



Case No.: UNDT/NY/2011/005

Order No.: 29 (NY/2011)

Date: 1 February 2011

limited to service with the ICSC. Since 2004 the Applicant has been on a series of fixed-term appointments at the P-2 level.

4. The Applicant's most recent letter of appointment was dated 3 November 2009 and was signed by her/him/the Executive Secretary of the ICSC for the Assistant Secretary-General of the Office of Human Resources Management ("OHRM"), on behalf of the Secretary-General. This letter of appointment stated, *inter alia* (emphasis in original):

You are hereby offered **FIXED-TERM APPOINTMENT** in the Secretariat of the United Nations, accordance with the terms and conditions specified below, and subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may be made from time to time to such Staff Regulations and such Staff Rules. ...

1. Assignment

Functional Title: Administrative Officer

Department/Office/Mission: 15icsc oexsec03

Category: Professional

Level: P-2/12

...

Effective Date of Appointment 1 January 2010

...

3. Tenure of Appointment

This appointment is for a fixed-term of 2 years from the effective date

5. Starting 1 January 2004 the Applicant has been receiving SPA to the P-3 level. For the period of 1 January 2004 to 31 December 2007 the SPA was granted by OHRM pursuant to requests from the ICSC. For the period of 1 January 2008 to 31 December 2009, it was granted by the SOC. For the period of 1 January to 31 December 2010, the decision to grant SPA was again made by OHRM. The Applicant submitted that this decision was made “under two-year delegation of authority back to OHRM (first of two years)”. With respect to this most recent decision, the Tribunal was provided with a copy of an email, dated 10 November 2009, from an OHRM Human Resources Officer to the Executive Secretary of the ICSC. This email was sent in response to the Executive Secretary’s request to OHRM, dated 3 November 2009—the same date the Applicant’s letter of appointment was signed—to extend Applicant’s SPA. This email stated:

Reference is made to your memorandum dated 3 November 2009 to [OHRM] on the above-mentioned subject.

Given the uniqueness of ICSC, and since there are no other staff members who can perform these functions in ICSC, OHRM agrees to your request to extend the SPA of Ms. Jaen through 31 December 2010.

Kindly issue the relevant personnel action.

6. In mid-November 2010 the Applicant had a conversation with the Executive Secretary of the ICSC about her SPA. The Applicant testified at the hearing that during that conversation she was told by the Executive Secretary that the prior decisions to grant her SPA were “illegal” and that it “undermined the General Assembly”. According to the Applicant, she asked the Executive Secretary to inform her of the final decision concerning her SPA in writing. However, despite several follow-up requests, she received no further information, let alone a written response. The Applicant further testified that, around the time of the events in question, one of the ICSC senior managers informed her that he had had a conversation with the Vice-Chairman of the ICSC about her SPA and that it looked promising”. This testimony was not contradicted by any oral or written evidence.

7. On 7 January 2011 the Applicant received an email from an official in the OPPBA Accounts Division, sent in response to her email enquiry of the same date. The email sent to the Applicant stated:

After checking the system, yes indeed the SPA to the P-3 expired on 31 December 2010, therefore for the month of January 2011 you will be paid at the original level which is P-2-12 unless the SPA is extended and for this to happen this month the PA [personnel action] should be done and approved before the cut-off date which is on Monday 17 January 2011.

8. On 7 January 2011 the Applicant requested management evaluation of the contested decision and, on 13 January 2011, filed her application for suspension of action with the Dispute Tribunal.

Applicable law

9. With respect to the Respondent's submissions concerning receivability of the present application, the applicable law is set out below.

10. The Statute of the ICSC, adopted by the General Assembly on 18 December 1975, states:

Article 6

1. The Commission shall be responsible as a body to the General Assembly. Its members shall perform their functions in full independence and with impartiality; they shall not seek or receive instructions from any Government or from any secretariat or staff association of an organization in the United Nations common system.

...

Article 8

1. The Chairman shall direct the work of the Commission and its staff.

2. If the Chairman is unable to act, the Vice-Chairman shall act as Chairman.

...

Article 20

1. The Commission shall have ~~as~~ ^{as} provided in the budget approved by the General Assembly.
2. The staff, selected in accordance ~~with~~ ^{with} the provisions of Article 101, paragraph 3, of the Charter ~~of~~ ^{of} the United Nations, shall be appointed by the Secretary-General ~~after~~ ^{after} consultation with the Chairman of the Commission and, ~~regards~~ ^{regards} senior staff, with the Administrative Committee on Co-ordination. All staff shall be appointed after appropriate selection ~~procedures~~ ^{procedures}. In carrying out their duties, they shall be ~~responsible~~ ^{responsible} to the ~~Chairman~~ ^{Chairman} and shall be removable only after consultation with him or her.
3. Subject to paragraph 2 above ~~the~~ ^{the} staff of the Commission shall be regarded for administrative ~~purposes~~ ^{purposes} as officials of the United Nations, which shall provide the necessary administrative facilities for them.

