
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/100

Judgment No.: UNDT/2017/028

Date: 26 April 2017

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

FITSUM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant
Nicole Washienko, OSLA

Counsel for the Respondent:
Sandra Baffoe-Bonnie, OES/ECA
Amboko Wameyo, OES/ECA

Introduction

1. The Applicant serves as a Human Resources Officer at the United Nations Economic Commission for Africa (ECA) at the NOC-5 level. On 28 October 2014, she filed an application contesting a decision dated 16 April 2014 not to pay her a Special Post Allowance (SPA) for the period 1 December 2009 to 10 May 2011.

2. The Respondent filed a reply to the application on 1 December 2014.

3. Vide Order No. 241 (NBI/2015) dated 22 July 2015, the proceedings in the case were suspended until 31 August 2015 as the parties sought to resolve the dispute through informal means.

4. On 31 August 2015, the parties filed a joint motion informing the Tribunal that they had been unable to arrive at an amicable solution to the dispute and requested the Tribunal to reopen proceedings.

5. The Tribunal heard the case from 12 to 13 July 2016.

6. The Tribunal having carefully reviewed all of the parties' submissions considers it necessary to make a determination on the issue of receivability.

Facts

7. The Applicant joined ECA in 1997 as a Human Resources Assistant, at the G-3 level. She was promoted several times and became a Senior Human Resources Assistant at the G-7 level in 2008. She is currently a Human Resources Officer on a National Officer post in the Human Resources Services Section (HRSS).

8. On 10 May 2009, Ms. Arthi Gounder, who was then a Human Resources Officer in HRSS at ECA, went on maternity leave/annual leave. During an HRSS meeting that took place prior to Ms. Gounder's departure, the Applicant was asked by Ms. Susan Mokonyana, then-Chief, HRSS, to perform all of the duties of a human

resources officer in HRSS. These duties, which commenced on 11 May 2009, included *inter alia*, acting as team leader within HRSS and exercising certifying

15. On 16 April 2014, the Applicant filed a management evaluation request contesting the Administration's decision not to grant her SPA for the period of 1 December 2009 to 10 May 2011.

16. On 30 July 2014, the Applicant received the management evaluation, upholding the Administration's decision.

17. The Applicant's case is not receivable.

a. The Applicant is claiming SPA for the period 1 December 2009 to 10 May 2011. She made this request for the first time, on 5 September 2011, more than 20 months after the date when she ought to have requested for SPA as per the provision of staff rule 3.17(ii). The Applicant testified that she was aware that the payment of SPA to her had been stopped upon the return of Ms. Gounder, therefore she had as from 1 December 2009 to 1 December 2010 as the appropriate time to file her request for SPA but she did not.

b. The Applicant testified with reference to her extended and exemplary record and experience in Human Resources and that part of her work was to review and advice on the granting of entitlements including SPA and if the requests were in line with the regulations and rules. Therefore, with this experience, the Applicant ought to have known that a request for any retroactivity of payments as is in her case, had to comply with staff rule 3.17(ii) but her request was filed nine months late.

c. In her application, the Applicant argues that section 7.3 of ST/AI/1999/17 which provides that SPA can be extended for up to two years is an exception to staff rule 3.17. The Respondent submits that section 7.3 is by no means an exception to the requirement of staff rule 3.17 and cannot be considered as such, unless specifically stipulated. This is because in the order of hierarchy of norms the staff rules are hierarchically superior to the

administrative instructions and as such an exception to a superior norm cannot be legislated for in an inferior norm.

d. In making its determination on the issue of receivability and if the staff rule and the administrative instruction are in conflict, the Tribunal should consider the jurisprudence of the Appeals Tribunal in *Couquet* 2015-UNAT-574, which found that in case of conflict between the two, the staff rules would take precedence.

e. The Applicant in her testimony said that she made verbal requests for extension of the payment of her SPA to her FRO and the Chief HRSS and that they promised her that they were looking into it. However both Mr. Rao and Ms. Gounder testified that they did not have verbal discussions with the Applicant regarding the payment of SPA. Additionally, even if this were so, the Applicant had to submit her written claim for retrospective payment of SPA within one year from the date she would have been entitled to it, i.e. between 1 December 2009 and 1 December 2010.

f. The Tribunal has held in *Mezoui* 2010-UNAT-043 and *Roman* 2013-UNAT-308 that there is the need to strictly enforce the various time limits in asserting one's rights. As an exception to time limits, a staff member has to prove that circumstances beyond her control led to the delay in requesting payment. However, the Applicant does not provide any evidence as to why she had delayed in making a request for retroactive payment of SPA. There is therefore no basis upon which the Applicant's claim should be considered receivable because it is time barred and no evidence has been availed by the Applicant demonstrating that she submitted her claim within one year following the date on which she would have been entitled to the initial payment as required by staff rule 3.17 (ii).

- g. The Applicant failed to pursue the procedures available to her for the

total period of up to two years, including the initial period, upon the supervisor's certification that the staff member continued to satisfactorily perform the full functions of the higher-level post.

b. Applying section 7.3 to the present case, the Applicant's SPA should be extended for a total period of two years, until 10 May 2011, since pursuant to her supervisor's requests, the Applicant continued to perform the full functions that she had been performing in Ms. Gounder's absence after the latter's return. The Applicant's supervisors confirmed that she continued to excel in performing these functions during this period.

c. The Applicant meets the requirements for an extension of her SPA by ECA and it is within ECA's discretion to grant this to the Applicant without reference to an SPA panel. Since there is no doubt that ECA benefitted from the Applicant's excellent performance of the higher-level functions, ECA should not be permitted to rely on staff rule 3.17(ii) to deny her this entitlement. Basic principles of good faith and fair dealing require ECA to extend her SPA.

d. Although the Applicant first made a written request for the extension of her SPA in September 2011, she did not receive a final response from the Administration until 16 April 2014, more than two and half years after her initial written request, and only after numerous follow-up queries by the Applicant and her counsel. Equity and fairness dictate that the Administration cannot deny her entitlement to the claim 189.41 8 Tm[(Applica)6(nt)-31(Lanm (nti)-hica)6(nt)

to ECA. Staff rule 3.17(ii) provides that staff members shall not be entitled to retroactive payments if they did not make a written claim for the payment within one year of the entitlement. Since the Applicant wrote to Mr. Rao on 5 September 2011 requesting an extension of her SPA, she should at least be entitled to SPA for the higher-level functions that she performed from 6 September 2010 to 31 May 2011, when she ceased performance of these functions to go on Special Leave without Pay.

Considerations

20. Staff rule 3.17(ii) provides as follows:

Retroactivity of payments

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

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

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

21. Sections 7.1 to 7.3 of ST/AI/1999/17 (Special post allowance) provide as follows:

Duration and extension of SPAs

7.1 SPAs shall be granted for a specific period determined in accordance with the provisions of the present section.

SPA for assignment to a temporarily vacant post

7.2 When an SPA is granted to a higher-level post which is temporarily vacant, it may be granted for an initial period of up to one year.

Judgment

29. The Applicant failed to comply with staff rule 3.17(ii) by failing to make a claim seeking retroactive payment of SPA in a timely manner. The application is refused as not receivable. Further the Applicant has not given evidence to show that she continued to perform higher level functions even after her supervisor some of whose functions she had taken on returned from leave.

(Signed)

Judge Nkemdilim Izuako

Dated this 26th day of April 2017

Entered in the Register on this 26th day of April 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi