



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1355

Case No. 1432

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas, on 9 August 2005, a former staff member of the United Nations, filed an Application requesting the Tribunal, inter alia, to:

- “(a) Direct the Secretary-General to retroactively rectify the injustice made to the [Applicant] and grant him P-3, step XIV (rather than step X) as of 1 July 1998;
- (b) Direct the Secretary-General to pay salary difference retroactively at the rate of US\$ 536.50 per month (...) starting July 1998 over a period of 63 months;
- (c) Direct the Secretary-General to pay retroactively all other entitlements including but not limited to exchange rate differences, cost of living adjustments, pension contributions and adjustments to pension entitlements;
- (d) Award ... interest on the money that the [Applicant] would have received since 1 July 1998;
- (e) Direct the Secretary-General to compensate the [Applicant] for the mental pain, anguish and health sufferings that he has been going through since 1998 due to the injustice perpetuated to him on the part of the ... Administration ... As it is difficult to evaluate health losses, the [Applicant] would leave it up to the Tribunal to judge and decide on this matter. However, a minimum compensation of \$10,000 per year is expected;
- (f) Award in favour of the [Applicant] any other remedy that the Tribunal may find appropriate ...
- (g) Award claims preparation costs in favour of the [Applicant].”

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 31 January 2006;

Whereas the Respondent filed his Answer on 19 January 2006;

Whereas the Applicant filed Written Observations on 20 February 2006;

Whereas the Respondent filed comments on the Applicant's Written Observations on 20 March 2006 and, on 24 April, the Applicant made observations thereon;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“[The Applicant’s] Professional Record

... The [Applicant] entered [the] service [of] the International Trade Centre (hereinafter ITC), as a Clerk-stenographer at the G-3, step III level, on 9 May 1977. [The Applicant served on a series of fixed-term appointments and was granted a number of promotions and, on 1 January 1986, was granted a permanent appointment.]

...

Summary of Facts

... On 1 May 1993, the [Applicant] was promoted from the GS level (G7 step XI) to ... P-2, step XII ... In accordance with staff rule 103.9 (e), he was granted a Personal Transitional Allowance (hereinafter PTA).

... On 1 July 1998, the [Applicant] was promoted from P-2 to P-3 and his salary was fixed at the P-3, step VII level.

... By memorandum dated 23 September 1998, the [Applicant] informed ... a Personnel Officer at [the] Human Resources Section/ITC [(HRS)] that after his promotion to the P-3, step VII level, his take-home salary decreased in comparison to his salary prior to his promotion. He therefore asked her to review the calculations and to rectify the discrepancy in his take-home salary.

... The same day, the Chief[, HRS,] wrote to the Chief, Rules and Personnel Manual Section[, Office of Human Resources Management (OHRM,)] asking for guidance on which calculation approach should be used with regard to the level on which the [Applicant] should be placed after his promotion from the P-2 to the P-3 level. [According to her, if they used the type of calculation sheet provided by another Geneva-based United Nations organisation that had dealt with several promotions of this nature, the staff member] ‘would be placed at step XI, which would give him a promotion equivalent to eight steps at the P-2 level’.

... By memorandum dated 27 October 1998, ... [the Chief] Rules and Regulations Unit, OHRM ... [replied] that according to staff rule 103.9 (a) ‘a staff member shall be placed at the lowest step in the level to which he [...] 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’. She ... [argued] that ‘therefore, the calculation of the staff member’s salary level on his promotion to P-3 should be based on his salary level at the time of the promotion, i.e. P-2 step XII’. She consider[ed] that as ‘the staff member’s P-2 salary includes the PTA, two salary steps should be added to his total salary (including the PTA), in order to arrive at his salary level on promotion to P-3’.

... On 18 December 1998, the [Applicant was placed] on [the] P-3, step X level, with retroactive effect as of 1 July 1998.

... By memorandum dated 25 January 1999, the [Applicant] reminded the Chief[, HRS,] that the rules allow a staff member upon promotion ‘to have an increase in net base salary equal to at least the amount that would have resulted from the granting of two steps’. He therefore considered that he should be placed at P-3, step XI level and asked her to further review the case.

...

... By memorandum dated 6 March 2000 ... [the Rules and Regulations Unit, OHRM,] confirmed that ... assuming that the previous calculations up to the time of his promotion to the P-3 level were correct the staff member should be promoted to [P-3, step X .]

...

... By memorandum dated 20 June 2002, the [Applicant] informed the Chief[, HRS,] that it was clear from the correspondence ... she had provided to him that his ‘salary on promotion to P-3 should have been fixed at least at P-3, step XI’. He underlined that he learned about an ‘identical case within ITC’ in which ‘the staff member’s salary, which was initially fixed at P-3, step VI [...] has now been remedied’ and ‘was re-fixed at P-3, step XIV’ level. The [Applicant] reiterated his request ‘to re-fix his salary in P-3 at the appropriate level and according to the precedents already followed by ITC in [a] similar case ...’

...

... By memorandum dated 6 December 2002 to the [Applicant], the Chief[, HRS,] reiterated that she ... had been advised in March 2000 that the step finally offered to the [Applicant] (step X) was correct. ...

... On 17 January 2003, ... the Chief[, HRS,] advised the Applicant] that the matter [had] been referred ... to the Compensation and Classification Policy Unit within OHRM. ...

... On 12 February 2003, the [Applicant] wrote to the Secretary-General ... requesting review of the incorrect fixation of his salary following his promotion in July 1998.

...”

On 10 June 2003, the Applicant lodged an appeal with the JAB in Geneva. The JAB adopted its report on 19 April 2005. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

58. The Panel first recalled that the central issue in the present case is what step had to be granted to the Appellant upon his promotion from the P-2 to the P-3 level in July 1998, in accordance with the applicable rules. ... The Panel ... stressed that the main applicable rule in order to determine the step at the P-3 level is staff rule 103.9 (a).

59. The Panel examined the arguments of both parties, including various communications they cited in this and other cases involving staff who had been promoted from the General Service category to the Professional category, but was not convinced by either one: It ascertained that neither party had used a consistent approach nor had they arrived at a single result (...).

60. The Panel noted that both the Appellant and the Respondent had added the PTA to the net base salary at the P2 step XII level, in order to determine the step at the P-3 level. The Panel found no basis for

such inclusion and considered that this could not be justified under the staff rules 103.9 (a) nor 103.9 (e).

...

...

65. The Panel ... concluded that in compliance with staff rule 103.9 (a) the Appellant should have been placed at the P-3 step VI level ...

66. Apart from the Panel's reading of staff rule 103.9 (a), which does not call for an integration of the PTA into the computation of the step at the P-3 level, such an inclusion would also be at variance with a key characteristic of the PTA, which is that it is a non-pensionable transitional allowance to be paid until increases in the recipient's net salary and allowances (some of which may be non-pensionable) in total exceed the amount of the PTA. The Panel considered that the incorporation of the PTA into the computation of the step at the P-3 level would artificially speed up the process of making it a pensionable and *permanent* element of the staff member's remuneration that is not based on the application of the Staff Rules governing salary policy in promotion.

67. The Panel also underlined that a promotion is only one of the many ... ways through which for which a PTA *can be reduced or eliminated*. In this sense, and in so far as the Appellant's total net remuneration upon promotion to the P-3, step VI level would not correspond to the total net remuneration he had at the G-7 step XI (plus 2 steps) level, the Panel considered that the Appellant should have continued to receive a PTA, albeit a reduced amount, in accordance with staff rule 103.9 (e).

Conclusions and Recommendations

68. The Panel reiterated that in conformity with the Staff Rules, the Appellant should have been placed at the P-3, step VI level. However, this being said, the Panel recalled that in the past, there was a lot of confusion with regard to the handling of such cases, which should not cause prejudice to the Appellant. The Panel therefore stressed that the Appellant, while he was trying to seek justice in conformity with what he legitimately considered to be a ruling, acted in good faith. The Panel also highlighted that the Appellant was told on a number of occasions was consistently by responsible officers who were supposed to follow the rules that the step X that was granted to him was the correct step. The Panel **recommends** that in view of the confusion and the repeated information given to the Appellant that step X was correct, the status quo should be maintained in the present case.

69. The Panel **recommends** to the Secretary-General that the present appeal **be rejected**.

..."

On 9 August 2005, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 12 October 2005, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General ... notes that it has been OHRM's consistent approach since 1994 to take into account the PTA when determining the step on promotion of a staff member from P-2 to P-3, as this allows for the discontinuation of the PTA and ensures compliance with the intent of staff rule 103.9 (a). In view of the considerations of equal treatment of staff, the Secretary-General regrets not being able to agree with the JAB that the determination of step should not take account of the PTA, or with its conclusion that you should have been placed at the P-3 step VI level. The Secretary-General, however, agrees with the JAB that your appeal should be rejected."

Whereas the Applicant's principal contention is:

His salary step was not properly established.

Whereas the Respondent's principal contentions are:

1. The Applicant's salary step was properly established on 18 December 1998, after he was promoted and placed at the P-3, step X level.

2. The Applicant is not entitled to compensation for pain and suffering, in connection with his having been placed, upon promotion, at the P-3, step X level. The Applicant could have appealed this decision earlier and resolved the matter in a more timely fashion.

The Tribunal, having deliberated from 30 October to 21 November 2007, now pronounces the following Judgement:

I. The Applicant appeals the decision to promote him to the P-3, step X level and argues that he should have been promoted to step XIV. In support of his claim, he contends that the relevant rule, i.e. staff rule 103.9, was not fully applied in calculating his salary plus PTA. He also refers to another "identical [promotion] case within ITC" where a staff member's salary was first fixed at the P-3, step VI level, however, as this led to a reduction of that staff member's take-home salary, the calculations were reviewed and it was determined that the proper step was step XIV. In the Applicant's view, in light of this "precedent", his salary should be recalculated accordingly.

II. It appears that problems first arose in connection with the Applicant's promotion in May 1993, from the G-7, step XI to the P-2 level. At the time, his G-7, step XI salary was higher than that at the highest step of the P-2 level and, thus, it was not possible to grant him the equivalent of an increase of two steps at the lower level. Consequently, he was awarded a PTA in accordance with the provisions of staff rule 103.9, paragraphs (a) and (e), which provide, respectively, that:

"(a) On promotion, a staff member shall be placed at the lowest step in the level to which he or she had 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;

...

(e) Where the total net remuneration before promotion of a staff member in the General Service and related categories exceeds that at the professional level before promotion, ... a personal transitional allowance in an amount sufficient to meet the requirements of subparagraph (a) will be paid until such time as it is overtaken by increases in net remuneration at the Professional level."

III. Upon his promotion from P-2 to P-3, initially, the step level of his P-3 grade was calculated at step VII, however, on 23 September 1998, the Applicant complained to HRS that his take-home salary decreased in comparison to his salary prior to his promotion. Subsequently, the Chief, HRS, sought the advice of OHRM which advised that his step level be re-calculated as follows: "as the staff member's P-2 salary includes the PTA, two

salary steps should be added to his total salary (including the PTA), in order to arrive at his salary level on promotion to P-3". Accordingly, retroactive to 1 July 1998, the Applicant was placed on P-3, step X level.

IV. The Tribunal notes that, on 25 January 1999, the Applicant requested the Chief, HRS, to review his case, stating that the rules allow a staff member upon promotion "to have an increase in net base salary equal to at least the amount that would have resulted from the granting of two steps" and that he should have been placed at P-3, step XI level. Subsequently, the issue was reviewed further by ITC and by OHRM, both reaching the conclusion that the Applicant's promotion had been correctly calculated at the P-3, step X level.

On 20 June 2002, the Applicant again wrote to the Chief, HRS, to review his case, this time claiming that the correct level should be step XIV, as this step had been given to a colleague who had an "identical case within ITC". As he did not receive a reply, on 17 January 2003, he sent another communication to the Chief, HRS, who advised him, on the same day, that the matter had been referred to the Compensation and Classification Policy Unit, OHRM, and advised him to wait for their reply. Subsequently, he was informed that step X was the correct step.

V. The Tribunal observes that the JAB - which had made its own calculations - concluded that the Applicant should actually have been placed at the P-3, step VI level; however, in view of the confusion and the repeated authoritative information given to the Applicant that step X was correct, the *status quo* should be maintained and the appeal rejected.

VI. The Tribunal is of the view, that the JAB correctly rejected the appeal; however, it cannot agree with its calculations. It recalls in this regard its consistent jurisprudence that "it is not within the purview of its authority to substitute its judgement for that of the Secretary-General ... unless his decision is tainted by prejudice, bias, improper motive or other extraneous factors, or otherwise vitiated". (See Judgement No. 1231 (2005).) Thus, it is of the view that it must defer to the calculations made by the competent officials in ITC and OHRM, which had reached the conclusion that the Applicant's promotion had been correctly calculated at P-3, step X level.

VII. The Tribunal also recalls its Judgement No. 1112, *Suresh* (2003), where it held that

"[i]n the instant case - as in any case where arbitrariness, discrimination or other such improper motivation is alleged - the *onus probandi*, or burden of proof, rests upon the Applicant. (See Judgements No. 639, *Leung-Ki* (1994); [Judgement No. 784, *Knowles* (1996)]; and, No. 870, *Choudhury and Ramchandani* (1998).)"

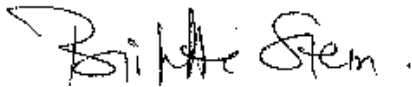
The Tribunal finds that the Applicant has not provided any convincing reasons that his case should be treated in the same manner as that of his colleague in ITC, whose step was allegedly upgraded from VI to XIV. By only advancing the argument that this created a "precedent" without providing any substantiating documentation, the Applicant has failed to discharge the burden of proof to support his claim. The Tribunal also confirms that grading the Applicant at the P-3, step X level accords with its reading of staff rule 103.9 (a), *supra*.

VIII. In view of the foregoing, the Tribunal makes no order on the Application.

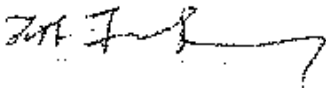
(Signatures)



Jacqueline R. **Scott**
Vice-President

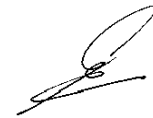


Brigitte **Stern**
Member



Goh Joon Seng
Member

New York, 21 November 2007



Maritza **Struyvenberg**
Executive Secretary