...

Article 21

1. The Secretary-General shall provide such office and conference facilities ~~as~~ ^{as} the Commission may require.
2. The budget of the Commission shall be included in the regular budget of the United Nations. The budget estimates shall be established by the Secretary-General after consultation with the Administrative Committee on Co-~~ordina~~ ^{ordina}tion, on the basis of proposals by the Commission. ...

11. Annex II to ST/AI/234/Rev.1 (Administration of the ~~staff~~ ^{staff} regulations and staff rules) states *inter alia*:

Matters within the authority of the Assistant Secretary-General for Human Resources Management

Rule 103.11(b) Granting of special ~~post~~ ^{post} allowance ... including special post allowance to the D-2 level.

12. Section 6 of ST/AI/1999/1 (Delegation of

13. Article 2 of the Statute of the Dispute Tribunal states:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

2. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

...

14. Article 3 of the Statute of the Dispute Tribunal states:

1. An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

...

2. A request for a suspension of action under article 2, paragraph 2, of the present statute may be filed by an individual, as provided for in paragraph 1 of the present article.

Applicant's submissions

15. The Applicant's principal contentions, contained in her written and oral submissions, may be summarised as follows:

a. The implied decision not to continue the payment of the SPA appears *prima facie* to be unlawful. The Applicant has been in receipt of the SPA for the last seven years, her contractual situation has not changed, and she continues to perform higher level functions. None of the bases for the discontinuance of SPA, articulated in sec. 8.1 of ST/AI/1999/17 (Special post allowance), apply to her case. The contested decision is also contrary to the principle of equal pay for equal work.

a. The Applicant's case is of particular urgency. The Applicant was informed on 7 January 2011 that the contested decision would go into effect on 17 January 2011 at the latest. She filed a timeous request for management evaluation and a timeous application with the Dispute Tribunal.

b. The implementation of the contested decision would cause the Applicant irreparable damage. She would suffer a pay cut of approximately USD1,500 a month and would not be able to meet her financial obligations, including her social security taxes and mortgage. There is a real possibility that the Applicant would default on her

ICSC from taking instructions from an organisation participating in the common system. The Respondent provided the Tribunal with a copy of a document, approved by the ICSC in August 1989, entitled "Personnel Arrangements for ICSC Secretariat Staff, which explained the procedures for the selection and appointment of the ICSC staff. The Respondent did not make and did not seek to make any written submissions with respect to whether the Applicant met the requirements *prima facie* of unlawfulness, urgency, and irreparable damage.

17. At the hearing, however, Counsel for the Respondent made oral submissions regarding both the receivability of the present application and the Applicant's substantive claims. These oral submissions may be summarised as follows:

- a. The application is not receivable because there is no contestable administrative decision. Although the Applicant may raise an appeal against a decision by the Secretary-General not to grant the SPA, the present case concerns a "non-recommendation", the absence of a recommendation, by the ICSC to the Secretary-General to grant the SPA. Whether or not the ICSC will make such recommendation is outside the Respondent's control. Thus, the decision that the Applicant seeks to contest is not yet a final administrative decision.
- b. The Applicant can request the Secretary-General to grant her an exception to the Staff Rules. As there was no request for an exception, there has been no decision to either grant or deny it.
- c. The Applicant has not met the conditions for the granting of a suspension of action. The contested decision is *prima facie* unlawful as there is no vacant P-3 post against which an SPA can be granted. The urgency requirement is also not satisfied in the present case because the Applicant should have been aware from *Interim* UNDT/2010/165 that she cannot get an SPA to the P-3 level. Further, the Applicant had discussions concerning this issue with the ICSC in late 2010. The requirement of irreparable harm is also

Case No. UNDT/NY/2011/005

Order No. 29 (NY/2011)

chooses to make one) for an exception. For the possibility of the Applicant requesting an exception does not render the decision not receivable before the Tribunal.

23. Accordingly, having found the application receivable, the Tribunal proceeded to consider whether the contested administrative decision appeared *prima facie* to be unlawful, whether the application was of particular urgency, and whether its implementation would cause the Applicant irreparable damage. The Tribunal can suspend the contested decision only if all of these three requirements have been met. Under art. 2.2 of the Statute, the Tribunal may order suspension of action during the pendency of the management evaluation only (see *Corcoran* UNDT/2009/071).

Prima facie unlawfulness

24. Given the interim nature of the relief the Tribunal may grant when ordering a suspension of action, an applicant must demonstrate that the decision appears *prima facie* to be unlawful. For the *prima facie* unlawfulness test to be satisfied, it is enough for an applicant to present a fairly arguable case that the contested decision was influenced by some improper consideration, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith (see, e.g. *Buckley* UNDT/2009/064, *Corcoran*, *Utkina* UNDT/2009/096).

25. Counsel for the Respondent submitted at the hearing that the contested decision was lawful because there was no vacant P-3 level post to justify the payment of the SPA. He further submitted that the contested decision resulted from UNDT/2010/165, which was rendered on 17 September 2010 in relation to a separate case involving the same parties—Case No. UNDT/NY/2009/098. In that case the Applicant contested the decision not to assign the P-2 post encumbered by her to the P-3 level, and the Tribunal ruled in favour of the Respondent.

26. With respect to the Respondent's submission concerning *Jaen* UNDT/2010/165, the Tribunal notes that that judgment concerned only the issue of reclassification of the P-2 post encumbered by the Applicant and did not address her SPA, which is governed by separate legal instruments and is a separate legal issue that was not at all the subject matter of Case No. UNDT/NY/2009/098.

27. From the submissions of the parties and the evidence before the Tribunal, it appears that the implementation of the contested decision would result in the Applicant continuing to perform the same P-3 level functions she has been performing since 1 January 2004, but without the SPA, contrary to the principle of equal pay for work of equal value.

28. No documentary or oral evidence has been provided by the Respondent explaining how the decision to discontinue the Applicant's SPA was reached, the reasons therefor, or the procedures followed. It is unclear who was involved in the decision-making process and whether these individuals acted pursuant to a properly delegated authority and in a proper manner. No evidence has been provided explaining how the Applicant's current situation is different from that of the last seven years, and why seemingly identical situations are treated differently. It is also unclear whether, since 1 January 2004, SPA was paid against a vacant P-3 level post or whether it was somehow processed in the absence of such post. If it was paid in the absence of a vacant post for such an extensive period of time, then a number of additional questions arise, including with respect to any prior exceptions to the Staff Rules granted to the Applicant and any reasonable expectation that may have been created as a result of the Organisation's long-standing practice with respect to the Applicant's actual terms of employment, particularly considering the timing of her letters of appointment and the decision to grant her SPA. The Respondent's submissions shed no light on any of these issues.

29. In light of the documentary and oral evidence provided by the Applicant, and in view of the issues identified above, the Tribunal found that the contested decision appeared *prima facie* to be unlawful.

Urgency

30. The Applicant was notified on 7 January 2011 that the contested decision would go into effect unless action was taken by 5:00 p.m. on 17 January 2011. She filed her request for management evaluation on the same day, and submitted her application for suspension of action on 16 January 2011, two working days before 17 January 2011. Her application was therefore clearly of an urgent nature, which explains why the Tribunal heard the application and issued Order No. 13 (NY/2011) on the same day, with a reasoned order to follow later. The Applicant acted diligently in pursuing this matter, and the urgent nature of her application was due to the actions of the ICSC and OHRM, who failed to respond to her written correspondence and failed to provide her with relevant information in a timely manner. For these reasons, the requirement of particular urgency was found to be satisfied.

Irreparable damage

31. The requirement of irreparable damage has been discussed in several rulings of the Tribunal. It is generally accepted that mere financial loss is not enough to satisfy this requirement (*Fradin de Bellabre* UNDT/2009/004, *Utkina*). The Tribunal has found in a number of cases that harm to professional reputation and career prospects, or harm to health, or sudden loss of employment may constitute irreparable damage (see, e.g. *Corcoran, Calvani* UNDT/2009/092).

32. In each case, the Tribunal has to look at the particular factual circumstances. In many instances—but not all—the Tribunal will be able to compensate the harm to professional reputation and career prospects. It should an applicant pursue a substantive appeal and should the Tribunal decide in his or her favor. Indeed, art. 10.5 of the Tribunal's Statute allows compensation for non-pecuniary loss, and such compensation has been awarded by both the Dispute Tribunal and the Appeals Tribunal. However, the Dispute Tribunal's ability to remedy a loss is not absolute. There are certain types of damages of a non-pecuniary nature that fall under the category of irreparable. In my view, such damages may stem from breach of a right

that is so valuable that it cannot be expressed in mere financial terms. Fundamental human rights, for instance, fall under this category—in large part, their true value for individuals is in being able to actually exercise them, and not simply to receive subsequent compensation for their breach. Such rights may stem, for instance, from the principle of equal pay for work of equal value—referred to in art. 23.2 of the Universal Declaration of Human Rights and art. 7 of the International Covenant on

such a nature as to justify awarding of irreparable damage (~~see~~ *Corcoran, Calvani*).

Conclusion

38. For the reasons articulated above, the Tribunal granted, by