies the principle of "equal pay for work of equal value" into the United Nations' system. It is not within the authority of the Appeals Tribunal or the UNDT to overturn such a legal framework.[13]

36. This case is distinguishable from *Chen* where the UNDT, upheld by this Tribunal, ordered compensation "including the equivalent loss in pension rights".[14] In *Chen*, the applicant requested reclassification of her post which was denied for years by the Administration without any convincing reason whereas in this case, Mr. Elmi requested retroactive promotion "for pension purposes" for having exercised higher level functions during a selection process. Furthermore, Ms. Chen never received SPA whereas Mr. Elmi, as stated above, received SPA for the whole length of the selection process in question.

37. Mr. Elmi has, among others, based the reasoning for his request for retroactive promotion effective 1 January 2012 on the length of the selection process. As the selection concerned a promotion for a D-1 position requiring utmost care in the examination and consideration of the candidates, we do not find it unreasonable that the selection process lasted until May 2013. Moreover, as the upgraded position was only advertised on

[13] *Bezziccheri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-538, paras. 37-39; *Ernst v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-227, para. 29.
[14] *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107, paras. 10 and 28.

9 January 2012 and posted until 9 March 2012, we deem it impossible that he could have been promoted effective 1 January 2012.

38. We note further that granting Mr. Elmi a retroactive promotion "for pension purposes" would create inconsistencies and injustice in other respects. It would be unfair that an incumbent like Mr. Elmi, who has, during a selection process, exercised higher level functions should, after having been selected, be granted retroactive promotion (in addition to the non-pensionable SPA he received) whereas an incumbent in the same situation but who was not selected and promoted, would only have his non-pensionable SPA.

Other issues

39. As the denial of the request for retroactive promotion is lawful, the administrative decision in question does not have to be rescinded and there can be no in-lieu compensation. Hence, this Tribunal does not have to decide whether the UNDT has rightfully awarded compensation of 12 months' net base salary.

Judgment

40. The Secretary-General's appeal on receivability is dismissed and his appeal on the merits is granted. Judgment No. UNDT/2015/013 on Receivability is hereby affirmed and Judgment No. UNDT/2016/032 on Liability and Relief is vacated.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Knierim, Presiding	Judge Thomas-Felix	Judge Raikos

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar