



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/110

Judgment No.: UNDT/2010/157

Date: 31 August 2010

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

BHATIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Nabil Abdel-Al

Counsel for respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. The applicant joined the United Nations in April 1994 at the G-3 level and was promoted in April 1996 to the G-4 level, at which he has remained since, although he received payment of Special Post Adjustment (SPA) to the G-5 level on a number of occasions. He also alleges the post he occupied should have been reclassified and advertised by his managers in a timely manner and that he has been performing functions at a level higher than that at which he was employed or remunerated. He says these breaches of his rights entitle him to financial compensation for the loss of SPA, hardship, mental stress, anxiety and suffering, harm to reputation and retroactive promotions.

The facts

2. The applicant joined the United Nations on at the G-3 level as an Administrative Clerk in the then Technological Innovations Program, Office of Director in the Office of Conference Services. He was promoted to the G-4 level effective 1 April 1996 and occupied post 5196. On 1 January 1997, the applicant and some other staff were redeployed to the Information Management Service, Information Technology Services Division (ITSD), Department of Management (DM). The redeployment did not change the post he occupied.

3. On 2 October 1998, the Officer-in-Charge (OIC), ITSD sent a memorandum to the Executive Officer, DM, regarding “the reassignment of [the applicant]” on account the functions of the applicant’s post had changed. He accordingly transmitted a Request for Classification and Recruitment form seeking a revision of the applicant’s duties, which was forwarded by the Executive Office (EO) to the Office of Human Resources Management (OHRM) on 9 October 1998. However, the memorandum “was subsequently retrieved by ITSD for further review and hence no further action ensued from the Executive Office”. It is admitted by the respondent that the applicant was never informed of the withdrawal of this request for reclassification.

4. On 1 December 2004, the Chief of Conditions of Service Section (CSS), OHRM, sent a memorandum to the EO/DM, notably stating that:

We have reviewed the elaborated information on the functions of the subject posts [including the applicant's] and also conducted a desk audit on 29 November 2004. In this respect, we have determined that the posts are classifiable at the GS-5 level, and therefore, it is proposed that the posts be associated with the GJP [generic job profile] for GS-5 Information Technology Assistant.

5. On 1 March 2005, the Chief of the Coordination and Support Service, ITSD, sent a memorandum to the Chief, CSS/OHRM, regarding the applicant's post 5196, indicating that the post did not have a classified job description nor a generic job profile, and that the review of the GJP for the G-5 position did not accurately reflect the responsibilities of the post, which were "more complex in nature than those at the GS-5 level" and thus closer to a G-6 level. This memorandum elaborated on at least eight functions of the post that were associated with a G-6 level and concluded with the request that OHRM "classify these functions in line with the Information Technology Assistant at the G-6 level." At the hearing of the matter, counsel for the respondent conceded that the applicant's supervisors considered the functions of the post to be at a G-6 level, upon which consideration they forwarded the request for reclassification to OHRM, who were then to review it, in accordance with the relevant instrument.

6. On 26 September 2005, ITSD recommended that the applicant be granted an SPA to the G-5 level retroactively from 1 July 2002 to 31 December 2005, and by memorandum dated 29 November 2005 this SPA was granted.

7. In a memorandum dated 7 October 2005 the Chief, CSS/OHRM noted to the EO/DM that the applicant was "already associated with [the Information Technology Assistant] GJP (1/12/2004)" at the G5 level, which the respondent conceded was a precursor to a classification at the G-5 level. The respondent stated that it was decided in December 2005 that the applicant's post would be reclassified to a G-5 level, following this determination by OHRM.

8. The applicant tendered the “SMS [Systems Management Section] Workplan for 2005”, authored by the Chief, System Management System and dated 6 October 2005. Although unsigned there is a space for the signature of the ITSD Director and Operations Director. At section 10, “Staffing Issues”, it has a notation “G6 for [the applicant]”. Similar documents with the same notation followed in 2006 and 2007.

9. Before the 2005 reclassification of the applicant’s post was implemented, it was abolished for budgetary reasons, effective 1 April 2006. The respondent points to this as evidence that the reclassification would not have been successful in 2005 at any rate, as both OHRM reclassification and budgetary funding are necessary for reclassification according to ST/AI/1998/9 (6 October 1998). The respondent says that the Chief, CSS, was in the process of drafting the vacancy announcement to advertise the newly reclassified post at the time of its abolition.

10. After the abolition of post 5196, the applicant was placed against a vacant G-6 post with post 6921, confirmed by memorandum dated 31 March 2008 from the OIC, CSS. Despite the post being a G-6 one, the applicant was technically still at a G-4 level, performing functions which were confirmed to have been at a G-5 level. On 23 April 2007 the Chief, SMS and the Chief, Coordination and Support Service, ITSD informed the applicant of his reassignment within ITSD effective 1 May 2007 to functions which comprised preparing and following-up procurement requisitions. These functions were classified at the G-5 level. Both Chiefs are alleged to have assured the applicant that his SPA to the G-5 level would continue with this reassignment and that a vacancy announcement would be posted on Galaxy for a G-5 post against which he would be promoted to G-5. The applicant appeared to have understood that this promotion would occur following the reclassification of the post. The respondent however contends that the applicant was not told he would be promoted, but that he could apply in accordance with ST/AI/2006/3 in the event reclassification took place. Neither party took the opportunity to call either of the Chiefs to give evidence on this point.

11. On 15 May 2007 the applicant enquired about his job description since his redeployment within ITSD on 1 January 1997, and was informed by the EO/DM, that:

According to the classification approvals from OHRM, the post you were on from 1 Jan. 1996 through 31 March 2006 was associated with the GJP of Information Technology Assistant (G-5) and the post you have been put on from 1 April 2006 onwards is classified at the G-6 level and associated with the GJP of Information Technology Assistant (G-6) ... VA [vacancy announcement] 412187 was created in October 2006 for the G-6 post but the PCO has yet to complete the VA.

12. On or about 31 May 2007, the applicant's SPA to a G-5 level was again extended to 30 November 2007.

13. On 1 July 2007, the applicant was transferred from post 6921 (the G-6 level post against which he had temporarily been placed) to post 41581, which is at a G-4 level. He remains on this post at the current time.

14. On 14 November 2007, the applicant received an email from the Chief, Coordination and Support Service, ITSD, stating as follows:

It has been brought to our attention ... that you have been receiving an SPA to the G5 level for a much longer period than the normal limit of two years. Although you are currently on a G5 [sic] post simply because no vacant G4 is available, the functions you are performing since you had been transferred to the ALSS are not at the G-5 level. We are, therefore, unable to document to the EO, as required by the SPA rules, that you are performing higher level functions. In light of this your current SPA will expire at the end of its current term and every effort will be made to put you against a G4 post.

15. The applicant submitted that the Chief of Information Management Service told him at a meeting in mid-November 2007, that he would be reassigned within ITSD but that his functions would be at the G-5 level with continuation of his SPA to the G-5 level, and with promotion to the G-5 level initially and subsequently to the G-6 level. There was no evidence led at the hearing of this rather important allegation; the Chief was not called by either party, the applicant did not testify and the respondent was unable, indeed not required, to answer to this allegation.

16. The applicant's SPA to the G-5 level was scheduled to end, and did end, on 30 November 2007. The applicant sought administrative review of this decision by letter dated 29 November 2007.

17. In a further reorganisation in 2008, the applicant was again reassigned, to the newly established Knowledge Management Service. He says the work in this position is at least at a G-6 level.

18. On 7 February 2008 the applicant filed an appeal with the Joint Appeals Board (JAB) contesting the cessation of his SPA. On 7 May 2009, the Deputy Secretary-General accepted the JAB's recommendation of 26 March 2009 that the applicant was unable to be put against a higher post. The applicant appealed this decision to the present Tribunal.

19. On 30 June 2009, the applicant's fixed-term appointment was converted to a permanent appointment.

20. On 22 January 2010 the Dispute Tribunal was advised by the respondent that the applicant had been granted an SPA to a G-5 level retroactively from 1 July 2008, and that his post had been reclassified to a G-5 level with effect from 30 October 2009, with the recruitment process still underway. At the hearing of this matter the Tribunal was advised that the applicant's SPA would continue to 31 July 2010, or until the post was filled through Galaxy.

21. In response to an Order requiring clarification, the applicant advised the Dispute Tribunal on 26 July 2010 that his SPA to the G-5 level was to be extended by a further six months, from 1 August 2010 to 31 January 2011 and also that the G-5 post had not yet been filled, despite the applicant having been interviewed for it on 25 March 2010. As at the date of this judgment, the Tribunal has been advised by the respondent that "the selection record is currently before the Central Review Body and, as such, a final selection decision will be made as soon as the recommendation is endorsed by the [Central Review Body]".

Applicant's submissions

22. The applicant's main submissions may be summarised as follows:
- a. He has performed functions at a higher level than G-4 since 1 January 1996 and should have been eligible for consideration for promotion many years ago, but the respondent's failure to carry out the promised reclassification has contravened his due process rights and career prospects as well as caused emotional harm.
 - b. From 1998 onwards his first and second reporting officers have assured him that it was "internally agreed" that his functions would be classified at a G-6 level, and the respondent should be held to this undertaking.
 - c. The fact that his post was classified at a G-5 level on 1 December 2004 was evidenced by the approval of the SPA whereupon a vacancy announcement should have been issued in accordance with ST/AI/1998/9. Had the Programme Manager prepared the VA in a timely manner, the applicant would have been eligible for consideration for promotion to G-6 under the provisions of ST/AI/2002/3.
 - d. ITSD failed to implement the provisions of ST/AI/1998/9, ST/AI/2002/4 and ST/AI/2006/3 as it did not issue the VA for the reclassified G-5 post in a timely manner, resulting in the applicant not being fully and fairly considered for promotion.
 - e. Discontinuance of the SPA with effect from 1 December 2007 on the pretext of being unable to document the applicant's performance of higher level functions, when the electronic performance appraisal report (e-PAS) reflects in no ambiguous terms performance of higher level functions, is improper.

f. Although the applicant applied for other posts, he was not successful, as candidates already working in a particular office are generally the ones who receive the post. He would have been a favoured candidate in respect of the position in his own office, had the reclassification and advertisement been completed in a timely manner.

g. Had the applicant been alerted to the undeclared intention of ITSD that he was being reassigned to “G-4 level functions”, he would not have agreed to the 2008 reassignment to the Project Management Office.

Respondent’s submissions

23. The respondent’s main submissions may be summarised as follows:

a. The JAB correctly found that the post the applicant has been occupying during the period 1 January 1996 through 30 June 2002 was not actually classified at the G-5 level until December 2004 and, as such, the applicant was not occupying a higher level post.

b. The JAB correctly determined that the applicant was not eligible for an SPA from 1 April 2006, in accordance with ST/AI/1999/17. The applicant has not proffered any evidence to rebut the JAB’s factual findings and there is no evidence that the Secretary-General’s decision was improper. No evidence is provided that the higher-level duties continued to exist after 30 November 2007, which would have warranted a further SPA beyond that date. The decision to grant SPA in any instance is discretionary.

c. With respect to the G-5 post, the JAB correctly determined that there was no indication that the applicant would have been the selected candidate even if the post was reclassified. His supervisors had advised him that any selection process would be competitive and he had no legitimate expectation either that reclassification would occur, or that he would be promoted if it did.

d. The applicant's application history shows that he applied for G-6 posts, although he was at a G-4 level. He was not successful, and this is not the respondent's responsibility.

e. With respect to the applicant's contentions that he should be awarded a G-6 post, the JAB correctly determined that this issue was outside the scope and terms of reference, stating that it "[could] not direct the Administration to place [the applicant] against higher posts as that would violate the staff selection system process, which requires that all candidates for a given post receive full and fair consideration for it".

f. The applicant has not suffered any financial loss. He has received an SPA to the G-5 level which covers the relevant period, and he has not lost any pension entitlements, as there was never any guarantee of him obtaining a higher level post, had the reclassification occurred earlier.

Consideration

24. In light of the numerous reassignments the applicant has had, making the proceedings more complex, it is important to clarify the issues that are properly before me and in contention in this matter. Firstly, there is the issue of the 1998 request for reclassification. Secondly, there is the matter of the 2005 request for reclassification, the abolition of that post, and the failure to advertise it before it was abolished. Thirdly, is the issue of the withdrawal of the SPA. Finally there are the applicant's reassignments in 2006 and 2007 and the alleged representations that he would be promoted, and the outstanding question of delay in relation to the current reclassification and advertisement of the applicant's post. I will consider these issues in turn.

25. In the pleadings the respondent relied heavily on the findings of the JAB, stating that the applicant was obliged to respond to the JAB's findings. The respondent should be aware of the duty to reply to the applicant's allegations raised in

his application; the Tribunal is not bound by the pleadings which were before, nor the conclusions of, the JAB. The respondent's approach in this regard has been singularly unhelpful in this case.

1998 reclassification exercise

26. In his prayer for relief the applicant characterises his loss as resulting from the respondent "not acting upon [his] thirteen [plus] years' old request for reclassification". While the record appears to show that there was an initial failure in the classification process in 1998, including a failure to notify the applicant of the outcome, this is clearly long out of time to be challenged. The applicant says that he was never advised of the fact that OHRM halted the reclassification process; therefore he could never have challenged it. I do not believe this lack of vigilance over such a substantial period of time justifies the consideration of the matter now after all these years. If the applicant had been out of time by a brief period, the respondent's omission may have justified extending or waiving the time limits. However, this happened almost a decade prior to the applicant requesting administrative review in 2007, and I find no circumstances to justify the delay and find that the matter of the 1998 reclassification is therefore not receivable.

2005 reclassification exercise

27. The challenge to the 2005 reclassification exercise was also out of time when the applicant requested administrative review. The applicant argued that he was not made aware of the outcome of the reclassification at the time. Consideration of this reclassification exercise is largely moot, due to the fact that the applicant's post was abolished some months after the reclassification was agreed to by OHRM. The applicant was clearly made aware of the abolishment of his post and did not challenge it. Furthermore, no ill motive was suggested in relation thereto. Accepting the proposition that the abolishment of the applicant's post was proper (and this the applicant has not challenged), the reclassification could logically not have occurred in

light of the short time between the agreement to reclassify and the post being abolished.

Withdrawal of SPA in 2007

28. This withdrawal has in part been rectified by the retroactive granting of an SPA from 1 July 2008, leaving a period of approximately seven months that the SPA was withdrawn and not paid for. This period December 2007–June 2008, is covered by the applicant’s e-PAS 2007–08 and 2008–09 performance records, which relate to the respective periods of 1 April 2007–31 March 2008 and 1 April 2008–31 March 2009. While the functions the applicant performed were different in each e-PAS cycle, they did not appear to change mid-cycle (each mid-point review noting “[a]fter discussion, no change in plan”). For the respondent to have withdrawn the applicant’s SPA during December 2007–June 2008 as a result of his functions having changed, it would be reasonable to expect a notation of a change in functions in the e-PAS records for both cycles, but there is none. Although this is to my mind adequate justification to order the SPA to be paid retrospectively, even if the respondent had shown the functions to have been changed, it could be quite correctly argued that the applicant had a legitimate expectation of the continuing payment, in the context of the pattern of retroactive grants and the failure to consult with the applicant on the change in functions. Accordingly, I find that the respondent is unable to justify the withdrawal of the G-5 level SPA for this period, and order it to be paid to the applicant, with interest. Given that the SPA is merely a financial payment, I do not find that the withdrawal of it for this period caused the applicant any additional loss which would not be compensated by this back-payment.

29. A further troubling issue, however, is found in the respondent’s change in position in regard to the SPA payments. In the email of 14 November 2007, ITSD initially informed the applicant that there was no evidence of higher-level functions being performed after 2007. When this position was revisited, it resulted in the granting of the SPA payments through 2010, a short time before the hearing of this

matter before the Dispute Tribunal. This belated concession itself illustrates a lack of good faith, or at least that the respondent's conduct was based on convenience at the time rather than a genuine consideration of the applicant's circumstances. I discuss the issue of the respondent's conduct further below under compensation.

Representations of promotion or reclassification after 2005

30. I turn now to the consideration of the applicant's reassignments during 2006–2008 and the alleged representations that he would be promoted. After the abolition of his post 5196, the applicant was placed against post 6921, a G-6 post (although at a G-4 level, with SPA to a G-5 level), from 1 April 2006. He was subsequently transferred to a new G-4 level post, number 41581, on 1 July 2007, after he had been transferred (in respect of his functional duties) within ITSD to the Project Management Office on 1 May 2007. The applicant says that his Chiefs at this stage, (as well as other stages not specifically identified) advised him that his SPA would continue, that a VA would be posted, and he would be promoted. The respondent expressly denied that such representations were made. The applicant did not avail himself of the opportunity to testify or to call the Chiefs to give evidence on this point. Subsequently, the applicant was again reassigned in respect of his functional duties (with his post remaining the same, i.e. G-4 post 41581) in 2008 to the Knowledge Management Service. He did not allege that additional representations were made at this time.

31. Ultimately, even if there was a representation made that the applicant's post would be reclassified, it came to fruition when the post was reclassified to a G-5 level with effect from 30 October 2009. This post was advertised in January 2010 and although interviews were conducted, the reclassified post has not yet been filled. Accordingly, it seems that the applicant's complaint must be limited to the extent of the loss suffered by him, if any, as a result of having to wait from 1 April 2006 to 30 October 2009 for the reclassification to occur.

32. In considering whether the applicant suffered any loss as a result of unfulfilled representations being made to him the evidence I have before me comprises the

applicant's unsworn assertions, the respondent's denial and the Workplans which show that a "G6 for [the applicant]" was considered a staffing issue for a number of continuing years. Dealing first with the Workplans, it is clear from the nature of the notations that obtaining a G6 post for the applicant was considered a general staffing issue within the team, rather than one promising the reclassification of a particular post at any specific point in time. Although the general way in which the "G6 for [the applicant]" issue was phrased each year is not of itself strong enough to my mind to bind the respondent to deliver on the representation, this is not to say that it is fair to make such continuing representations or expect that they will not potentially cause compensable harm. I find it reasonable that the atmosphere created within the Division caused unnecessary uncertainty and anxiety for the applicant as he was given conflicting messages whether he would obtain a chance to advance his career by promotion following reclassification. The applicant should be awarded some compensation on this basis, which I discuss below under the heading "compensation and orders".

33. However, as regards the applicant's specific assertions that his supervisors promised that he would obtain the benefit of a reclassification and/or promotion there was no evidence placed before me, or indeed even sufficient specificity on the record, for me to accept this as the more probable version of events. Thus, as far as the available evidence goes, there are general references to the applicant's promotion within the Workplans, but no compelling evidence that a concrete representation was made to him regarding his reclassification or promotion at any particular time. On this basis I am unpersuaded that he should be granted the relief sought.

Compensation and orders

34. The applicant was not, but should have been paid SPA for a period of 7 months in 2007–08 and the Tribunal orders this to be paid at the rate applicable at the time.

35. The actions of the respondent in creating an unfulfilled expectation in the applicant that he would be provided with an opportunity for advancement improperly

caused the applicant loss. Although I do not hold the applicant's complaints in respect of the 1998 and 2005 reclassifications to fall within the current review, they still provide relevant background context to enable me to support this conclusion. The history includes a reclassification exercise which the respondent admitted was improperly conducted in 1998, while the applicant was at the same level within the same Division he remains at today. It was not until these proceedings were filed that the applicant was informed what actually happened with this request, when on 7 January 2008 he was advised by the respondent that it had been "rejected". Up to this time and in his reply the respondent had stated that it was "retrieved ... for further review". As discussed at para 31, the applicant was also misinformed in relation to the Organisation's characterisation of the level of his duties. I note also that, while it came to a different conclusion by which I am not bound, the JAB was also critical of the respondent's conduct in its report.

36. The applicant has been paid an SPA for an abnormally long time (see the usual duration discussed in ST/AI/1999/17, sec. 7) which the respondent purported to withdraw or allow to lapse on more than one occasion, causing further uncertainty. He has therefore sustained compensable harm in terms of his emotional distress due to the ongoing uncertain circumstances. Accordingly, as a result of the environment in which it was reasonable for the applicant to expect the advancement of his career, as well as the uncertainty resulting from the respondent's changes in position, I order the respondent to pay to the applicant USD6,000 in compensation.

37. I take note of decision of the Appeals Tribunal in *Warren* 2010-UNAT-059 and order interest payable on the sums specified in this judgment in accordance with the principles stated therein.

38. The applicant conceded that were a reclassification to have occurred, he would at any rate have had to go through a competitive selection process for the reclassified post, albeit most likely with a practical advantage. He himself implicitly concedes that, at best, any representation made to him would have been a representation that a reclassification/selection would occur, and not that he would necessarily obtain a

promotion once the vacancy was advertised. He also conceded that, while he maintained his career had been “stymied”, he had had the opportunity to apply for posts, including those more than one grade above the G-4 level for a period, during the material time. I have taken these matters into account in assessing the above amount.

39. As a final matter, I note that the applicant’s current post was reclassified to a G-5 level effective 30 October 2009 but remains unfilled at present. However, the consideration of this alleged “delay” is not properly before me in this application as it was not part of the initial application and has not undergone the process of administrative review / management evaluation. The selection process for a post is a separate one to the reclassification process and must occur after a reclassification process is completed. Accordingly, I have not dealt with this issue.

Conclusion

40. The respondent is to pay to the applicant the applicable SPA for December 2007–June 2008 as well as USD6000 for emotional distress within 45 days of the date of this judgment, failing which interest shall accrue thereon at the US Prime Rate plus 5% until the date of payment. The applicant’s other claims are dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of August 2010

Entered in the Register on this 31st day of August 2010

(Signed)

Hafida Lahiouel, Registrar, New York