



Administrative Tribunal

Distr. Limited
30 January 2004

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1149

Case No. 1252: MENDOZA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President; Mr. Omer Yousif Bireedo;

Whereas at the request of Danila S. Mendoza, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 October 2001 and once thereafter until 30 April 2002;

Whereas, on 11 April 2002, the Applicant filed an Application, requesting the Tribunal, *inter alia*, to:

“5. ... order the Respondent to pay her a special post allowance [(SPA)] for the period from 1 May 1996 through 31 December 1997, taking into account the first three months of her service as a higher level in accordance with staff rule 103.11. The Applicant also requests that the Tribunal order any other relief as it deems fit.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 19 August 2002 and twice thereafter until 18 January 2003;

Whereas the Respondent filed his Answer on 17 January 2003;

Whereas the Applicant filed Written Observations on 7 February 2003;

Whereas the facts in the case are as follows:

The Applicant joined the Organization as a Clerk at the G-2 level with the Department of Economic and Social Affairs (ESA) on a three-month fixed-term appointment, on 5 January 1970. She was granted a permanent appointment on 1 January 1972. In 1981, the Applicant was successful in the examination for promotion to the Professional category. She was promoted to the P-1 level on 1 March 1982, and was transferred to the Department of Public Information (DPI). Following promotions to the P-2 level and P-3 levels as a Television Producer, the Applicant was temporarily placed against a P-4 level post for the period from 1 May 1997 through 31 July 1997. On 1 January 1998, she was promoted to the P-4 level. She retired on 31 May 1998.

On 23 January 1996, the Applicant's supervisor, advised the Executive Officer, DPI, that during the forthcoming six weeks absence of the Executive Producer of "United Nations in Action/CNN World Report" (UN in Action/CNN World Report), the Applicant would be his replacement. She pointed out that the Applicant had performed these functions extremely competently on several occasions in the past; that, unfortunately, the Staff Regulations and Rules precluded the granting of a special post allowance (SPA) to staff members serving in positions for less than three months; and that the "total accumulated time that the Applicant had taken on this responsibility" exceeded three months.

On 2 May 1996, the Officer-in-Charge (OiC), Media Division, DPI, informed the Executive Office, DPI, that the Applicant had been requested to perform, on a temporary basis, the functions of Executive Producer of UN in Action/CNN World Report, effective today, 2 May 1996, until further notice.

The P-4 post of Executive Producer, Video Section, became vacant upon the promotion of the incumbent, on 1 May 1997. On 18 May 1997, the Office of Human Resources Management (OHRM) approved the Applicant's temporary assignment to the post, from 1 May to 31 July. Effective 1 January 1998, the Applicant was promoted to the P-4 post. On 3 February 1998, she wrote to the Executive Officer,

DPI, asking him to consider granting her an SPA for the period from May 1996 onwards when she began to “discharge the duties of the P-4 post” until the date of her promotion.

In his reply of 6 March 1998, the Executive Officer, DPI, advised the Applicant that he was unable to approve her request for an SPA for the period from 1 May 1996 through 31 December 1997. He recalled that the OiC, Media Division, when asking her to perform higher level functions, had not recommended her for an SPA or asked her to be placed against a higher level post. Therefore, it had been decided that neither she nor her other colleagues who had been temporarily assigned to higher level functions would be recommended for an SPA. He added that when the issue came up again in May 1997, she was put against the higher level post, with OHRM’s approval, on the understanding that the vacancy announcement was being circulated and that she was to be an applicant for the post, and that under the provisions of ST/AI/413 of 25 March 1996, and because of the limited nature of the assignment, no SPA would be granted.

On 3 April 1998, the Applicant wrote to the Secretary-General, requesting review of the decision to deny her an SPA.

On 11 June 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB issued its report on 18 December 2000. Its considerations and recommendation read, in part, as follows:

“Considerations

...

22. The Panel ... found that the Appellant had ... performed the work of Executive Producer without interruption from May 1996 to her retirement, the date of her promotion being the cut-off date for the purposes of this case. ... This finding is corroborated in ... the Appellant’s promotion file:

...

... The Panel ... relied on the letter of assignment conferring to the Appellant the full duties and responsibilities of the post of Executive Producer as of 2 May 1996, and of the corroborating language in her promotion file to find that she had indeed fulfilled those functions at a stretch until 1 January 1998, when she was promoted.

23. ... [T]he Panel felt that the present situation was indeed ‘exceptional’ because the Appellant had been assigned higher level functions for extended periods of time prior to the contested period, had performed them uncomplainingly and well and was only now asking for recognition of her efforts.

24. As to the Respondent's argument that the Appellant could not have received an SPA because her supervisor had not recommended it, the Panel finds that [Personnel Directive] PD/1/84 [of 28 September 1990] clearly provides that a staff member can, on his or her own, initiate the SPA process by requesting an SPA ...

25. The Panel therefore found that the supervisor's recommendation was not an essential prerequisite for granting an SPA to the Appellant. It also found that the Department erred when it decided in March 1998 that the Appellant could not now be considered for an SPA for her work at the higher level because *inter alia* there had been no contemporaneous recommendation.

26. Next, the Panel turned to the question of whether the Appellant needed to have been placed against the higher-level post to be eligible for an SPA. The Panel found that ... [the] Personnel Directive makes no mention of the need for a staff member to be administratively placed against ... a [higher level] post in order to be eligible for an SPA. ...

27. The Panel therefore found that eligibility for an SPA did not require the staff member to be placed against the post. ...

28. Last, the Panel considered the discretionary authority of the Secretary-General. ... The Panel found the Appellant's Department and OHRM denied her an SPA because it mistakenly assumed

- a) that the supervisor's recommendation (contemporaneous with the performance of higher-level functions) was a prerequisite; and
- b) that the placement of the Appellant *against* a higher-level post was a prerequisite.

The fact that the Department 'never contemplated' an SPA for the Appellant, far from supporting the Respondent's reasoning, was found by the Panel to be aggravating the flawed nature of the decision-making process.

29. In sum, the Panel found that the decision by DPI and OHRM not to grant the Appellant an SPA for the period 1 May 1996 to 31 December 1997 was invalidated by the above-named mistakes of fact and law [and] that this constituted a violation of her rights.

30. ... the Panel ... *unanimously recommends* that the Appellant be granted an SPA for the period 1 August 1996 to 31 December 1997. ..."

On 17 April 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General is not in agreement with the Board's position. Staff Rule 103.11 explicitly provides that the granting of an SPA is discretionary, rather than an entitlement as a matter of right, in stating that if the necessary conditions are present, a staff member 'may in exceptional cases', be granted an SPA. You have provided no evidence and the Board has made no finding of prejudice or violation of the Staff Rules by the refusal to grant the SPA in your case. In addition, contrary to the Board's view, the

supervisor's recommendation (which should not be confused with the issue of whether it was the supervisor or the staff member initiating the request for an SPA) *is* an essential prerequisite for granting an SPA, as is made clear in paragraph 6 of PD/1/84/Rev.1, which provides that the granting of an SPA 'requires the approval of the [Assistant Secretary-General, for Human resources Management], *on the recommendation of the department or office concerned*' (emphasis added). In this case, no such recommendation was ever made. Likewise, it *is* an essential prerequisite that there must be a vacant post at a higher level (...). In this case, the post in question became vacant only on 1 May 1997, so there was no question of an SPA for the period prior to that date.

In light of the above, the Secretary-General cannot accept the recommendation of the Board for the payment of an SPA ..."

On 11 April 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant served continuously for 19 months as Executive Producer from May 1996 to December 1997.
2. The granting of an SPA did not require that the Applicant be placed against a higher level post; it is sufficient that the Applicant was called upon to perform higher level functions.
3. In any event, when the Applicant requested an SPA, she had been placed against a higher level post.
4. The provisions of ST/AI/413 were not relevant to a consideration for the granting of an SPA. The discretionary decision not to grant an SPA was exercised in an arbitrary manner as relevant procedures were not followed and reasons external to the granting of a SPA were considered.
5. The Respondent erred in not upholding the unanimous recommendation of the JAB, namely that the Applicant be granted an SPA for the period 1 August 1996 to 31 December 1997.

Whereas the Respondent's principal contentions are:

1. The payment of an SPA is discretionary and is limited to "exceptional" cases.

2. The Applicant did not fulfill the mandatory criteria to be considered for payment of an SPA, as (1) there was no recommendation for payment of an SPA from the Applicant's Department, and (2) the Applicant was not assigned to the functions of a post for which budgetary conditions existed until 1 May 1997.

3. The decision not to grant the Applicant an SPA was made on the basis of staff rule 103.11 and PD/1/84/Rev.1 on SPA and not under the provisions of ST/AI/413.

The Tribunal, having deliberated from 28 October to 17 November 2003, now pronounces the following Judgement:

I. The procedures governing applications for and the granting of special post allowances relative to this case and the procedures for determining such applications together with the criteria to be considered thereon are dealt with by staff rule 103.11(a) and (b) and by PD/1/84/Rev.1.

Their provisions are as follows:

Staff Rule 103.11

"Special post allowance

(a) Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts.

(b) Without prejudice to the principle that promotion under staff rule 104.14 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level.

..."

PD/1/84/Rev 1

The most relevant portions thereof read as follows:

"3. Under Staff Rule 103.11 staff members are expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts. The rule also affirms that promotion under staff rule 104.14 shall be the normal means of recognizing increased responsibilities and demonstrated ability. It provides nevertheless that a staff member who is called upon to assume the full duties

and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may be granted, in exceptional cases, a non-pensionable SPA from the beginning of the fourth month of service at the higher level. The SPA is therefore a payment designed to provide an additional financial compensation for the temporary but prolonged assumption by a staff member of the functions of a higher level post.

...

6. The granting of an SPA requires the approval of the Assistant Secretary-General for Human Resources Management, on the recommendation of the department or office concerned. Where a staff member believes that he or she fulfils all the conditions for the granting of an SPA, the request may be initiated by the staff member through the executive office or administrative office of the department concerned. The executive or administrative office shall provide the appropriate comments and forward the request with its recommendation to OHRM for consideration. ...”

II. The Respondent contends that on a proper construction of the provisions of the Personnel Directive and in particular article 6 thereof, the Assistant Secretary-General, OHRM, cannot embark upon a consideration as to whether he should grant or withhold his approval for the payment of an SPA unless there has been a positive or favourable recommendation “from the office or department concerned” meaning a recommendation in favour of payment. In effect, he contends for a restrictive construction of the words “on the recommendation of the office or department concerned”. If this construction is to be given then it would follow:

- (a) That the department or office would always enjoy an effective veto in relation to an application for the granting of an SPA as the functions of the Assistant Secretary-General, OHRM, to grant or withhold approval would be rendered nugatory and he would be deprived of his function in the matter if he could only consider an application where the recommendation had been favourable; and,
- (b) That the department would effectively be bound to issue a favourable recommendation where ‘*the staff member considers that he or she fulfils all the conditions for the granting of SPA*’ and the request is initiated by the staff member through the executive or administrative office of the department concerned, for in such cases the executive or administrative officer is required to provide the appropriate comments and forward the request **with its recommendation** to OHRM for consideration.

The Tribunal is satisfied that what was envisaged was a two tiered application process which would require in the first instance that the staff member's office or department would firstly indicate its views and recommendations as to whether the SPA claimed should be approved and that thereafter the Assistant Secretary-General, OHRM, would consider the application including the office or departmental recommendation whether it be favourable or unfavourable and then determine whether to grant or to withhold approval for payment.

It cannot be that the department or office concerned was to be given an effective veto so that by withholding a favourable recommendation it could frustrate the second part of the process nor would it make sense that in instances where the staff member initiated the request through the executive or administrative officer that it would then be incumbent upon the executive or administrative officer to forward his comments and a **favourable recommendation**, so as to comply with the requirements of article 6 and to trigger the consideration of the Assistant Secretary-General, OHRM, of the claim which would result in his decision as to whether to grant or to withhold his approval.

The Tribunal is therefore satisfied that the construction contended for by the Respondent cannot be correct and that when the Personnel Directive speaks of "the recommendation of the office or department concerned" that what was intended was such recommendation as it considered appropriate, be it a recommendation in favour of the granting or a recommendation that the application should be denied.

III. In the instant case, the Applicant's department declined to forward the application to the Assistant Secretary-General, OHRM, for his consideration as it considered that it was not admissible or not receivable by him for consideration in the absence of a favourable recommendation from the office or department concerned and on other grounds. Those other grounds included the issue as to whether the Applicant had ever fulfilled the functions at the higher level for a continuous period in excess of three months. The Applicant had claimed that she had been assigned to and had fulfilled the full functions at the higher level continuously between 2 May 1996 and 31 December 1997, whereas this was contested by the Respondent who claimed that she had only fulfilled the functions intermittently during the period and that no stretch when she had fulfilled them had exceeded the requisite minimum period of three months. In the circumstances, the Applicant never had her claim considered on its merits by the Assistant-Secretary-General, OHRM, as was her right under the Staff

Rule and Personnel Directive in the light of the Tribunal's decision as to their meaning, as stated above. The Tribunal is likewise concerned with the relevance of appropriateness in relation to the other grounds which were advanced by the Administration when it determined to dismiss the said application without further consideration, rather than to forward it to the Assistant Secretary-General, OHRM, for his decision but it is now unnecessary for the Tribunal to determine those issues or to express any view thereon, as it has determined that she was wrongfully denied her right to have her Application considered by the Assistant Secretary-General, OHRM, in accordance with the provisions of the Staff Rule and Personnel Directive concerned.

The Applicant has asked the Tribunal, should it find that she was denied proper consideration of her claim, that the Tribunal should itself embark on the consideration thereof and to rule that she was entitled to the SPA as claimed. The Tribunal is satisfied that it would be wholly inappropriate to embark upon such a consideration nor would it have any function in adjudicating upon the merits or otherwise of the claim. Accordingly, the Applicant's request in this regard is denied.

IV. It may well be that the Applicant would not have persuaded the Assistant Secretary-General, OHRM, to approve of the granting of the SPA as claimed. It appears to the Tribunal that some of the arguments made by the Respondent against the payment of such an allowance may have merit. The Tribunal expresses no views one way or the other. It just remarks that for example the Applicant may have had difficulty establishing that the services rendered by her during the period in question constitute "an exceptional case" as required by the Staff Rule and Personnel Directive, more particularly when it appears that similar duties had been performed by the Applicant on many prior occasions and she had never applied for let alone been paid any SPA for those said periods. Likewise, the issue as to whether the Applicant had fulfilled the full functions at the higher level for the entirety of the period from 1 May 1996 to 31 December 1997, as was maintained by the Applicant or just for intermittent periods none of which exceeded three months should have been considered by the Assistant Secretary-General, OHRM, in the course of an application for his approval. Certainly, the ground found by the JAB to establish "exceptional circumstances" namely "that she carried out the duties uncomplainingly" and maybe with a smile on her face may be somewhat novel and might not properly be considered

as establishing “an exceptional case” as envisaged by the Personnel Directive. Here again the Tribunal expresses no view on this aspect.

In any event it is not for the Tribunal to decide on the merits or otherwise of the Applicant’s claim for the SPA. The case should have been properly considered by the office or department concerned in the first instance which should have determined the nature of the recommendation that it should issue and forward to the Assistant Secretary-General, OHRM, for his consideration under the second part of the process. The appropriate matters ought to have been properly considered by the Assistant Secretary-General, OHRM, who should have determined whether to grant or to withhold his approval.

V. In all of the circumstances the Tribunal limits its finding to one that the Respondent denied the Applicant a proper consideration of the said claim for SPA. It expresses no views as to its merits. By way of compensation to the Applicant for this wrong suffered by her the Tribunal awards to her the sum of \$1000. The question now remains as to what should be done so that her claim will now be given proper consideration. The Tribunal orders that it now be dealt with afresh starting with the preparation of a proper report on her claim by her department which should include its recommendation, be it in favour of the payment or against it. This should then be considered by the Assistant Secretary-General, OHRM, in accordance with the prescribed procedure. It however recognises that either party may consider such a step as lacking in an air of reality and that the attendant further delays added to the delays which have already occurred may be considered by either party to be unacceptable. Should either the Applicant or the Respondent prefer in the alternative an order that the matter be resolved by the payment of further compensation rather than by now embarking upon a proper consideration which would have real difficulties at this late remove, the Tribunal awards to the Applicant an additional \$500. This also constitutes a monetary payment in lieu of specific performance should the Respondent, in the interest of the Organization, determine to take no further action in the case.

VI. Accordingly, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of \$1000 for the wrong suffered by her, in denying the Applicant a proper consideration of her claim;

2. Orders the Respondent to reconsider the Applicant's request for the granting of an SPA, in accordance with the relevant provisions of PD/1/84/Rev.1, unless either party opt that in lieu of such consideration the Respondent should pay a further sum of \$500 to the Applicant; and,
3. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Kevin Haugh
Vice-President

Omer Yousif Bireedo
Member

New York, 17 November 2003

Maritza Struyvenberg
Executive Secretary