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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/023

Judgment No.: UNDT/2016/032

Date: 18 April 2016

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ELMI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**  
Daniel Trup, OSLA

**Counsel for the Respondent:**

## **Introduction**

1. The Applicant is a former staff member of the United Nations Office at Nairobi (UNON). In his Application dated 21 March 2014, he contests the decision by the Assistant Secretary-General for Human Resources Management (ASG/OHRM), dated 27 February 2014, not to grant him a retroactive promotion for pension purposes as an exception under staff rule 12.3(b).

2. The Respondent filed a Reply on 15 May 2014 in which it was asserted that the Application was without merit and was not receivable.

3. In a response to the Respondent 30 September 2014, the Applicant raised his concerns with regards to the disclosure to the Respondent of email communications between him and the said MEU.

4. On 11 February 2015, the Tribunal issued Judgment No. UNDT/2015/013 and ruled that the Application was receivable.

5. The Tribunal, with the consent of the Parties at the Case Management Discussion of 12 May 2015, decided, in accordance with art. 16.1 of the

the merits of this case and that it





Assembly decision. Therefore, the Secretary-General has the discretion to exceptionally grant retroactive promotions.

21. Such discretion to issue a decision to retroactively promote the Applicant to the post of D-1 Director of Human Resources commencing January 2012 lies within the power of the Administration.

22. The initial request

*Zeid*<sup>1</sup> and *Kamal*<sup>2</sup>, highlight that such an administrative power does exist within the United Nations and has been exercised on previous occasions.

27. were not related to any legal impediments but rather to the costs involved, and also to its conclusion that its obligations under the principle of equal pay for work of equal value had been met.

*Was an obligation under the principle of equal pay for work of equal value triggered in the circumstances of this case?*

28. The principle of equal pay for work of equal value has been accepted to be part of the fabric of administrative law within the United Nations. It is not for the Administration to pick and choose that which is convenient for them to follow under this principle.

29. If the principle of equal pay for work of equal value has been accepted as part of international administrative law, then it applies to all aspects of the staff member interactions with the Administration. In other words, either the principle of equal pay for work of equal value applies in its totality or it does not apply at all. Such a laudable administrative principle does not lend itself to partial compliance at the convenience of the Administration. In *Diaz-Menendez, Centellas Martinez*<sup>3</sup>, the Tribunal reiterated that the Administration retained no discretion to violate the principle of equal pay for work of equal value.

30. The legal concept of equal pay for work of equal value forms the basis of it is the position that equal pay includes pensions. The inclusion of pensions in the concept of equal pay for work of equal value has been accepted in the European Court of Justice (ECJ) jurisprudence and general international administrative law under the Equal Remuneration Convention of 1951.

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<sup>1</sup> UNDT/2013/005.

<sup>2</sup> UNDT/2011/034.

<sup>3</sup> UNDT/2014/131.







level only as of 2018

confirmed in *Chen*<sup>9</sup>, budgetary considerations should not trump the requirement for equal treatment.

42.

refuse the request was also grounded on an incorrect reasoning that they had met their obligations vis-à-vis equal pay for work of equal value because the Applicant had received SPA from January 2012. The Administration failed to take into account the fact that receipt of SPA by the Applicant at the D-1 level did not entail any calculable pension contributions for him.

43. The decision to grant retroactive promotion is at the discretion of the Administration. However, discretionary authority is not absolute. In *Banguora*<sup>10</sup>, the former Administrative Tribunal concluded that although the Administration has discretionary power, which means necessarily, that staff members do not, strictly speaking, have a substantial right to secure a particular decision that should be protected, they do, however have a right to fair and equitable consideration and treatment because the Tribunal monitors the way in which that power is exercised

44. In the present case, any fair and equitable consideration of the exercise of discretion should have included the fact that the request for retroactive promotion was to remedy the results of a prolonged recruitment process in which the Applicant lost out in relation to pension rights. In addition, the obligations under the principle of equal pay for work of equal value had been triggered and not yet fully met. T





j. Should the Tribunal decide that the Secretary-  
retion  
was exercised improperly;

Administration. Rather they provide the Administration, with the









**Judgment**

62. The Tribunal awards the Applicant 12 months net base salary as compensation.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 18<sup>th</sup> day of April 2016

Entered in the Register on this 18<sup>th</sup> day of April 2016