



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/097

Judgment No.: UNDT/2021/015

Date: 26 February 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

GONZALEZ VASQUEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Alan Gutman, ALD/OHR UN Secretariat

Introduction

1. On 13 December 2019, the Applicant filed an application in which she contests the methodology used when deciding to place her at step 1 at the P-2 level after being promoted from the G-6 level, step 11, arguing that post adjustment should not be part of the calculation of her net base salary.
2. On 8 January 2020, the Respondent filed his reply in which he submits that the application is without merit.
3. By Order No. 194 (NY/2020) dated 9 December 2020, the Tribunal noted that none of the parties had requested any further evidence to be produced and that the case file appeared to be fully informed. The Applicant was therefore ordered to file her closing statement by 14 January 2021, which she duly did.
4. In light of the reasons set out below, the Tribunal grants the application in full.

Facts

5. On 12 June 2019, the Applicant was selected for an Associate Human Resources Officer post at the P-2 level after having successfully passed the Young Professional Programme (“YPP”) exam in 2017. At the time, she was serving at the G-6 level, step 11.
6. In the subsequent offer of appointment dated 19 July 2019, it was indicated that she would serve at step 1 on the P-2 level in her new job.
7. On 22 July 2019, the Applicant requested Headquarters Client Services Service (“HQCSS”) to reconsider that she was assigned step 1. She noted that at step 1 of the P-2 level, the “net salary” per annum was USD47,322, while at the G-6 level, step 10, the “net salary” per annum was USD68,063.

8. On 23 July 2019, HQCSS replied that “the long-standing practice in the Organization” has been to use “the GS to P promotion calculation formula” for appointments to the Professional level for currently serving YPP candidates and that the total salary at the P-2 level, step 1, would be USD77,512, which was the sum of USD47,292 in “[n]et” and USD30,220 in “[p]ost [a]djustment”.

Consideration

Issue of the case

9. The parties agree that the determination of the Applicant’s step at the P-2 level after having been promoted from G-6, step 11 is governed by staff rule 3.4(b), which provide as follows (emphasis added):

... On promotion, a staff member who holds a fixed-term or a continuing appointment shall be placed at the lowest step of the level to which he or she has been promoted that provides an increase in *net base salary* equal to at least the amount that would have resulted from the granting of two steps at the lower level.

10. The key question is therefore what is the meaning of the expression “net base salary”, and in particular, whether it was lawful for HQCSS to include the Applicant’s post adjustment payment in the calculation of her net base salary when deciding her step at the P-2 level after her promotion from the G-6 level, step 11.

The parties’ submissions

11. The Applicant, in essence, submits that it was in violation of staff rule 3.4(b) to include the Applicant’s post adjustment payment when deciding her net base salary at the P-2 level.

12. The Respondent's contention may be summarized as follows:

a. The “purpose of Staff Rule 3.4 is to ensure that the net [remuneration] of a staff member does not decrease on promotion”, and to “achieve this purpose, the Organization considers the differences between the salary scales of the General Service and the Professional categories when a staff member is promoted between the two categories”;

b. The “salary scales of the Professional and General Service categories differ in how they account for the cost of living at a duty station”. While the “General Service salary scales include a cost of living component”, the “Professional category salary scales do not”. In order to “account for the cost of living at a duty station, staff members in the Professional category receive a cost of living adjustment to their salary referred to as post adjustment”. The importance of “reconciling this difference when calculating a salary on promotion between categories” was explained by the United Nations Administrative Tribunal in Judgment No. 175 *Garnett* (1973), in relation to staff rule 103.9, the predecessor to staff rule 3.4(b);

c. The Organization “correctly offered the Applicant an appointment” at step 1 on the P-2 level, which “met the requirements” of staff rule 3.4 as it “provided the Applicant with an increase in her net [remuneration] upon promotion to the Professional category”;

d. In accordance with staff rule 3.4, the Organization “first calculated what the Applicant's net [remuneration] would have been had the Applicant been granted two steps at her former G-6 level, step 11. The “projected net [remuneration]” at this level was USD76,115. Second, the Organization “identified the lowest step” of the P-2 level salary scale that provided “a net [remuneration] equal to or greater than USD76,115”, which was step 1 of the P-2 salary scale. That step “provided for a net [remuneration] of USD79,264.6”,

and “the total exceeded the net [remuneration the Applicant would have earned, if she had been granted two steps at the G-6 level]”, namely USD76,115;

e. The Applicant’s “claims with respect to the term ‘net base salary’ in Staff Rule 3.4(b) have no legal basis or policy rationale”, because the “General Services salary scales include a cost of living component” while the “Professional category salary scales do not”. The Organization “accounts for this difference when it promotes staff members between categories”. As held in *Garnett*, “failing to account for this difference ‘would be to compare unlikes, and would distort the purpose of the rule”. Accordingly, “when calculating the applicable salary on promotion between categories, the Organization considers the additional [remuneration] in the form of post adjustment that a staff member will earn in the Professional category”;

f. The Dispute Tribunal’s judgment in *Valentine* UNDT/2018/050 is “not on point” to this case, as it concerns “the interpretation of the term ‘net base salary’ in relation to the award of material damages under [art.] 10.5(b) of the Dispute Tribunal’s Statute” and does not “address the calculation of salary on promotion between categories pursuant to staff rule 3.4(b)”. Furthermore, the Dispute Tribunal in *Valentine* incorrectly relies on a vacated judgement, namely *Lloret Alcaniz et al.* UNDT/2017/097. The term “net base salary” as “used by the Tribunals in calculating material damages excludes post adjustment for the reasons outlined” by the Appeals Tribunal in *Kasyanov* 2010-UNAT-076;

g. Staff rule 3.4 “distinguishes between the salary established on a staff member’s initial appointment, and the salary established on a staff member’s promotion”. The Applicant’s “views with respect to that distinction are neither reviewable nor relevant to these proceedings” as the “Dispute Tribunal is not a constitutional court and does not have the jurisdiction to review the legality of the Staff Regulations and Rules”.

The meaning of “net base salary” in staff rule 3.4(b)

13. The Appeals Tribunal has consistently held that “first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm” (see the Appeals Tribunal in *Scott* 2012-UNAT-225, as later affirmed in, among other judgments, *De Aguirre* 2016-UNAT-705, *Timothy* 2018-UNAT-847, and *Ozturk* 2018-UNAT-892). This principle is also known as “the plain meaning rule”.

14. In plain English, the term “net base salary”, however, does not have any meaning on its own, and the Tribunal will therefore instead look for an authoritative definition. When reviewing the statutory framework governing the Applicant’s employment contract, the Tribunal, however, notes that no legal definition of “net base salary” is provided anywhere. Also, the term, “net base salary”, is nowhere used in the Applicant’s contract, which under the heading, “Salary and Allowances”, instead refers to: “[p]ensionable remuneration”, “[g]ross base salary”, “[n]et salary after deduction of Staff Assessment”, and “[p]ost adjustment”.

15. Throughout the Respondent’s submissions, instead of “net base salary”, he refers to the term “net [remuneration]” by which it appears that he means the actual amount that the Applicant is paid as salary at the end of each month. No basis, however, exists anywhere that indicates that “net [remuneration]” equals “net base salary”. In fact, the Respondent has not even made any reference to where “net [remuneration]” is defined in the statutory framework or in the employment contract.

16. In the lack of any proper definition of the term “net base salary”, the Tribunal is therefore left to give it a meaning on the basis of its context and a teleological interpretation (in line herewith, see, for instance, *Collins* 2020-UNAT-1021, para. 43).

17. In this regard, when closely perusing the Staff Regulations and Rules, the Tribunal notes that the term, “net base salary”, is also used in various other places than staff rule 3.4(b), namely where certain benefits and entitlements are calculated on the basis of (emphasis added) “net base salary”, it is always mentioned “*plus* post adjustment” (see staff regulations 3.4 and 3.5, and staff rules 3.6(b)(i) and (ii), 9.9(a)(i)

and (ii), and 13.11(a)). This clearly indicates that according to the Staff Regulations and Rules, post adjustment is not to be calculated as part of the net base salary but is instead a separate and distinctive amount.

18. In line herewith, in the offer of employment, “post adjustment” is listed separately from the “gross base salary” and the “net salary after deduction of Staff Assessment”, thereby indicating that it is not included in any of these “base” or “net” salary amounts.

19. This logic also follows from the definition of the purpose of the “post adjustment” in staff rule 3.7(a), where its objective is stated as “to ensure equity in purchasing power of staff members across duty stations”. This perspective is reiterated in Annex 1 to the Staff Regulation, which in para. 9 provides that:

... In order to preserve equivalent standards of living at different offices, the Secretary-General may adjust the basic salaries ... by the application of non-pensionable post adjustments based on relative costs of living, standards of living and related factors at the office concerned as compared to New York. Such post adjustments shall not be subject to staff assessment.

20. Similarly, the Appeals Tribunal held in *Kasyanov*, to which the Respondent also refers, that post adjustment is “not intended as a profit for a staff member but as a means of maintaining the same level of income in spite of the different costs of living at different duty stations of the Organization” and “does not accrue unless the staff member effectively lives at the duty station” (para. 27).

21. The base salary, as opposed to the post adjustment payment, is the same across all duty stations for all staff members at the same level and step and “is used to calculate the amounts of post adjustment/cost-of-living multiplier” and “certain separation payments” according to the International Civil Service Commission’s (“ICSC”) booklet, *United Nations Common System of Salaries, Allowances and Benefits* (United Nations, February 2021), p. 1 (para. 3)). Here, ICSC also refers to “net base” as “the floor salary” and states that this “represents the minimum, or floor remuneration payable i.e., no deductions are made from it”.

22. The Dispute Tribunal in *Valentine* UNDT/2018/050 (para. 9) reached a similar conclusion as it held that “net base salary ... refers to gross salary minus staff assessment [and] does not include a post adjustment component”. Unlike what is pleaded by the Respondent, the fact that *Valentine* concerned compensation for harm pursuant to art. 10.5(b) of the United Nations Dispute Tribunal Statute, and not promotion as in the present case, makes no difference whatsoever—the term must unquestionably be understood and applied uniformly in all relevant situations related to the employment contract.

23. Also, the Respondent’s submission regarding the non-applicability of the definition of “net base salary” in *Valentine* because it refers to *Lloret Alcaniz et al.* UNDT/2017/097, which was overturned by the Appeals Tribunal in *Lloret Alcaniz et al.* 2018-UNAT-840, is irrelevant. The case before the Appeals Tribunal did not address how the Dispute Tribunal had defined “net base salary” in the first instance case, and if anything, the Appeals Tribunal actually distinguished between “net base salary *and* post adjustment” in para. 9, last sentence (emphasis added). In effect, the Appeals Tribunal therefore did not overturn the Dispute Tribunal’s definition of “net base salary” in *Lloret Alcaniz et al.*, which provides that (para. 101),

... It is noted that the Applicants’ letters of appointment refer to the “net salary” as being the gross salary minus staff assessment. This is in line with the terminology used on the salary scale, which is an annex to the Staff Regulations and Rules. The expression “net base salary” is more generally used in the Staff Regulations and Rules, notably for the calculation of the dependency and transitional allowances. It is understood, however, that the two expressions bear the same meaning. The Tribunal will therefore use the terminology commonly used in the current edition of the Staff Regulations and Rules, and refer to “net base salary” as being the gross salary minus staff assessment.

24. Similarly, in *Kasyanov*, the Appeals Tribunal decided that the awarded compensation amount should be calculated on the basis of the net base salary rather than a lumpsum, because the lumpsum was “based on the difference in post adjustment” between two duty stations. In consequence, the Appeals Tribunal therefore also held that the post adjustment should not form basis of the net base salary.

25. Accordingly, in light of the purpose of the post adjustment, the Tribunal accepts the Applicant's argument that her net base salary should be calculated without taking into account post adjustment, because if she were to relocate to a duty station with a lower post adjustment than where she is now (New York, where post adjustment is relatively high due to expensive living conditions) she would risk earning less than she did at the G-6 level, step 11.

26. Logically, this must also be the reason why staff rule 3.4(b) only refers to "net base salary" and does not state "plus post adjustment" as in the other staff rules referred to above—a G-level staff member would otherwise be financially discouraged from receiving a promotion to the P-level at a duty station with a lower post adjustment.

27. This notion was also confirmed by the former United Nations Administrative Tribunal in *Garnett* in which it held that "the obvious purpose of Staff Rule 103.9 (i) [a long abolished provision, which concerned the same situation as that in current staff rule 3.4(b)] is to ensure that a staff member shall not suffer financially by reason of a promotion". That the former United Nations Administrative Tribunal in *Garnett*, nevertheless, held that when deciding the step for a G-level staff member who is promoted to the P-level, the calculation should also take into account post adjustment, is possibly explained by the different structure or language of former staff rule 103.9 as compared to the current staff rule 3.4(b). In any event, a judgment of the former United Nations Administrative Tribunal is only of persuasive value to this Tribunal (see *Hamda* 2010-UNAT-022, *Leal* 2013-UNAT-337, *Zeid* 2014-UNAT-401, and *Igbinedion* 2014-UNAT-410).

28. Finally, the Tribunal finds that *Ihekwaba* UNDT/2010/043, paras. 15 to 17 (confirmed in 2010-UNAT-083), to which the Respondent also makes reference, is not relevant to the present case. In *Ihekwaba*, the Dispute Tribunal only addressed the issue of the meaning of "gross" income in relation to provisional staff rule 3.4 (the predecessor to staff rule 3.4(b)), but offered no definition of "net base salary" and whether post adjustment should be taken into account. *Ihekwaba* is, anyhow, also only of persuasive value to this Tribunal, because solely the judgments of the Appeals

Tribunal are binding on this Tribunal under the doctrine of *stare decisis* (see, for instance, *Igbinedion*).

29. Accordingly, in light of the above, the Tribunal finds that it was unlawful for HQCSS to take into account post adjustment when deciding the Applicant's step upon her promotion from G-6 step 11 to the P-2 level, because "net base salary" is correctly determined as "gross base salary", as per the offer of appointment, minus staff assessment.

Remedies

30. As relevant to the present case, the Applicant requests that "[t]he calculation of the Applicant's step should be adjusted in accordance with the Staff Rules, with retroactive effect".

31. Under art. 10.5(a), the Tribunal therefore grants specific performance to the Applicant's right to have her step correctly determined in accordance with meaning of "net base salary" as determined by the Tribunal in the present Judgment.

Observation

32. To allow staff members and the Administration better guidance and avoid unnecessary dispute and even litigation, the Tribunal finds that it would be useful if easily understandable and consistent statutory definitions were made of all the different salary terms used throughout the legal framework of the Organization.

Conclusion

33. The application is granted.

(Signed)

Judge Joelle Adda

Dated this 26th day of February 2021

Entered in the Register on this 26th day of February 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York