UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/035/ UNAT/1681
Judgment No.: UNDT/2010/195
Date: 29 October 2010
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

ALY ET AL.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
François Loriot

Counsel for respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The instant case, in summary, is an appeal by a group of applicants of the Secretary-General's decision about what can perhaps most usefully be described as a protracted classification review process.

2. Specifically, the Secretary-General's decision being contested in the present appeal is 1) an acceptance of the Joint Appeals Board ("JAB") recommendation that the applicants submit their cases to the Classification Appeals Committees ("CAC") for consideration and a request that the applicants take the appropriate action within 90 days; and 2) a non-acceptance of the JAB's recommendation of three months' net base salary as compensation for the delays within the classification review process.

3. The instant case covers the period of 2000 until the date of the decision under appeal (6 November 2008). During this period, a reclassification was requested for a group of staff members (2000), a decision not to reclassify was taken (exact date unknown) and there then ensued a period during which that decision was not properly reviewed (2004–2008), the reasons for which both parties are jointly responsible.

Note

4. It is noted that the existing Classification, Appeals and Review Committees ("CARCs") under ST/AI/1998/9 (System for the classification of posts) were renamed the Classification Appeals Committees ("CAC"). The CACs are a group of bodies. The relevant body for General Service classification reviews in New York is the New York General Service Classification Appeal Committee ("NYGSCAC"). For ease of reference, the abbreviation CAC has been used wherever possible and should be taken to include the applicable review body for each individual applicant for classification decision appeals under the CAC umbrella.

Facts

5. The 24 applicants, for the purposes of this Judgment, are named herewith: Aziza Aly; Andrew Brown; José Cherian; Stephen W. Cone; Carl O. Corriette; Jorge Diaz; José F. Elizabeth; Amjad Ejaz; Anthony Gamit; Louis Giordano; José Golfarini; Asfaha Hadera; Emad Hassanin; San Htoo; Miguel Kauffman; Soe Naing Maung; Thomas McCall; Joseph Nemth; Reynaldo Pava; John Saffir; George Samuel; Errol Sebro; Alex Smit; and Robert Vocile.

6. The group of applicants worked for a number of years in the Distribution Section (formerly called the Publishing Section) in the Department for General Assembly Conference Management ("DGACM"). Apparently, as a result of technological advances within the publishing industry, in 1990, the Organization began a series of job analyses that eventually led to a 1998 reorganisation of the Publishing Section. The applicants considered that the reorganisation had led to an increase in their functions and responsibilities, without commensurate reclassification of their posts. A 1999 Staff/Management Task Force was convened, which ultimately issued a number of recommendations.

7. Thus, in October 2000, a joint departmental Staff/Management Task Force, via the Executive Officer, DGACM, called for the reclassification of the 28 job descriptions in the Publishing Section.

8. With that request, a classification analysis under ST/AI/1998/9, sec. 2.3 should have occurred and a classification decision by, or on behalf of, the Assistant Secretary-General ("ASG"), OHRM, or the head of office should have been made. According to JAB Report No. 2001 (para. 28), a reclassification exercise did take place and concluded sometime in 2003, but the applicants were not informed of the outcome as to their classification request regarding the 28 job descriptions. It appears that reclassification did occur for some 14 other staff members who received updated job functions as "lead functions", but none of this information was communicated to the applicants.

9. On 14 January 2004, over three years after the original classification request was made, the Vice President of the Staff Union wrote to OHRM, enquiring about the outcome of the Classification Audit following the October 2000 reclassification request and requesting that the staff members receive a formal notification on the conclusion of the audit and the results concerning their respective posts.

10. On 3 February 2004, OHRM responded to the Staff Union Vice President and stated that "[s]ection 2.4 of ST/AI/1998/9 provides that a notice of classification results, including the final ratings and/or comments on the basis of which the decision was taken, shall be sent to the requesting executive or administrative office, which will keep in its records and provide a copy to the incumbent of the post". The letter further stated that the results had been previously sent to the staff members' Executive Office and that because the database did not associate classification actions against the names of the posts' incumbents or their index numbers, the applicants should redirect their request to their Executive Office.

11. Whether and when, in fact, the audit results had previously been sent to the staff members' Executive Office is not clear from the record evidence before the Tribunal.

12. At any rate, on 4 March 2004, the decisions related to the audit and classifications of posts were announced by email to the staff members, who were also invited to collect copies of their job descriptions. No documentary evidence has been provided showing that staff members were informed of the classification results as stated above, although this fact was not disputed by either party.

13. On 8 May 2004, applicants' counsel filed an appeal with the ASG/OHRM, under the procedures of ST/AI/1998/9, section 5. Applicant's counsel requested a fair and independent review of the audit results, which the applicants claimed did not correspond to earlier analysis and agreements between staff and management under the 1999 Staff/Management Task Force. Counsel further stated in the same letter that

he was including a copy of the respective audited job descriptions received from the Executive Office.

14. At that point in the process, the appeal should have been referred for review to the ASG/OHRM, and if that official decided to maintain the original classification or to classify the post at a lower level, the appeal should have been referred to the CAC for further review and determination (ST/AI/1998/9, secs. 6.4, 6.6, 6.10 and 6.13).

15. In cases where the Administration has questioned the receivability of an appeal, the CAC would be the competent body to make a determination on that issue (ST/AI/1998/9, sec. 6.8). The CAC would make a decision and would inform the parties as to outcome (ST/AI/1998/9, sec. 6.10).

16. It is at this point in the process that each party contends that the *other party* is responsible for a breakdown in the CAC process: the respondent contends that the applicant failed to provide the necessary information to the CAC ("to show for each post that the classification standards were incorrectly applied, resulting in the classification of the post at the wrong level"), while the applicants contend that they had already submitted this information in the 8 May 2004 letter, and in a subsequent letter of 22 December 2004. The facts illustrating this are set out below.

17. On 9 September 2004, the Director for the Division of Organizational Development, OHRM, replied to counsel for the applicants and wrote, *inter alia,* as follows:

> …
>
> On the basis of the above, we conclude that procedures for the classification of posts set out in section 2 of ST/AI/1998/9 were fully observed, and that the process leading to the classification of the posts in question was fully consistent with the agreements reached with the staff.
>
> In closing we would wish to draw your attention to section 5 of ST/AI/1998/9, which defines the parameters for classification appeals. Should you wish to proceed on that basis on behalf of the staff

> members you represent, it would be necessary to show for each post that the classification standards were incorrectly applied resulting in the classification of the post the wrong level.

18. The Tribunal will address, *infra*, whether the 9 September 2004 letter constituted an "administrative decision" not to reclassify the applicants' posts or not to refer the matter to the CAC, whether such decision should have been made the subject of an administrative review outside the processes of ST/AI/1998/9 and, thus, whether the application is time-barred for failure to appeal within two months of notification of the decision to the staff members under former staff rule 111.2(a).

19. On 22 December 2004, the applicants' counsel again wrote to OHRM, stating that the major priorities under recommendation 7 of para. 36 of the 1999 Staff/Management Task Force report had not been fully applied, that the procedures for the classification of posts had not been fully observed by OHRM and the process had not been consistent with the agreements reached with staff, leading to unequal treatment of staff who were performing the same work but were not entitled to the same career path. He stated that in a few cases the priorities of recommendation 7 had been properly applied and that those staff members had recently obtained updated job descriptions as "lead functions" while his clients, working in the same Unit, doing the same work, had been denied them. He requested that his clients' job descriptions be reclassified by OHRM under the same standards applied to "lead functions job descriptions" and if OHRM did not reclassify them at that level, that the matter be appealed under sec. 5 of ST/AI/1998/9. In that letter, he reiterated his statement in his 8 May 2004 letter that a copy of each client's job description had been included in his letter to the ASG/OHRM. (The decision to promote other staff members based on "lead functions" became the subject of a separate appeal to the JAB (JAB Case No. 2005-021, Report No. 1805)).

20. On 29 August 2006, the Under-Secretary-General for Management upheld the recommendation of the JAB in Report No. 1805 (Case No. 2005-021, *Aziza Aly et al*, dated 31 May 2006). The JAB agreed with the Administration that the applicants' rights had not been violated by the promotion of 14 other staff members in the

Publishing Section to lead function posts, without prior advertising, that the 14 staff members had been encumbering and that had been reclassified at a higher level.

21. On 18 September 2006, counsel for the applicants wrote again to Ms. Beagle, Director for Organizational Development/OHRM to inquire as to the status of his 22 December 2004 request and the status of his clients' appeals before the CAC. He also drew her attention to the outcome of the above-mentioned appeal and requested that the JAB Report No. 1805 be added to the 8 June 2004 submission to the CAC.

22. To paraphrase simply what occurred between 8 May 2004 (the date of applicants' request to appeal the decision to the CAC) and 18 September 2006, the matter was never submitted to the CAC for review and, thus, no review by that body ever occurred. Under the provisions of ST/AI/1998/9, sec. 6.14, a "reasoned recommendation concerning the disposition of the appeal" would then be made by the CAC to the ASG/OHRM, who would take the final classification decision. It is only after a final classification decision of the ASG/OHRM has been made that an appeal may be made to the former United Nations Administrative Tribunal (the cases before which were transferred to the Dispute Tribunal).

23. On 8 November 2006, the applicants filed a request for an administrative review against the implied decision by OHRM to deny their right to have their reclassification requests submitted to the CAC.

24. The applicants received no response from the respondent to their 8 November 2006 request for administrative review. Thus, on 22 June 2007, they filed a statement of appeal with the JAB against the implied decision not to submit the classification appeals to the CAC under ST/AI/1998/9. The parties have not contended that there is a time-bar issue with regard to former staff rule 111.2(a)(ii) on the appeal of this decision and the Tribunal has accepted, in the circumstances of the instant case and what ensued, that this is not relevant to the instant proceedings.

25. On 27 December 2007, the respondent replied, stating that JAB was the incorrect forum and that the appeal was time-barred with respect to appealing to the CAC. The respondent wrote the following:

> …
>
> In view of this background, please note that, consistent with section 6 of ST/AI/1998/9, it would have been necessary to appeal OHRM's decision of 9 September 2004 to uphold the initial classification of the Appellants' post to the New York General Service Classification Committee ("CAC"), as Ms. Beagle advised in the penultimate paragraph of the 9 September 2004 letter. Moreover, pursuant to section 6.8 of ST/AI/1998/9, such an appeal to the CAC would have had to be filed by 9 November 2004, i.e., within sixty (60) days of OHRM's decision to uphold the classifications. [emphasis added]

The respondent further invited the applicants to submit their appeal directly to the CAC and pledged not to raise any issue of timeliness before the CAC.

26. On 8 January 2008, applicants' counsel wrote to OHRM, expressing appreciation for the waiver of the time-limits in order to allow the classification appeals of 18 of his clients to move forward at the CAC. With respect to the JAB case, counsel explained that the applicants were "not challenging the classification of posts", as their classifications had never changed. The applicants were appealing the Administration's failure to act in a timely fashion on their 2004 reclassification appeals to OHRM and CAC and the discrimination which they alleged had prevailed against them.

27. On 28 January 2008, the applicants filed their observations on the respondent's reply of 27 December 2007. They explained that they would agree to file their appeal directly to the CAC only if the following conditions were met: (a) compliance with procedures mandated by ST/AI/1998/9; (b) prior disclosure of the International Civil Service Commission ("ICSC") standards used by OHRM in the Distribution Unit classifications referred to by OHRM in the annex letter of 9

September 2004, and; (c) three-months' net salary in compensation and retroactivity of the CAC reclassification.

28. On 29 February 2008, the respondent filed comments on the applicants' observations. With respect to point (a) of para. 27 above, the respondent stated that it could not strictly comply with the provisions of ST/AI/1998/9 because the time to undertake certain actions had already lapsed. Regarding point (b), the respondent provided a chart of the ICSC standards used in the initial classification exercise. As for point (c), the respondent stated that the Administration was not in a position to award damages to applicants for alleged violation of their due process rights and that that was for the JAB to determine. Moreover, the "demand" for monetary damages was premature, as it prejudged both the outcome of the present appeal and the future one before the CAC. Furthermore, the retroactive recognition of a reclassification decision was envisaged under sec. 4.1 of ST/AI/1998/9, but the request in this case was in any event also premature, as it presupposed the outcome of the proceedings of the CAC, which was the competent body to grant upward reclassifications and decide when such classifications were to take effect.

29. The JAB appeal ultimately concluded with the JAB making the following recommendations:

> …
>
> 36. In light of the above analysis, the Panel unanimously concluded that appellants' due process rights had been violated by the Administration's failure to review their cases in a timely manner. Therefore, the Panel *unanimously agreed* to recommend for that moral injury suffered, Appellants be granted three months net-base salary at the rate in effect as at end August 2008, i.e., the date of this report.
>
> 37. The Panel further *unanimously agreed* to recommend that Appellants submit their cases to the CAC as expeditiously as possible and no later than 90 days from the date of the Secretary-General's decision on the [JAB Report].

Procedural background

30. The applicants herein contest the decision of the Secretary-General of 6 November 2008 following issuance of the JAB Report No. 2001. This decision can be split into two parts:

a. the Secretary-General's decision to accept the JAB's recommendation that the applicants submit the cases to the CAC and request that the applicants "take all appropriate action in this regard within 90 days from the date of this decision"; and

b. the Secretary-General's decision not to accept the JAB's recommendation of three months' net base salary compensation for delays because he considers that the Administration's offering in December 2007 to allow the applicants to file their cases directly with the CAC and to waive the timeline was fair. The respondent noted that any decision to reclassify would backdate payment to the date of the original classification request (October 2000) and therefore repair any financial harm.

31. On 22 September 2009, the respondent filed his reply with the former UN Administrative Tribunal.

32. On 18 October 2009, the applicants filed comments on the respondent's reply.

33. On 8 January 2010, by way of email, the parties were advised that the case had been transferred to the New York Registry of the UN Dispute Tribunal.

Legal provisions

34. ST/AI/1998/9 entitled "System for the classification of posts" of 6 October 1998, provides the following:

> 1.1 Requests for the classification or reclassification of a post shall be made by the Executive Officer, the head of administration at offices

away from Headquarters, or other appropriate official in the following cases:

(a) When a post is newly established or has not previously been classified;

(b) When the duties and responsibilities of the post have changed substantially as a result of a restructuring within an office and/or a General Assembly resolution;

…

2.1 Requests for classification or reclassification of posts shall be submitted to:

(a) The Assistant Secretary-General for Human Resources Management, in the case of:

(i) Posts in the Professional category and at the Principal Officer (D-1) and Director (D-2) levels, except when authority for classification of such posts has been delegated to the head of office, in which case the request shall be submitted to the head of that office;

(ii) Posts in the Field Service category;

(iii) Posts in the General Service and related categories at Headquarters;

…

2.3 The classification analysis shall be conducted independently by two classification or human resources officers on the basis of the classification standards set in section 3 below. The decision regarding the classification of the post will be taken by, or on behalf of, the Assistant Secretary-General for Human Resources Management, or the head of office. …

2.4 A notice of the classification results, including the final ratings and/or comments on the basis of which the decision was taken, shall be sent to the requesting executive or administrative office, which will keep it in its records and provide a copy to the incumbent of the post.

…

6.2 Appeals must be accompanied by the job description on the basis of which the post was classified.

6.3 Appeals must be submitted within 60 days from the date on which the classification decision is received.

6.4 The appeal shall be referred for review to:

(a) In the case of appeals submitted to the Assistant Secretary-General for Human Resources Management, the responsible office in the Office of Human Resources Management, which will submit a report with its findings and recommendation for decision by, or on behalf of, the Assistant Secretary-General;

…

6.6 If it is decided to maintain the original classification or to classify the post at a lower level than that claimed by the appellant, the appeal, together with the report of the reviewing service or section, shall be referred to the appropriate Classification Appeals Committee established in accordance with the provisions of section 7 below.

6.7 The Secretary of the Appeals Committee shall transmit a copy of the report of the reviewing service or section to the appellant for comments, which must be submitted within a period of three weeks. The appellant's comments will be provided to the Office of Human Resources management or the human resources service or section concerned, as appropriate, for their observations, which must be submitted within a period of two weeks.

6.8 In cases where the Administration has questioned the receivability of the appeal, the Committee shall first determine whether the appeal is receivable. The following appeals shall not be receivable:

…

(a) Appeals submitted after the 60-day time limit, unless exceptional circumstances warrant the waiver of the time limit;

…

6.10 If the appeal is found to be receivable, the Committee shall so inform the parties.

…

6.13 The Appeals Committee shall submit its report to the Assistant Secretary-General, OHRM, or the respective Head of Office, as

> appropriate. The report shall constitute the official record of the proceedings in the appeal …
>
> 6.14 The Assistant Secretary-General, OHRM, or the Head of Office, as appropriate, shall take the final decision on the appeal. A copy of the final decision shall be communicated promptly to the appellant, together with a copy of the report of the Appeals Committee. Any further recourse against the decision shall be submitted to the United Nations Administrative Tribunal.
>
> 6.15 In those cases where the appeal is successful, the effective date of implementation of the post classification shall be, subject to the availability of a post, the same effective date as that of the original decision, as defined in section 4.1 above.

35. The relevant sections of the document "Procedures for the review of classification appeals including procedures for the review of appeals by the New York General Service appeals and review committee" of 3 December 1997 provides:

> **Who may appeal?**
>
> Either the incumbent or the head of the office in which the post is located may appeal a classification decision.
>
> **Deadline for filing an appeal**
>
> The deadline for filing appeals is 60 days from receipt of the classification notice concerning the post.
>
> **Grounds for appeal of classification decisions**
>
> There are two grounds for appeal: 1) the classification standards were incorrectly applied, resulting in the classification of the post at the wrong level; and 2) the job description, used to classify the post, did not properly reflect the duties and responsibilities of the post. With respect to the second criterion, a determination is made on whether the revisions submitted by the appellant are a clarification of the functions which were the subject of the classification decision, or whether they reflect a different job. If the latter, the appeal is not receivable. Rather the case must be examined to determine whether a new classification review is required.

Issues presented

36. By joint submission dated 1 June 2010, the parties submit that the issues before the Dispute Tribunal are as follows:

a. whether the applicants' claim regarding the Administration's decision not to reclassify their posts is receivable;

b. whether there are obstacles to the review of the applicants' appeal by the CAC;

c. whether the applicants' claim regarding the Administration's alleged refusal to submit their appeal of the decision not to reclassify their posts to the CAC is receivable; and

d. whether the remedies sought by the applicants in relation to these claims are appropriate and legally sustainable.

Receivability

37. The respondent raises receivability issues with regard both to the Administration's decision not to reclassify the applicants' posts and "the Administration's alleged refusal to submit the Applicants' appeal of the decision not to reclassify their posts to the NYGSCAC".

9 September 2004 letter

38. At this juncture, the Tribunal must briefly address the interpretation to be given to the 9 September 2004 letter from OHRM to counsel for the applicants: did that letter constitute an "administrative decision" that the applicants' posts would not be reclassified or that the respondent had decided not to refer the matter to the CAC? And if so, should the applicants have made this letter the subject of a request for review and appeal within 60 days of that date, under former staff rule 111.2(a)?

39. The Tribunal finds that the 9 September 2004 letter does not constitute an administrative decision barred by failure to appeal within 60 days of that date under former staff rule 111.2(a), for the following reasons.

40. First, the respondent himself did not ascribe a "rule 111.2(a)" meaning to the 9 September 2004 letter. In fact, the respondent made specific statements and gave the applicants direct instructions to the *contrary*: the respondent's *only* legal arguments before the former Administrative Tribunal make clear that the argument regarding receivability was as to applicants' compliance with procedures under ST/AI/1998/9 alone. Moreover, the text of the letter of 27 December 2007 (see para. 25 above) shows that the respondent explicitly accepts the correct appeal procedure is to the CAC.

41. Second, the language of the letter itself, at best, is ambiguous as to what the letter meant. The respondent in its 27 December 2007 letter argued that the 9 September 2004 letter conveyed a "decision to uphold the initial classification of the Appellants' posts" but, in fact, the 9 September 2004 letter does not state this in any manner. The Tribunal finds that the 9 September 2004 letter does not put the applicants on notice that the letter constituted an administrative decision that counsel for the applicant should appeal under former staff rule 111.2(a). By referring the applicants' counsel back to procedures under ST/AI/1998/9, the letter strongly implies that the *only* process to be observed was under that administrative instruction. This instruction (to utilise ST/AI/1998/9 procedures) is all the more confounding since the applicants *had already initiated an appeal on 8 May 2004 under CAC procedures*. A discussion in UN Administrative Tribunal Judgment No. 1329 (2000) regarding clarity of administrative decisions is worth noting:

> VI. In addition, it is a general principle of procedural law, and indeed of administrative law, that the right to contest an administrative decision before the Courts of law and request redress for a perceived threat to one's interests <u>is predicated upon the condition that the impugned decision is stated in precise terms</u>. Of course, there are situations where an applicant is not aware of all administrative decisions affecting him/her. …. However, <u>nothing can repair the</u>

> damage that vagueness and imprecision can cause to an application.
> [emphasis added]

42. Third, any confusion surrounding the proper process to be employed was created by the language used by the respondent himself, and the respondent is estopped from arguing that the 9 September 2004 letter conveyed a final administrative decision not to classify the applicants' posts. The elements of equitable estoppel are: (1) conduct, through language, acts, or silence that amounts to a representation; (2) these facts are known to the party being estopped; (3) the other party does not know of the true circumstances surrounding the conduct; (4) the conduct is done with the intention or expectation that it will be acted on by the other party; (5) the conduct is relied upon by the other party to his or her detriment. In this case, the applicants understandably may have believed they already had complied with the respondent's instructions, without detriment to their case and that the process was still ongoing and no final decision had been made.

43. Fourth, the Tribunal agrees that it is highly likely that the applicants *did* believe that they had already taken sufficient steps to appeal, particularly as the onus was on the respondent to refer the matter to the CAC, notwithstanding the responsibility of the applicants to provide certain documentation. The JAB itself similarly concluded that following the 9 September 2004 letter, the applicants "may have thought that they had already taken the necessary steps to appeal… . The misunderstandings may have been compounded by an expectation on the part of OHRM that it would be conducting the review and by [the applicants'] understanding that their cases were being submitted to the [NYGSCAC]" (JAB, para. 30).

44. Fifth, the respondent and the applicants' counsel were in ostensibly agreed-upon negotiations regarding modification of time-limits in this case (see para. 25, 26, 27, and 28 above), and that any existing time limits did not apply.

45. The JAB's comments on the "dynamics" of this case are worth repeating, for they indicate the departmental classification of posts that was to occur and how the

process broke down over time, without the applicants' access to agreed-upon CAC procedures:

> 26. … The background to the case originated in 2000–2003, when the then Department of General Assembly Affairs and Conference Services (DGAACS) apparently failed to provide proper notification of the job classification results and began the reclassification and promotion of some staff in the Publishing Section without a prior selection process. [footnote deleted] The somewhat vague language employed in footnote 3 … left the Panel with the strong impression that something had gone seriously amiss with respect to the dissemination of the results and that the Publishing Section was at fault for not being transparent and for not sharing the classification results with the staff and that ultimately it was that lack of disclosure that led to the previous and present JAB appeals.
>
> 27. The Panel in the instant case felt that from its inception the classification exercise in the Publishing Unit appeared to have been fraught with dissension and mistrust. Those feelings had already been festering and were inevitably exacerbated by the decision in the 2005-021 case which, rightly or wrongly, perpetuated perceptions of favoritism, discrimination and lack of due process.

The JAB Panel appears to have been influenced by these considerations when it made the decision to refer the matter back to the CAC, so that a proper classification review could be made.

Implied administrative decision

46. The difficulty facing the Tribunal is understanding whether and on what date a reclassification decision was made. As stated above, the letter of 9 September 2004 from the respondent was neither a final reclassification decision after the requisite referral of the decision to the CAC, nor was it a decision explicitly declining to refer the matter it to the CAC. The letter's references to ST/AI/1998/9 implied that the matter would be reviewed by the CAC. It is reasonable that the applicants would have understood the correct review process to have been by the CAC rather than within the appeals' procedure provided for under former staff rule 111.2, at least on the basis of that letter.

47. In their application, the applicants state that an "implicit" administrative decision was taken by the respondent, and that the applicants only became aware of this on 18 September 2006:

> 5. ... On 18 September 2006, the Applicants learned that OHRM had never submitted their classification appeals of 22 December 2004 to the CARC and they requested a review of that administrative failure to take action, which had had the effect of denying them the right of appeal to the CARC and reclassification of their posts. On 22 June 2007, in the absence of any response or action by OHRM on their request for review, a collective appeal against that implicit administrative decision not to take action was filed with the JAB in New York. …

48. As stated in the former UN Administrative Tribunal Judgment No. 1157 *Andronov* (2003):

> VI. As stated in previous jurisprudence, the countdown for the deadlines of appeals begins only when the contested decisions and their relevant details are known to the Applicant. Staff rule 111.2(a) indicates, procedurally, the point in time from which the counting towards the deadline begins for initiating an appeal process. However, if a decision is not made in writing and is unknown to the staff member concerned, the point of time for starting the process is from the time the staff member knew or should have known of the said decision. This is particularly so in cases of implied administrative decisions, as otherwise the right to legal and judicial protection could easily be jeopardized. …

49. It would appear that 18 September 2006 is the date on which the applicants knew or should have known of the implied administrative decision to the effect that the applicants' posts would not be reclassified or that the respondent had decided not to refer the matter to the CAC.

50. Further compounding the difficulty facing the Tribunal is the fact that the matter has never been referred to back to the CAC for that body to render a final classification decision, which is one pre-requisite to appeal under ST/AI/1998/9, sec. 6.14.

51. The Tribunal accepts that a decision not to refer the matter to the CAC was taken *at some point* following the initial classification decision in 2000, but the letter of 9 September 2004 does not pinpoint this date or suggest it is of itself a final decision, because it implies that the process was still continuing, the doors were not shut and a further referral to the CAC could take place. The subsequent failure to refer the matter to the CAC means that the expert body on classification reviews and appeals has never, to date, considered the matter. Thus, at some point after the initial classification decision of 2000, there was an implied decision *not* to change the initial decision of 2000 as to these applicants, which could be termed a decision not to reclassify. The Tribunal also notes that the applicant has been given the opportunity to have the CAC review the cases and that he has not availed himself of this opportunity.

52. The Tribunal has considered the entire circumstances of the case before it—its protracted nature, the contents of the letter of 9 September 2004 (i.e., that it was not a clear administrative decision from which statutory deadlines should be fixed), the implied administrative decision that was made, the apparent agreements underlying the 1999 Staff/Management Task Force, the fact that the CAC procedures have never been implemented, and the delays on both sides. In ascertaining the most efficient, as well as fair, manner in which to adjudicate this most complex case, the Tribunal has carefully weighed these considerations, as well as how best to remedy the situation.

53. For the reasons set out above, the Tribunal considers that both the decision not to refer the matter to the CAC and the decision not to reclassify (or not to change the initial decision of 2000) are receivable. The Tribunal considers they are properly before the Tribunal as part of the instant application, which is an appeal of the decision of the Secretary-General in 2008 as to how to resolve the entire protracted matter which was appealed to the UN Administrative Tribunal and then transferred to the UN Dispute Tribunal for adjudication.

Applicants' submissions

54. The applicants submit, *inter alia*, that*:*

a. the composition and procedures of the current CAC are not clear and it has not met since 2003 for lack of a quorum;

b. the reform of the internal justice system has abolished or modified the jurisdiction of the CAC, replacing it with the new Dispute Tribunal which should deal with classification issues;

c. the decision to refer the matter to the CAC as proposed by the respondent cannot resolve the current situation as it can only make a ruling on classification if the posts in dispute can be reclassified against posts for which budgetary provision has been made and the only posts available for reclassification have already been assigned; and

d. the respondent has failed to implement General Assembly resolutions and apply standards of the ICSC.

55. The applicants request the Tribunal to:

a. declare that the respondent's repeated refusal, since 2000, to reclassify the applicants' posts constitutes an abuse of power and denial of justice;

b. order the respondent to confirm and produce evidence of the existence of the CAC, its regular composition, a representative quorum, its internal procedures, the relevant standards of the ICSC, and the budgetary posts against which the applicants may request reclassification of their posts;

c. order, in the interim, payment of three months' net base salary;

d. order the respondent, if he does not produce information about the CAC, to proceed directly to a retroactive reclassification of the applicants' posts, notwithstanding the availability of budgetary resources for that purpose;

e. order the respondent to pay the applicants two years' net salary for the unfair delays and serious violations of procedure with regard to reclassification which have occurred since their initial requests were made in 2001;

f. order the respondent, on an exceptional basis and in view of the failure to apply the reclassification procedures, to pay the applicants three years' net base salary in accordance with art. 10.1 of the Statute of the former UN Administrative Tribunal; and

g. recommend to the Secretary-General that an indemnity paid in this case should be recovered from the "errant and negligent staff members", in accordance with staff rule 112.3; and

h. order the respondent to pay USD10,000 for expenses to the undersigned attorney on account of the vexatious measures and delaying tactics of the respondent, as the attorney has spent more than 6 years trying to obtain justice.

Respondent's submissions

56. The respondent requests the Tribunal to:

a. find that the applicants' claim regarding the Administration's decision not to reclassify the applicants' posts is not receivable and should be remanded to the CAC pursuant to art. 10.2 of the Tribunal's Statute;

b. find that there are no obstacles to the submission of the applicants' appeal to the CAC;

c. find that the applicants' claim regarding the Administration's alleged refusal to submit the applicants' appeal to the CAC is not receivable, as it is moot;

d. find that the applicant's request for retroactive reclassification or pay three years' compensation are inappropriate and legally unsustainable;

e. find that the applicants' request for compensation for the delays incurred in connection with the applicants' appeal to the CAC is inappropriate and legally unfounded;

f. find that the applicants' request for compensation for costs to be awarded to their counsel for vexatious measures and dilatory tactics is inappropriate and without basis;

g. find that the applicants' request for the Tribunal to recommend the Secretary-General recover compensation from negligent officials is unwarranted; and

h. reject the applicants' pleas in their entirety.

Considerations

Was the Secretary-General's decision to allow the applicants to resubmit their cases to the CAC within 90 days reasonable and fair?

57. It bears recalling at this point that the applicant's initial appeal on 8 May 2004 was to deal with the failure of the respondent to review the classification of the applicants' posts (ST/AI/1998/9, sec. 6.4) and, later, that the appeal was never referred to the CAC (ST/AI/1998/9, sec. 6.6). The crux of the issue now before the Tribunal is whether the matter should be returned to the CAC at this point in time, so that a decision on the classification can be taken, or whether the Tribunal itself is seized of the matter concerning the classification of applicants' posts.

58. The parties' submissions contain a great deal of argument as to whether the CAC was correctly constituted throughout the period in question and whether it was able to make a fair decision as to reclassification. The applicants have presented

information outlining—to choose a generic term—difficulties which the CAC appears to have faced during the past decade in forming a quorum; the applicant further questions the CAC's procedures and deliberations, including its use of the ICSC standards for classification. The respondent counters that the CAC is functioning and that the applicant has been provided with the information pertaining to its composition.

59. The Tribunal is of the view that, while these concerns may require adjudication in future cases, the Tribunal currently is unable to render judgment based on the general problems which hypothetically may be faced by the CAC.

60. The applicants also have raised budgetary issues and generally contend that by reclassifying the 14 staff members with "lead functions", the respondent cannot at the same time fail to make a budgetary request for the applicants' 28 posts in question. The applicants argue:

> [T]he Respondent did not have the right to delay consideration of the Applicants' requests for reclassification by invoking budgetary considerations. Since 2000, the Respondent has recognized the Applicants' right to reclassification and has had ample time to make the appropriate budgetary requests. In 2004, the Respondent had even short-circuited all the promotion and reclassification rules by favouring and directly promoting 18 colleagues who were doing the same work as the Applicants. Meanwhile, the Respondent has made no request for additional funds so that the Applicants' posts could be considered for reclassification. This failure to act or this negligence of the Respondent cannot now be imputed to the Applicants…
>
> The Tribunal is requested to order the Respondent to shed light on the administrative and budgetary aspect of the procedures that he should follow in relation to post reclassification, in order to avoid a meaningless referral to the CARC which would bring no result or resolution to the present dispute.

61. The Tribunal believes that a budgetary request is not a pre-requisite for decision-making by the CAC and that the CAC may consider the applicants' request for reclassification in the absence of a formal budgetary request having been made. The Tribunal notes the discussion by its esteemed colleague, Judge Ebrahim-

Carstens, in *Jaen* UNDT/2010/098, of the procedures under ST/AI/1998/9 regarding reclassification of posts and budgetary submissions:

> 25. The general procedure for reclassification of posts, including those requiring budgetary submission, is as follows. The executive officer of the department requests a proposed reclassification if he or she is satisfied that one of the criteria in sec. 1.1 of ST/AI/1998/9 has been met. The department will then submit to OHRM a job description for the posts suggested for reclassification. Next, OHRM will review the request and provide the department with a classification advice pursuant to ST/AI/1998/9. If the department concerned decides to proceed further, the Proposed Programme Budget is finalised by the offices involved in the process, with the participation of the OPPBA and the Controller, and is submitted by the Secretary-General to the General Assembly for its review and approval. Formal notices of classification are only issued after the General Assembly approves the budgetary proposal that includes the proposed reclassification (see the Instructions for Proposed Programmer Budget for the Biennium 2008–2009 (16 October 2006) as well as the Instructions for Proposed Programmer Budget for the Biennium 2010–2011 (1 October 2008)). Following approval of the related post proposal by the General Assembly, a formal notice of classification is issued by OHRM and is also provided to the incumbent of the post. When a classification request is submitted for advice prior to a budgetary submission (e.g. when there is no available budgeted post already approved at the appropriate level and for appropriate functions), the classification becomes effective once the reclassification has been approved in the budget. For posts that do not require budgetary submission, the classification decision will become effective as of the first of the month following receipt of a classification request fulfilling the conditions of sec. 2.2 of ST/AI/1998/9, including, *inter alia*, a valid and available post number confirming the existence of a post approved at the appropriate level in the budget. [emphasis added]

62. The Tribunal has considered whether a lack of budget or posts would, as the applicant contends, render the CAC unable to resolve the current situation, i.e., even if the CAC recommends that the posts are reclassified, whether this decision will have no "teeth", as it were, because no budget and/or posts are available. With regard to this specific concern of the applicant, the Tribunal notes that the respondent states, in the decision under appeal that "the Secretary-General notes that if your reclassifications are recommended by the CAC, the reclassifications would take

effect retroactively to the first of the month following receipt of the classification request in October 2000" and that financial compensation would be payable. The Tribunal believes that this should assuage the applicants concerns in this regard. The Tribunal is unable to ascertain whether budget is required, but from the open possibility of appeal to CAC, it appears that either the budget was approved for this or that no approval was necessary.

63. The applicants have contended that with the establishment of the new system of justice within the UN, the CAC has been abolished or has had its jurisdiction modified. Clearly, however, ST/AI/1998/9 remains in place unaltered, and its provisions are to be recognised and respected. The Tribunal agrees with the respondent that there are no obstacles to submission of the applicants' appeal to the CAC.

64. Finally, in the absence of an administrative decision having been taken by the CAC, the Tribunal finds that it may not, and should not, engage in a retroactive reclassification of the 28 posts involved in this case.

65. For all of the foregoing reasons, the Tribunal finds that the CAC is the legitimate and appropriate body to hear the applicants' request for a review of a reclassification decision. Once a classification decision is recommended by the CAC and taken by the ASG/OHRM or the head of office as the final decision on classification, the applicants are, of course, at liberty to file a new appeal within the new system of internal justice if they are not satisfied with the outcome.

66. With regard to length of time granted to do so, the usual time limit to request a review of a classification decision is 60 days, as per sec. 6.3 of ST/AI/1998/9; 90 days is, in comparison, generous.

67. The Tribunal considers that the Secretary-General's decision to uphold the JAB's recommendation that the applicants submit the cases to the CAC within ninety days of the date of the decision was both reasonable and fair.

68. The Tribunal will make the necessary order, under art 10.5(a) for specific performance of the Tribunal's Statute, that the case shall be remanded to the CAC for decision by the CAC within 180 days, on the proviso that the applicants submit the cases for review within sixty days.

Compensation for delay

69. On the issue of compensation for the reclassification delay, the JAB unanimously concluded "that Appellants' due process rights had been violated by the Administration's failure to review their cases in a timely manner. Therefore the Panel unanimously agreed to recommend that for the moral injury suffered, Appellants be granted three months' net-base salary at the rate in effect as at end August 2008, i.e. the date of this report". The JAB's analysis of this issue, whilst recognising a "lack of follow-through on both sides" was as follows:

> 35. As to compensation for moral damage, the Panel was mindful of its obligation to take account the Administrative Tribunal's rulings on delays. The Panel consulted, among others, UNAT Judgement No. 861 *Knowles* (1996), Judgement No. 880 *MacMillan-Nihlen* (1998), Judgment No. 892 *Sitnikova* (1998) and Judgment No. 1136 *Savet & Skeldon* (2003). While the particulars of the cases differed, all of them were consistent on the issue of delay and individually cited Judgment No. 353 *El-Bokany* (1985), which stated that an inordinate delay "not only adversely affects the administration of justice, but on occasion can inflict unnecessary anxiety and suffering to an applicant", and "… because of the dilatory and casual way in which [the Applicant's] case was dealt with, [she] is entitled to some compensation." As noted above, the Panel considered that the Administration incurred the lion's share of blame for the delays. This was particularly true for the period 2002–2004 when Appellants experience a black-out as to the outcome of the Classification Audit. Moreover, Respondent made the following telling admission in her 13 June 2008 to the Panels Interrogatories:
>
> > "Following the October 2000 review, owing to an oversight (emphasis added), none of the cases of the subject thirty two staff members were referred to the New York General Service Classification Committee (NYGSC)."

70. Following this conclusion and recommendation of the JAB, the Secretary-General's decision with regard to the issue of compensation was as follows:

> The Secretary-General, however, has decided not to accept the JAB's recommendation that you be granted three months net-based salary as compensation for the delays. In this respect, the Secretary-General considers that the Administration offering, in December 2007, to allow you to file your cases directly with the CAC and offering to waive the time-line, is a fair and reasonable way to address any delays that may have occurred. Additionally, the Secretary-General has taken note of Section 6.15 of ST/AI/1998/9 which stipulates, "[i]n those cases where the appeal is successful, the effective date of implementation of the post classification shall be, subject to the availability of a post, the same effective date as that of the original decision as defined in section 4.1 […]". Section 4.1 stipulates that "[c]lassification decisions shall become effective as of the first of the month following receipt of a classification request fulfilling the conditions of section 2.2 above […]". Consequently, the Secretary-General notes that if your reclassifications are recommended by the CAC, the reclassifications would take effect retroactively to the first of the month following receipt of the classification request in October 2000, thereby repairing any financial harm that you may have experienced.

71. It is noted that the decision of the Secretary-General does not dispute the conclusion of the JAB that the respondent was responsible for the majority of the delays throughout the period in question. The decision, on the face of it, fails to address the need for compensation for undue delay and violation of procedural rights.

72. While the decision noted correctly that any reclassification decision, if warranted, would be retroactively applicable, the applicants do not address moral or emotional injury. Although it was mentioned by the JAB (cf. para. 36 above), there is no basis for the Tribunal to award compensation under this head in the instant case.

73. However, in the respondent's reply of 22 September 2009, the respondent strongly objects to the Administration assuming responsibility for delays post 9 September 2004, when a letter was sent to the applicants requesting them to submit an appeal to the CAC. Furthermore, the respondent emphasises that it was the applicants who were mainly responsible for such delays, by failing to submit information during this period, requesting information and rejecting prior offers to

submit their appeals to the CAC and instead, preferring to appeal to the JAB. The Tribunal is convinced by the facts as agreed by the parties, the explanations given by the respondent and the failure of the applicant to explain the delays on his side post 9 September 2004, that the parties must take joint responsibility for the delays post 9 September 2004 as articulated in the JAB report, and that compensation is not warranted for this period.

74. Nevertheless, the Tribunal is of the view that the respondent has not provided sufficient explanation for the delays during the period between 2000 and 2004. After the joint departmental Staff/Management Working Group, via the Executive Officer of DGACM, "called for" the reclassification of the 28 job descriptions, there was no response until 2004. In the light of the totality of the evidence before it, the Tribunal finds the respondent's silence on the delays during this period to be telling. The JAB report—which is before the Tribunal as an annex to the application but without its annexes—serves as circumstantial evidence of the record of the JAB rather than any kind of binding authority.

75. In view of this report, the lack of information provided in the years between 2000 and 2004 in the facts as agreed by the parties, and the respondent's silence in explaining this specific delay, the Tribunal finds that compensation for the excessive delay in responding to the original request for reclassification is warranted, as is compensation for the breach of the applicants' procedural rights.

76. With regard to nominal compensation for breach of a right, it is useful to recall the case law of the Dispute Tribunal: in *Abboud* UNDT/2010/001, USD20,000 was awarded for the failure of the Administration to properly consider a request for an investigation; in *Kasyanov* UNDT/2010/026, USD25,000 was awarded for breach of a right and emotional distress; in *Beaudry* UNDT/2010/126, USD6,000 was awarded for failure to give proper consideration to rebuttal of an electronic performance appraisal; in *Koh* UNDT/2010/040, USD2000 was awarded for breach of a right to candidacy; in *Frechon* UNDT/2010/089, three months' net base salary was awarded for delay in complying with procedures. Notably, in World Bank

Administrative Tribunal Decision No. 421 (2009), USD30,000 was awarded for improper delay in completing performance appraisal and a further USD30,000 for emotional stress and anxiety (moral damages).

77. The Tribunal is of the view that all applicants should be treated equally with regard to compensation for non-economic loss and therefore such compensation is more fairly awarded in terms of a nominal sum rather than as salary: see Carstens, J in *Applicant* UNDT/2010/148 at para. 29.

78. Bearing this in mind, the Tribunal considers USD20,000 per applicant for the excessive delay and breach of procedural rights in failing to refer the matter to the CAC as required should be awarded. It is noted that the two year cap as provided for in art. 10.5(b) of the Statute of the Dispute Tribunal does not apply as the amount awarded is per applicant.

79. The JAB awards three months' for violation of due process rights (failure of the respondent to review the cases in a timely manner) but then goes on to describe the award to be for "moral injury". The Tribunal notes that the applicant did not make submissions as to moral injury and does not consider an award for moral injury to be appropriate in the circumstances.

80. On the question of whether the applicants be compensated for the period from the date of Secretary-General's decision in November 2008 until 9 February 2009, the date of appeal to the UN Administrative Tribunal, the Tribunal notes that counsel for the applicants requested information about the composition of the CAC in November 2008 and January 2009, to which he received no response. In their appeal to the Administrative Tribunal of 9 February 2009, the applicants requested, *inter alia*, the Administrative Tribunal to direct the respondent to provide the necessary clarifications concerning the functioning of the CAC prior to referring the applicants' reclassification requests to it.

81. As a matter of good administrative practice and particularly in light of the circumstances of the applicants' case which has been drawn out over many years, the

respondent should have responded to the applicant. On the other hand, there was nothing to prevent counsel for the applicant—a seasoned counsel in such disputes—to have submitted his cases to the CAC and then to have followed-up with his questions on the CAC's composition.

82. The Tribunal further notes that counsel for the applicant for a second time appears to have made an informed decision *not* to submit the cases to the CAC: in addition to the decision under review, the applicants were also afforded the same opportunity by the Administration in 2007–2008. For these reasons, the Tribunal is of the view that compensation for the period from November 2008 until the date of appeal is not warranted.

83. Finally, with regard to awarding compensation for "expenses" to the attorney, bearing in mind the shared responsibility that counsel for the applicant for the delays post-2004 and that there has been no abuse of proceedings before the Tribunal as required under art. 10.6 of the Statute, the Tribunal does not consider such compensation to be warranted.

Conclusion

84. For the above reasons, the Tribunal finds that the decision to remand the case to the CAC was reasonable and fair and awards USD20,000 to each of the applicants for excessive delays and procedural non-compliance.

85. All other pleas are rejected in their entirety.

Orders

86. It is ordered that:

a. under art. 10.5(a) the case shall be remanded to the CAC for classification decisions on the proviso that each applicant submits the

cases for review within sixty days of the date this Judgment becomes executable;

b. for all cases submitted to the CAC within sixty days of the instant Judgment, the CAC shall render decisions within 180 days of the date this Judgment becomes executable; and

c. the respondent shall make payment of USD20,000 to each of the applicants within sixty calendar days of the date this judgment becomes executable, failing which interest is to accrue to the date of payment at the US Prime Rate applicable as at the date of expiry of this period. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Marilyn J. Kaman

Dated this 29th day of October 2010

Entered in the Register on this 29th day of October 2010

(*Signed*)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry