UNITED NATIONS DISPUTE TRIBUNAL

Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

CHEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Susan Maddox, ALS-OHRM, UN Secretariat

Introduction

1. In 2006, the applicant requested that her post be reclassified on the ground that a 19 January 1999 decision to reclassify the post she encumbered was made but not implemented. In October 2008 she was advised that the Department of General Assembly and Conference Management (DGACM) was not in a position to grant her request. An administrative review upheld that decision. The applicant appealed to the Joint Appeals Board (JAB). That appeal was transferred to the United Nations Dispute Tribunal for decision. Following a hearing of the case the parties agreed to take the issue to mediation but that was unsuccessful. She now seeks a review of the decision made on 25 September 2008 not to reclassify her post from the P-3 to the P-4 level. She is due to retire in 2010.

2. The Tribunal is asked to:

a. implement the decision of 19 January 1999 to reclassify the applicant's position as Chief of

of a Special Post Allowance (SPA) in 1999 was refused, she accepts she did not seek an administrative review of that decision. That claim is therefore not receivable as a substantive claim in this appeal, however the facts relating to those two matters are relevant as background to her claim.

English, French and Arabic Chiefs, were available and encumbered. It was noted by DGACM that upon availability of resources three more posts may be made available.

8. In September 1999, after repeated requests, the applicant was promoted to the P-3 level. In November 1999, the Chief of the Spanish Unit requested an SPA to the P-4 level for that position. The report from the Executive Officer of DGACM supported this application. He said that the Spanish Chief had, since 1998, "assumed the functions of the job description 007195, classified at the P-4 level serving as officer in charge of the Unit". Although not expressed as such, it is a reasonable inference that the Executive Officer was relying on the classification of job description 007195 that had been undertaken in 1999.

9. The posts of Chinese and Russian Chiefs of Unit did not receive similar treatment. In respect of the Chinese position, the reasons given included that there was no available P-4 post for the Chinese Chief of Unit so the applicant's job description could not be reclassified to P-4. The applicant's request for an SPA was refused.

10. There was no evidence that there were any differences between the responsibilities of the Chiefs of the six units. Counsel for the respondent advised that there had never been a comparison of the work done by each of them but it was not seriously disputed that the functional profiles and responsibilities of the Chiefs of all language units in CPPS were and remain the same.

11. The applicant's performance evaluations for more than ten years show that she performed with high competency as both Chief of Unit and copy preparer. She consistently received the grade of "frequently exceeds performance expectations". Her 2008 assessment in the electronic performance appraisal system (e-PAS) described her as "an inspiration as a model of a Chief of CPP Unit".

12. On 17 August 2006, the applicant made a formal request to the Chief of CPPS to have her post as Chief of the Chinese Unit reclassified to the P-4 level. In summary she made the following points:

a. Since taking up her position in 1996 her functional title was "copy preparer", a P-3 position, but her extra duties in managing the unit were never recognised.

b. She met the criteria for promotion to the P-4 level in every respect and her e-PAS demonstrated high competency.

c. The lower grade accorded to the Chinese Chief of Unit gave the impression that not all six official languages are treated equally, that Chinese is an inferior language in CPPS and that the Chief for Chinese language is inferior to other language Chiefs.

13. The Chief of CPPS fulsomely supported the applicant's application, describing the situation as "unfortunate". She said that "tolerating the current situation as it is would be a form of discrimination". She also pointed out that the applicant had to face the humiliation of having a subordinate functioning at the same P-3 level as her.

14. In April 2007 the Under-Secretary

b. Since 1999 the P-3 level of the applicant's post did not correspond with the work she was performing or with that of the other Chiefs of Unit who were doing the same work.

c. Senior management of DGACM recognised that this difference of treatment resulted in inappropriate inequalities in the treatment of different languages and in the application of the concept of equal pay for equal work. Although this was brought to the attention of the Controller, the decision was made not to rectify those inequalities.

Applicant's submissions

19. The applicant submitted that the 1999 classification covered the job description of all Chiefs of Unit within CPPS and was not confined to the three posts for which resources were then available. Therefore, the post of Chief of the Chinese CPPS Unit was classified at the P-4 level at that time.

20. In the alternative, the applicant argued that if, as the respondent submitted, the original classification in 1999 had been limited to three posts then the Administration willfully and knowingly violated the fundamental principle of equal work for equal pay and the prohibition on discrimination by confining the classification of Chief of Unit within CPPS to three out of six posts since 1999 even though all the posts had identical job descriptions. She pointed out that she had performed functions exceeding her original job description without associated remuneration for a period of almost fourteen years.

Respondent's submissions

21. In reliance on a statement from the Compensation Officer of the Conditions of Service Section of the Office of Human Resources Management (OHRM), counsel for the respondent submitted that post classification is not an administrative decision as it relates to posts not positions and that the applicant's rights had not been violated.

(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;

(c) Prior to the issuance of a vacancy announcement, when a substantive change in the functions of a post has occurred since the previous classification;

(d) When required by a classification review or audit of a post or related posts, as determined by the classification or human resources officer concerned.

classification of a post is subject to scrutiny to determine whether the classification process was carried out in accordance with the UN Regulations and Rules.

31. Although there is a distinction to be made between the classification of a post which depends on the nature of the duties and responsibilities assigned to it and promotion which relies on the individual characteristics, experience and suitability of an individual staff member for a particular post, ST/AI/1998/9 recognises that there is an interface between these two concepts. Where individuals are directly affected by a classification decision they are entitled to the opportunity to have the decision reviewed.

32. I conclude on the first issue that the administrative decision made on 6 October 2008 was an administrative decision which is capable of being reviewed.

Was there a breach of the terms of employment or the applicant's contract of employment?

33. The classification system is promulgated by the Staff Regulations and Rules and it is part of the conditions of employment for all staff members as the rules are incorporated by reference into all UN employment contracts. In reliance on staff regulation 2.1, the UN Administrative Tribunal has consistently held that classification of a post is to be done according to its job description.[1] I concur with that opinion.

34. The obligation of the Secretary-General under staff regulation 2.1 is first to consider the nature of the duties and responsibilities required for the post when deciding whether to classify a position. Thus a post is either worthy of classification by virtue of its duties and responsibilities or not. Next, staff regulation 2.1 requires the Secretary-General to make adequate provision for the classification. The

[1] UNAT Judgment No. 1113 *Janssen* (2003) on failure to implement a classification for budgetary reasons resulting in violation of the applicants rights; UNAT Judgment No. 1217 *Sabet and Skeldon* (2003) on failure to carry classification to its conclusion in violation of the principles in reg 2.1; and

implication of staff regulation 2.1 is that the budget should usually support the case for reclassification, not thwart it.

35. In the present case, the P-4 status had been acknowledged since 1999 for job description 007195 which aligned the job descriptions of the Chiefs of Unit in CPPS. The decision in 2000 to grant an SPA to the Chief of the Spanish Unit relied on this status. Indeed the Executive Officer said it had been classified at the P-4 level. In spite of this, the Administration did not fully implement the classification which properly attached to all of the Chief of Unit positions, leaving the classification of the Russian and Chinese Chiefs' posts unchanged.

36. The decision not to grant the applicant's 2006 request for the administration to implement the P-4 status was not a decision as to whether the job was capable of being classified at P-4. That point was not seriously questioned by the USG/DGACM or the Controller. Rather the decision was that the budget could not accommodate the encumbering of the position to the status already conferred on it.

37. The question then is whether in terms of regulation 2.1 "appropriate provision" had been made for the classification of the post. Appropriateness may be judged by factors such as whether a matter is done in accordance with the relevant rules and regulations and in light of the principles which underpin those legislative arrangements.

38. Counsel for the applicant submitted that the failure of the Administration to implement the P-4 classification violated the fundamental principle of equal pay for equal work and that such a violation of this right is not justified by budgetary arguments.

39. This principle, articulated in the Universal Declaration of Human Rights, was

though the USG/DGACM did not agree that this was possible. This was not in accordance with regulation 2.1. Appropriate provision was not provided to prevent the breach of the equality in work principle.

47. The budgetary considerations effectively supplanted the proper considerations that should have been brought to bear on the applicant's application to have her post classification implemented at a P-4 level.

48. The principal consideration in the Administration's decision not to implement the reclassification of the Chinese Chief of Unit post was not that the nature of the duties and responsibilities did not justify the classification but that there was no budget. The reliance on budgetary restraints in the face of strong evidence that the classification was justified according to the mandatory considerations of the nature of the duties and responsibilities required by staff regulation 2.1 impugns the decision. The case for P-4 status has been clear since 1999.

49. The respondent submitted that DGACM had been torn between implementing a classification decision and the lack of an unencumbered post on one hand and the desirability for all official languages to be treated equally on the other. It was also submitted that DGACM had made reasonable efforts to provide a P-4 post for the Chinese Chief of Unit and had been completely supportive of the applicant. This amounts to a possible explanation for the breach of the terms of her employment, but does not excuse it.

50. I accept that the USG/DGACM did much to support the applicant however he was constrained by a budgetary decision made at a higher level and was reluctant to take any internal steps to rectify the situation.

51. Counsel for the respondent also submitted that the responsibility of an employer to act should be balanced by the right of the applicant to move. In her submission, the applicant did not have to stay in her job and if she were unhappy, she could have applied for jobs elsewhere. That submission must speak for itself. It does

not assist the respondent in any way and certainly does not excuse the respondent's failure to act according to the staff regulations.

52. I conclude that the decision was not in compliance with staff regulation 2.1 and therefore not in compliance with the applicant's terms of employment. The Secretary-General is obliged to make appropriate provision for classification. Such appropriate provision was not made in the case of the post of the Chinese Chief of Unit. The refusal to make a budgetary allocation overlooked the compelling case for P-4 classification and the consequence was a breach of staff regulation 2.1. As a result there was a breach of the principle of equal pay for work of equal value implied into the applicant's contract of employment. In turn this had direct and prolonged adverse consequences for the applicant whose right to equal treatment was violated.

What remedies are appropriate in the event of such a breach?

53. Counsel for the respondent submitted that under the rules of the Organization, since 2002, if the staff member's post had been reclassified at the P-4 level, she would have had to re-apply for the post. Therefore there was no guarantee even if her post had been reclassified that the applicant would have been appointed to it.

54. I do not accept that submission. The failure to apply the same job classification to the applicant's post as applied to posts with the same job description has deprived the applicant of her rightful opportunity to be considered for promotion. It is correct that there is no automatic promotion to an upgraded post but in this case the applicant had performed the functions of the position with distinction for many years. The Organization has had the advantage of her capabilities for all of that time while she performed a role at a lesser salary than her colleagues working under the same job description. Although not guaranteed, I find that she had a more than reasonable chance of being promoted to the newly classified position.

55. The applicant submitted that due to the failure to implement the P-4 classification she has lost the chance for promotion which would have been available

to her after five years at the P-4 level. The evidence also speaks of her frustration and disappointment at the inequality of treatment she had to endure for so long and her humiliation at having to manage staff who were at the same level as her. It is to the applicant's credit that in spite of these considerable disappointments she continued to work at a very high level as demonstrated by her performance evaluations.

56. Article 10.5 of its Statute empowers the Tribunal to rescind a contested administrative decision, set an amount of compensation or both. In this the applicant is entitled to compensation but as she is shortly due for retirement, rescission of the decision made to refuse her application is not appropriate. However it is to be expected that the Administration will take steps to ensure that the post will be reclassified without delay so that the present inequality is not perpetuated.

57. I hold that the date for assessing compensation for the difference between what she actually earned and what she would have earned at the P-4 level should be

P-3 and step and the P-4 level and step to which she was entitled from 17 August 2006 until her date of retirement, including the equivalent of the loss in pension rights.

61. For the non-material damage of frustration and humiliation compounded by the delays she was subjected to, the respondent is to pay to the applicant compensation equivalent to six months net base salary at the P-4 level and step to which she was entitled.

62. These payments are to be made within 60 days from the date of receipt of this judgment, after which interest on these sums shall accrue at the rate of eight per cent per annum until payment is effected.

(*Signed*)

Judge Coral Shaw

Dated this 22nd day of April 2010

Entered in the Register on this 22nd day of April 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York