



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/056

Judgment No.: UNDT/2013/121

Date: 8 October 2013

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Eric Muli, Officer-in-Charge

SLADE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Seth Levine, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant joined the Organization on 10 February 2006 as an

Human Resources Management reform, contractual arrangements and harmonization of conditions of service.

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- e. Whether, in view of the facts in the present case, the Administration had unlawfully ignored the protests of staff associations and individual staff members; and
- f. Whether international labour standards and the United Nation's Charter had been breached in the process of the implementation of the General Assembly resolution on the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions.

16. On 22 September 2011, the Applicant filed the present Application on the merits. The Respondent filed his Reply to the Application on 24 October 2011.

17. The Tribunal decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing was not required in determining thid40p .3(hC-12.9(m/8-5.2(l2n))JTJ0 -

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17.

in the amount of post adjustment, mobility and hardship allowance and rental subsidy and will be gradually phased out in the attached note.

The implementation and phasing-out schedule of the PTA contained in that memorandum mirrors that contained in an OHRM pamphlet entitled “Human Resources Reform – what’s in it for me”, sent to the Applicant on 9 February 2009. Both documents state that the PTA is to be phased out according to the following schedule:

First Year (i.e. 1 July 2009 – 30 June 2010):	100%
Second Year (1 July 2010- 30 June 2011):	100%
Third Year (1 July 2011-30 June 2012):	70%
Fourth Year (1 July 2012-30 June 2013):	40 %

21. The same phasing-out schedule is repeated in the guidance manual entitled “United Nations Contractual Reform – Transitional Measures and Implementation in Family and Non-Family Missions” dated 26 May 2009.

22. The 30 April 2009 memorandum signed by the Applicant and the Administration on 8 May 2011, is a document that explicitly incorporates the terms of the PTA and the schedule for its phasing out into the terms and conditions of the Applicant’s contract.

23. The Applicant received a Letter of Appointment (LOA) in respect of a new fixed-term contract in July 2009. Due to concern over its terms, the Applicant did not, in fact, sign the LOA until 7 December 2009.

24. Paragraph 2 of the LOA, headed “Allowances”, stipulates - “The salary shown does not include any allowances to which you may be entitled”.

25. A Personnel Action (PA) was generated as a result of the offer of a fixed-term appointment. The effective date of the PA was 1 July 2009. The PA is certified as having been finalized on 26 June 2009 and approved, by Margaret Dahlo, on 7 July 2009 (the date the LOA was signed on behalf of the ASG/OHRM). The PA lists, under Entitlements, PTA at USD2,016.43 monthly, with an expiry date of 30 June 2013.

26. A further LOA was signed on behalf of the ASG/OHRM on 29 June 2010 and by the Applicant on 14 July 2010. The PTA is calculated on the PA as USD1, 690.98 monthly. The expiry date of the PTA was 30 June 2013.

27. At the start of a third year following the contractual reforms, another LOA, in the same terms for all material purposes, was signed on behalf of the ASG/OHRM on 4 July 2011 and by the Applicant on 13 September 2011. The Applicant wrote below her signature “signed with reservations”. The Applicant submitted that she felt compelled to sign her contracts, as failure to do so would have led to her becoming constructively separated from the Organization. She submitted that she was in an unequal bargaining position. Forced acquiescence with unilaterally imposed terms, explicit or implied, in breach of previous commitments by the Organization is not the same as informed consent.

28. The PA generated in respect of the July 2011 LOA made no reference to PTA. Staff Rules and Regulations are incorporated, by reference, into all United Nations employment contracts.

29. The Applicant submitted that the payment and terms of the PTA were incontrovertibly part of her contract of employment and that this is readily apparent from the signed letter of 30 April 2009. Given that the terms in that letter provided for a four-year implementation schedule for PTA, the Applicant was entitled to rely on the existence of those terms when signing subsequent contracts.

30. Whilst the entitlement to PTA and its subsequent variation flow from General Assembly legislation, all contractual matters within the United Nations system are also the products of statute. The Applicant was appealing against the decision of the Administration to unilaterally alter her contract. Whilst the same decision may have been taken in respect of numerous other staff members, the Applicant is concerned solely with her pr

2009 reforms. Whilst other terms and conditions may have been subject to change, express or implied, the implementation of the PTA was made the subject of a separate, binding contractual agreement that could only be repealed with the consent of both parties.

32. The Applicant submitted that all contractual issues within the United Nations are framed within the context of the Organization's legislative architecture. Whilst the Applicant was not challenging the validity of any General Assembly resolution, the Secretary General is responsible for ensuring that the implementation of the same does not violate the express terms of a staff memb(e)s with th(m)mly 8pse-5.r-4.

36. United Nations' jurisprudence has long recognized that, as a standard-bearer for human rights, it should, in its own administration, set an example. In *Mwangi*¹, the Administrative Tribunal noted that the United Nations, "as an exemplary employer, should be held to higher standards". In *Araim*² the Administrative Tribunal held that "the Organization has to respect and follow its procedures in keeping with what the world expects of the United Nations".

37. The loss of PTA has affected the Applicant disproportionately, as she is a single person with no dependants. Article 23(2) of the Universal Declaration of Human Rights provides that "everyone, without any discrimination, has the right to equal pay for equal work". International conventions such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Labour Organisation's Equal Remuneration Convention 100 have developed this principle to address gender discrimination.

38. For the above reasons, the Applicant submitted that the decision to withdraw her PTA was one unilaterally taken by the Secretary-General in breach of an explicit term of her contract. The appropriate remedy is the reinstatement of the PTA pursuant to the terms, in respect of the Applicant, as set out in the document signed on 8 May 2009 or, in the alternative, compensation in the same amount.

Respondent's case

39. The Respondent's case is summarized below:

40. The transition from the MSA system to the United Nations common system resulted in a loss of income for some staff. To mitigate the impact of any loss of income, a PTA was paid to some international staff from 1 July 2009, including the Applicant who, due to the reforms approved by the General Assembly, incurred a loss of income between the amount of MSA received before the conversion and the amount of post adjustment, mobility allowance, hardship

allowance, non-removal allowance and rental subsidy/rental deduction payable as of 1 July 2009.

41. By memorandum dated 30 April 2009, the Applicant was informed that, following the implementation of the new conditions of service as of 1 July 2009,

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subject to approval by the Chief Civilian Personnel Officer (CPPO). It did not, in and of itself, constitute a contract or an agreement regarding the Applicant's terms and conditions, but a *recommendation* from the Applicant's supervisor to grant her a new FTA for one year, including a confirmation that she had been informed of such recommendation.

51.

55. The Applicant's right to receive the PTA accrued to her, and other staff, as a consequence of the Organization's unilateral decision to pay the transitional allowance, from 1 July 2009 to 30 June 2011, to compensate some international staff in non-family duty stations whose income was reduced as a consequence of the harmonization of conditions of service as from 1 July 2009.

56. There is no basis for implying into the Applicant's terms and conditions of appointment a right to receive the PTA until 30 June 2013, in view of the purpose of the memorandum dated 30 April 2009, as described above. Furthermore, the harmonization of conditions of service for staff in the field was an on going matter under consideration by the ICSC and the General Assembly.

57. The terms and conditions of the Applicant's appointment, as of 1 July 2011, reflected the further harmonization of conditions of service approved by the General Assembly in resolution 65/248, including the introduction of an additional hardship allowance and discontinuance of the PTA. Accordingly, the terms and conditions of the Applicant's appointment did not include any right to be paid the PTA beyond the two-year period from 1 July 2009 to 30 June 2011.

58. The discontinuations of the PTA did not constitute a unilateral modification of the terms and conditions of the Applicant's contract. The PTA represented a transitional allowance paid to specific staff members and did not form part of a remuneration package in the offer of appointment and subsequent LOA issued to staff under the Staff Rules and Regulations.

59. The Applicant was informed as early as 30 April 2009 that she would receive a PTA which would be gradually phased out. The Applicant signed the memorandum of 30 April 2009 on 8 May 2009, acknowledging that she had been informed of the new contractual arrangements for international staff members in special missions and agreed to transition to a fixed-term appointment on 1 July 2009.

60. As explained to the Applicant, the PTA was a temporary transitional allowance used to compensate staff for any loss of income as a result of their

transition to their new contractual status of 1 July 2009. Accordingly, the Applicant was duly informed that the PTA would eventually be discontinued.

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memorandum to the Applicant of 30 April 2009 did not create a legitimate expectation that the Applicant would receive the PTA until 30 June 2013, as the terms and conditions of her appointment did not include such a right. Further, the on going consideration by the General Assembly of the issue of harmonization of conditions of service in the field was inconsistent with any expectation that the PTA would continue for any fixed period.

65. The Administration consulted with relevant staff unions regarding the implementation of General Assembly resolution 63/250. The FSU was represented by the United Nations International Civil Servants' Federation (UNISERV), which was a member of the ICSC's Working Group on harmonization of conditions of service in non-family duty stations. As indicated in paragraph 48 of the Working Group's report, the discontinuance of the PTA was discussed in its meeting in May 2010. In addition, the discontinuance of the PTA, in connection with the implementation of harmonized conditions of service, was further discussed in July 2010 with staff representatives during the seventy-first session of ICSC. UNISERV, representing FSU, participated in the meetings of the ICSC held over the course of six days.

66. Further, during the meeting of the Field Joint Negotiation Committee (FJNC), held from 27 to 28 April 2011, the FSU was consulted on the guidelines

that the PTA would be discontinued. As recorded in the webcast of the meeting, the Deputy Secretary-General clearly stated that the PTA would be discontinued come 1 July 2009 and there would be a short-term impact on some staff.

68. Various iSeek articles were posted, announcing the adoption of General Assembly resolution 65/247 on human resources issues and that the PTA would be discontinued.

69. The Applicant's contention that the discontinuance of the PTA violates international human rights or labour standards is without merit. Under the United Nations common system, salaries vary according to whether the staff member concerned has dependents, given the associated costs that come with having dependants. Further, there are allowances to which only staff members with dependants are entitled (for example, education grant), or which vary according to whether the staff member concerned has dependants (for example, rental subsidy). As the salary and allowances to which any staff member is entitled depends upon whether he or she has dependents, the impact of the withdrawal of the PTA on the Applicant is of no consequence.

70. In view of the foregoing, the Respondent respectfully requests the Dispute Tribunal to reject the Application.

Legal Issues

71. The Tribunal considers that the legal issues arising in this case can be framed under the following questions:

- a. Whether the PTA is part of the term

- d. Whether international labour standards and the United Nation's Charter have been breached in the process of the implementation of the General Assembly resolution on the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions.

Consideration

Was the PTA part of the terms and conditions of service of the Applicant?

72. The Applicant submitted that the 30 April 2009 document, signed by her and the Administration on 8 May 2011, explicitly incorporated the terms of the

- f. the memorandum dated 30 April 2009 was subject to approval by the CPPO, it did not, in and of itself, constitute a contract or an agreement regarding the Applicant's terms and conditions, but a *recommendation* from the Applicant's supervisor to grant her a new fixed-term appointment;
- g. there is no basis for implying into the Applicant's terms and conditions of appointment a right to receive the PTA until 30 June 2013; and
- h. the discontinuation of the PTA does not constitute a unilateral modification of the terms and conditions of the Applicant's contract.

74. Article 2.1(a) of the Tribunal's Statute defines the contract of employment, as including:

all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

75. Article 101 of the United Nations Charter and staff regulation 4.1. confer upon the Secretary-General the power of appointment of staff members. These provisions stipulate that the act whereby the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or by an official acting on his behalf. However, the Appeals Tribunal in *Sprauten* 2011-UNAT-111 held that the employment contract is

new arrangement was that an allowance known as Mission Subsistence Allowance (MSA) usually made to all mission staff would be discontinued.

77. Since discontinuance of the MSA would result in a loss of income for some staff, another allowance, the PTA, was to be paid to such staff to mitigate the loss. The PTA however, was to be gradually phased out over a four-year period, that is, by 30 June 2013. This phasing-out was clearly set out as 100% for

the Applicant in varying degrees for the remaining two years – July 2011 to June 2013.

85. Separate recommendations had been made for staff in non-family duty stations who were receiving the Extended Monthly Security Evacuation

certain allowances to staff resulting in one staff member taking home more money than his colleague on the same grade does not necessarily amount to unequal incomes.

89. Certain allowances granted by the Organization to its staff are predicated on the existence of certain conditions. For instance, a staff member with school age children may receive education grant while it is not expected that another with adult and perhaps income-earning children will receive the same grant. Similarly, staff with dependant spouses may receive an allowance that unmarried ones would not receive. Whatever differences exist in the take-home pay of staff members as urged upon the Tribunal in this case are not based on any form of discrimination, gender or otherwise. The submission of inequality in the payment for work of equal value fails in this case.

90. Article 101 of the Charter stipulates that staff of the United Nations secretariat shall be appointed by the Secretary-General under regulations established by the General Assembly. In resolution A/RES/65/248 of 24 December 2010, the General Assembly approved the recommendations of the ICSC which resulted in the discontinuance of the PTA among other matters.

91. Having reviewed the parties' submissions on this score, the Tribunal finds and holds that no international labour standards or the United Nation's Charter were breached in the process of the implementation of the General Assembly resolution on the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions.

Findings

92. The following is a summary of the Tribunal's findings in this case:

- a. The 30 April 2009 memorandum did not, strictly speaking, incorporate the PTA into the Applicant's employment contract.
- b. Even though the Tribunal finds that the PTA was not part of the terms and conditions of the Applicant's contract of employment, a legitimate expectation that the Organization would honour

proposals made by it could be inferred in the circumstances, barring further policy decisions by the General Assembly.

- c. The implementation of the recommendations adopted by the General Assembly had served to terminate the proposed payment of the PTA to the Applicant in varying degrees for the remaining two years – July 2011 to June 2013.
- d. No international labour standards or the United Nation's Charter were breached in the process of the implementation of the General Assembly resolution on the Ha