

JUDGE SABINE KNIERIM , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2015/013 (Judgment on Receivability) and Judgment No. UNDT/2016/032 (Judgment on Liability and Relief), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 11 February 2015 and 18 April 2016, respectively, in the case of *Elmi v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 17 June 2016, and Mr. Suleiman Elmi filed his answer on 30 June 2016.

Facts and Procedure

2. The following facts are uncontested:

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26. Under the applicable legal framework, promotions do not go into effect retroactively. On the contrary, Administrative Instruction ST /AI/2010/3, entitled “Staff selection system”, Section 10.2 specifically provides that “[w]hen the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision, subject to the availability of the position and the assumption of higher-level functions.”

27. However, Mr. Elmi claimed that in his case, an exception must be granted under Staff Rule 12.3(b), which reads:

(b) Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the 9 Tw [(r03 Tc .0579 T1 h(u)-4.6(-3.3(-5.2 0 T5(ral, ed)-.5]TJo)6.5)

as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

29. Applying these standards, we cannot find any fault with the ASG/OHRM denying such exception and refusing to grant Mr. Elmi retroactive promotion with effect from 1 January 2012 "for pension purposes".

30. It was legitimate for the ASG/OHRM to consider that a retroactive promotion would create technical problems and additional costs as pension contributions had not been paid concurrently. The clear purpose of ST/AI/2010/3, Section 10.2 stipulating that a promotion may only become effective on the first day of the month following the decision, hence in the future, is to avoid the costs and technical problems which would arise from any retroactive promotion with regard to salary and pension.

31. The denial is in full accord with Staff Rule 3.10 which states:

(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 4.15 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member holding a fixed-term or continuing appointment 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.

Under Staff Rule 3.10, staff members must, in general, exercise higher level functions even without any extra compensation, and only in exceptional circumstances may they be granted a non-pensionable special post allowance "from the beginning of the fourth month of service at the higher level". Since Mr. Elmi received such SPA from the moment of the reclassification of his post, he already obtained a higher "remuneration" than generally allowed under Staff Rule 3.10(b). Furthermore, granting Mr. Elmi a retroactive promotion would have the same effect as granting him pensionable SPA, which is not possible under Staff Rule 3.10(b).

However, this different treatment is not discriminatory because there is a lawful and convincing reason for it. In administrative bodies like the United Nations, salary and pension generally follow status and grade, not function. The reason and justification for the different treatment is the different grade of the staff members in question.

35. It does not follow from the principle “equal pay for work of equal value” that a staff member who exercises higher level functions has a right to receive the same salary and pension benefits as a staff member at a higher level exercising the same or similar functions. If this were the case, Staff Rule 3.10(a) and (b) would be unlawful in itself as it states expressly that staff members, for a certain amount of time, must exercise higher functions as a normal part of their customary work and without any pecuniary reward in the form of higher salary or pension and, afterwards and if certain criteria are met, may receive only non-pensionable SPA. As Staff Rule 3.10(a) and (b) regulates the interests of staff members of lower grades exercising higher level functions in a consistent and reasonable way, it

9 January 2012 and posted until 9 March 2012, we deem it impossible that he could have

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Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Raikos

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar