



Introduction

1. The applicant, a staff member of the International Civil Service Commission (ICSC), contests the decision not to reclassify the P-2 post encumbered by her to the P-3 level. The applicant seeks retroactive reclassification of her post to the P-3 level, starting 1 February 2007, and full compensation and entitlements (including pension) commensurate with the P-3 post. The applicant asks that the requirement for competing for the post be waived as a part of the corrective action. As an alternative, the applicant would accept a “buy-out consisting of full salary and benefits at the P-3 level for 3 years and 8 months (or until [the applicant] reaches age 58) at which time her retirement would be effective”.

2. A directions hearing was held on 15 January 2010, following which the Tribunal issued several orders directing the parties to file further submissions. The application, the respondent’s reply and subsequent submissions constitute the pleadings and the record in this case. With the consent of the parties, the Tribunal determined the matter on the papers.

The facts

3. On 11 December 2000 the applicant was transferred to the ICSC as a general service-level Administrative Assistant in the Office of the Executive Secretary. She was granted a special post allowance (SPA) to the P-2 (professional) level from 2001 through December 2003, and then promoted to the P-2 level as an Administrative Assistant on a fixed-term contract limited to service with the ICSC.

4. In 2004 and 2006 the then Chairman of the ICSC informed the applicant that, as part of the Proposed Programme Budget of the ICSC, he was going to propose an upgrade to the P-3 level of the post occupied by her. However, no formal documentation on this proposal was prepared until December 2006.

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Subject: Classification of post of Administrative Officer, ICSC, JFA-030-03010-EP3-0003, IMIS #4124

In response to your memorandum dated 3 January 2007 concerning the classification review of the above mentioned post, please be advised that we have concluded our review.

We have found the job classifiable at the P-3 level. Kindly note that under Section B3.2 [of the Request for Classification Action] the experience requirement would need to be revised to five years.

Upon receipt of your comment, if any, and the revision to [S]ection B[3.2], we are prepared to finalize our review.

9. On 10 January 2007 the Executive Secretary of the ICSC sent a memorandum to the Chief of the Conditions of Service Section of OHRM, stating:

Subject: Classification of post of Administrative Officer, ICSC, JFA-030-03010EP-30003, IMIS #4124

1. Reference is made to your memorandum of 8 January 2007 on the above-mentioned subject, containing the results of your office's classification review of the post of Administrative Officer, ICSC, deeming it classifiable at the P-3 level.

2. In this connection, we took note of your request to revise the experience requirement under Section B3.2 to five years (relevant page containing Section B [has been] revised and [is] attached, as well as the last page of the classification request duly signed by both the incumbent and the supervisor).

3. I would like to thank you for the action taken in the review of this significant post in the Office of Executive Secretary and look forward to its finalization.

10. On 12 January 2007 the Chief of the Economic, Social, Political, Legal and Information Activities Section of OHRM sent a memorandum to the Executive Secretary of the ICSC, stating:

Consistent with advice we provide to all other departments, we advised ICSC that OHRM would have no objection to the placement of the Administrative Officer against the P-3 post because Administrative Officer functions by their nature are more often than not at the P-3 level. In this case, we note that the functions have now been confirmed to be classifiable at that level. Therefore, the Administrative Officer is seen to have been performing P-3 functions

and, at the very least, should be considered for a Special Post Allowance.

11. On 16 January 2007 the Executive Secretary sent a revised version of the Proposed Programme Budget for 2008–2009 to the Director of the OPPBA, requesting five post reclassifications. The P-2 post occupied by the applicant was not included in the list of posts proposed for reclassification.

12. On 17 January 2007 the Chief of the Conditions of Service Section of OHRM, sent a memorandum to the Executive Secretary of the ICSC, stating:

Subject: Classification advice for post of Administrative Officer, ICSC

1. This is in response to your memorandum of 10 January 2007 in which you provided revised two pages for the job description of the post under review.

2. As mentioned in my memorandum of 8 January 2007, we have reviewed the post and found it classifiable at the P-3 level. We understand that our advice would be used either for SPA purposes and/or for submission in the next programme budget.

3. Upon *provision of a post number authorized for this purpose*, we would finalize our review and issue the classification notice. [Emphasis added.]

13. In response, on 22 January 2007, the Executive Secretary of the ICSC provided OHRM with a post number (“JFA030-03010EP-300[0]3”) for the “purposes of finalizing [OHRM’s] review and issuing the classification notice”.

14. Approximately two years later, on 15 December 2008, the Executive Secretary of ICSC submitted a memorandum with the Proposed Programme Budget for 2010–2011 to the OPPBA, stating that “ICSC is proposing two reclassifications from the P-2 to P-3 level and one reclassification from the G-7 to the P-2 level”. The P-2 post occupied by the applicant was one of the two P-2 posts proposed for reclassification. The explanatory note attached to the memorandum stated that “[t]he incumbent of the Administrative Officer’s post is currently at the P-2 level and has been in receipt of an SPA to the P-3 level since 1 January 2004. [T]he

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reclassification of the Administrative Officer

Staffing Table Authorization of the Proposed Programme Budget for the Biennium 2006–2007 and could have been used for reclassification. The ICSC routinely uses vacant posts for upgrades, lateral moves, and SPAs as well as for hiring staff. The ICSC receives a specific number of posts which are not distributed among multiple sub-units as is the case in larger departments and offices. Thus, the reclassification of the applicant's post did not require approval in the budget. The Controller should have had no involvement in this matter as a valid post was available in the budget. Further, the Controller did not have the authority to make decisions on what should or should not be included in the ICSC Proposed Programme Budget.

Respondent's submissions

19. The respondent's submissions may be summarised as follows:

a. The appeal is not receivable as the decision not to support the proposed reclassification for 2010–2011 is not an appealable administrative decision within the meaning of art. 2.1 of the Tribunal's Statute as it did not create any direct legal consequences for the applicant's terms of employment as a P-2 level Administrative Officer (United Nations Administrative Tribunal, Judgment No. 1157, *Andronov* (2003)). This decision is not of individual application because issues of classification relate to the evaluation and the functional organisation of posts, not to individuals. Had the reclassification of the applicant's post been approved in the budget for the biennium 2010–2011, the post would have been advertised in accordance with ST/AI/1998/9 (System for the classification of posts) and ST/AI/2006/3 (Staff selection system) and a competitive selection process would have followed. Therefore, the only right that the applicant would have had would be to be given full and fair consideration of her candidacy. Therefore, the applicant has no standing to contest the decision.

b. OHRM was not able to provide a final decision on classification because there was no valid and available post number confirming the existence of an Administrative Officer post at the P-3 level. The post number provided on 22 January 2007 was that of a Compensation Officer, which was borrowed from the Salaries and Allowances Division of the ICSC and which was not authorised and budgeted as a P-3 Administrative Officer post in the Administrative Unit of the ICSC. As the reclassification proposal was never approved in the budget, no authorised post number could have been provided, and the functions were never actually classified at the P-3 level. Had OHRM issued a classification notice against the proposed reclassification of the Compensation Officer, P-3 level, Salaries and Allowances Division, ICSC, as an Administrative Officer post, P-3 level, in the Administrative Unit of the

ICSC, this would have constituted a de facto redeployment of post for which the ICSC and OHRM have no authority. Although the Organisation's system of classification of posts allows some flexibility in the use of approved resources to enable the programme manager to implement the programme of work as approved by the General Assembly, this relates only to the *temporary* use of vacant posts, through the temporary loaning and borrowing of such posts from one organisational unit to another. However, this flexibility does not extend to the permanent movement of posts from one organisational unit to another, with a change in functions, since such changes are made through the budgetary process and with the General Assembly's approval.

c. The Controller's decision not to include a proposal for the reclassification of the applicant's post from the P-2 to P-3 level in the Proposed Programme Budget for 2010–2011 was proper and did not contravene the applicant's rights as a staff member. Although the authority and responsibility under financial rule 102.1 for decisions on the content and resource allocation of the Proposed Programme Budget is reserved to the Secretary-General, the Under-Secretary-General for Management and the Controller have general authority to participate in this process by virtue of ST/SGB/2003/16 (Organisation of OPPBA), which sets forth specific responsibilities entrusted to the Controller.

d. There was no improper interference by the Controller with the independence of the ICSC. Article 6 of the ICSC Statute concerns the independence and impartiality of the members of the ICSC in performing their functions, whereas the present case does not relate to the functions of the ICSC but the approval process of the ICSC budget. The ICSC is under the administration of the United Nations Secretariat and its budget is included in the regular budget of the United Nations. Therefore, the involvement of the Controller and the Secretary-General in the budget preparation and approval process was proper.

e. The applicant has failed to show that the decision not to include the proposed reclassification in the Proposed Programme Budget was motivated by prejudice, discrimination or other extraneous factors.

Consideration

Scope of application and receivability

20. Requests for administrative review and management evaluation are mandatory first steps in the appeal process (*Crichlow* UNDT/2009/028, *Caldarone* UNDT/2009/035, *Planas* UNDT/2009/070, *Parmar* UNDT/2010/006, *Syed* 2010-UNAT-061). The applicant's request for administrative review referred specifically to the decision to "exclude the reclassification of [her] post from the P-2 to the P-3 level in the context of the Proposed Budget for the Biennium 2010–2011". Therefore, the scope of the present application will be limited to the decision not to propose the reclassification of the applicant's post as part of the 2010–2011 Proposed Programme Budget. The Tribunal will not consider the applicant's other claims, including claims disputing the P-2 level of the two-year fixed-term appointment she received in January 2010.

21. The next question is whether the failure to propose the reclassification of the said post constitutes an administrative decision capable of being appealed and whether the applicant has standing to contest it. The respondent contends that no administrative decision was taken by the Administration as the decision not to support the reclassification of the applicant's post "did not create any direct legal consequences for the Applicant's terms of employment as a P-2 level Administrative Officer". According to the respondent, issues of classification relate to posts, and not to individuals. The respondent relies on *Andronov*, which states:

[T]he administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are

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ST/AI/1998/9 envisages that classification decisions directly affect the incumbent staff member. For example, sec. 5 of the instruction (“[t]he decision on the classification level ... may be appealed by ... the incumbent of the post at the time of its classification”) illustrates that incumbents of the post proposed for reclassification have a special interest in the reclassification process as it grants them a right to appeal the classification decision through a separate appeal process.

24. When a staff member alleges, as the applicant does in this case, that the contested decision is not in compliance with his or her contract of employment, the Tribunal will be competent to hear and decide the case under art. 2.1(a) of its Statute (see also UN Administrative Tribunal Judgment No. 99, *Mr. A* (1966), para. II). I am therefore satisfied that the applicant has standing to bring this application and that it is receivable.

Reclassification process

25. The general procedure for reclassification of posts, including those requiring budgetary submission, is as follows. The executive officer of the department requests a proposed reclassification if he or she is satisfied that one of the criteria in sec. 1.1 of ST/AI/1998/9 has been met. The department will then submit to OHRM a job description for the posts suggested for reclassification. Next, OHRM will review the request and provide the department with a classification advice pursuant to ST/AI/1998/9. If the department concerned decides to proceed further, the Proposed Programme Budget is finalised by the offices involved in the process, with the participation of the OPPBA and the Controller, and is submitted by the Secretary-General to the General Assembly for its review and approval. Formal notices of classification are only issued after the General Assembly approves the budgetary proposal that includes the proposed reclassification (see the Instructions for Proposed Programmer Budget for the Biennium 2008–2009 (16 October 2006) as well as the Instructions for Proposed Programmer Budget for the Biennium 2010–2011 (1 October 2008)). Following approval of the related post proposal by the General

Assembly, a formal notice of classification is issued by OHRM and is also provided to the incumbent of the post. When a classification request is submitted for advice prior to a budgetary submission (e.g. when there is no available budgeted post already approved at the appropriate level and for appropriate functions), the classification becomes effective once the reclassification has been approved in the budget. For posts that do not require budgetary submission, the classification decision will become effective as of the first of the month following receipt of a classification request fulfilling the conditions of sec. 2.2 of ST/AI/1998/9, including, *inter alia*, a valid and available post number confirming the existence of a post approved at the appropriate level in the budget.

Use of post number JFA-030-03010-EP-30003 for reclassification

26. The first issue that the Tribunal will address is whether OHRM could have used the vacant post JFA-030-03010-EP-30003 for this reclassification exercise. Of particular relevance are the communications between the ICSC and OHRM in December 2006 and January 2007. Although these communications relate to the Proposed Programme Budget for 2008–2009, it is, in effect, accepted by both parties that these communications were the basis for the consideration as to whether the post encumbered by the applicant should be included in the Proposed Programme Budget for 2010–2011.

27. The applicant requested the Tribunal to compel the respondent to search and produce records of instances where vacant posts with particular functions were reclassified with the change in functions without the approval of the General Assembly. Whether or not there was any evidence of the Administration engaging in this practice in the past is not the issue in this case. The real question is whether, in the particular circumstances of the present case, the Organisation was legally permitted (and obligated) to use this vacant post for the proposed reclassification or whether the Administration was required to seek the General Assembly's approval. I therefore denied the applicant's request for production.

28. It has been submitted by the respondent, and not disputed by the applicant, that post JFA-031-03010-EP-30003 was that of a Compensation Officer, and that in

Controller has a significant role with respect to the preparation of the proposed budget and budgetary submissions. I cannot agree with the applicant that the Controller's participation in the budgetary process was contrary to art. 6 of the ICSC Statute, which provides that the members of the ICSC "shall not seek or receive instructions from any Government, or from any secretariat or staff association of an organisation in the United Nations common system". As correctly stated by the respondent, the present case does not relate to the functions of the ICSC but to the ICSC budget approval process. Secretary-General's bulletin ST/SGB/2003/16 sets forth specific responsibilities entrusted to the Controller and his office for aspects concerning the preparation of the Organisation's Proposed Programme Budget (see secs. 2, 3, 7). These responsibilities are further elaborated on in the instructions for Proposed Programme Budget for 2008–2009 and 2010–2011, which were relied on by both parties in their submissions and which discuss the involvement of OPPBA in the budgetary and reclassification process. Furthermore, in this case the Secretary-General submitted, pursuant to financial rule 102.1, the Proposed Programme budget (finalised with the Controller's participation) to the General Assembly without the proposed reclassification of the applicant's post, and it must follow that the Secretary-General agreed to the final text of the budget submitted for the General Assembly's consideration. The Tribunal finds that the applicant has failed to demonstrate that the Controller's participation in the process and the exercise of his discretion were improper, manifestly unreasonable or tainted by prejudice or discrimination against her.

Allegations of discrimination

34. With respect to the applicant's contention that the Administration's failure to reclassify her post was tainted by prejudice, discrimination, and other extraneous factors, the applicant has failed to articulate these allegations with any specificity and there is no evidence before the Tribunal to support these allegations. As the Tribunal stated in *Abbasi* UNDT/2010/055, "[m]ere belief, or suspicion, unsupported by information or rational argument, is not a sufficient basis for embarking on a

searching enquiry into whether there was or was not an act or acts of discrimination”.
The applicant’s contentions are therefore rejected.

Conclusion

35. In the absence of a properly budgeted post, the request of the ICSC was a request for classification advice prior to a budgetary submission. The reclassification proposal was not included in the budgetary submission to the General Assembly, and, accordingly, the General Assembly did not approve the proposed reclassification and there was no basis for OHRM to issue a final classification decision and classification notice. Further, the Controller’s participation in the budget preparation process was not improper and the applicant has failed to demonstrate that the failure to reclassify the post was tainted by prejudice or discrimination.

36. The application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 17th day of September 2010

Entered in the Register on this 17th day of September 2010

(Signed)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry