Case No.: AUAT/2020/024-041
Judgment No.: AUAT/2022/009

IN THE MATTER OF:

S.T.S. et al, *Applicants*

v.

Chairperson of the African Union Commission, *Respondent*

FOR APPLICANT: Cédric VAREIL, Counsel
FOR RESPONDENT: Guy-Fleury NTWARI, Legal Counsel, African Union Commission
BEFORE: S. MAINGA, President, J. SEDQI, and P. COMOANE
HEARD ON: 22 August 2022, 23 September 2022

JUDGMENT

Procedural and Factual History

1. On 19 June 2020, eighteen (18) staff members currently serving in the African Union Permanent Missions in Geneva and Brussels filed, by and through counsel, applications challenging Respondent's decision to discontinue the preferential exchange rate (PER), a percentage factor under which the staff members' monthly pay was converted from the U.S. dollar to the local currency.

2. The Tribunal consolidated the applications by order dated 17 August 2020. Respondent submitted his written Answer on 28 October 2020. Applicants' written Observations were received on 30 December 2020.

3. On 20 October 2021, the parties were notified that this matter was scheduled for consideration by the Tribunal during its November 2021 Session. On 12 November 2021, the Tribunal heard this matter on the parties' papers filed.

4. On 16 November 2021, the Tribunal ordered Respondent to submit: (a) each applicant's letter of appointment valid at the time PER was discontinued; (b) any communication sent to Applicants notifying them of the decision to discontinue PER; (c) any report(s) presented to the Executive Council prior to the issuance of EX.CL/Dec.1073 (XXXVI) and any related documents reflecting the deliberations of the Executive Council pertaining to PER.

5. On 29 December 2021, Respondent filed additional information as required, which was transmitted to Counsel for Applicants. In a reply filed on 17 January 2022, Counsel for Applicants observed that Respondent's submissions were not adequately responsive or otherwise irrelevant. The Tribunal subsequently considered this matter on 15 March 2022 and invited the parties for an oral hearing on 12 April 2022, during which both parties presented oral arguments. The material facts are summarized as follows.

6. Applicants are staff members serving at the African Union offices in Geneva and Brussels in the Professional and General Service categories of appointment who collectively complained against the decision to stop PER as of 1 March 2020, following an Executive Council decision taken during 6-7 February 2020 (Ex.CL/Dec.1073(XXXVI))

7. Applicants learned of the implementation of Ex.CL/Dec.1073(XXXVI)) from their respective pay statements for the March 2020 pay period, according to which Applicants saw changes in their take-home pays approaching 50% reduction to staff posted in Geneva and 35% to staff posted in Brussels.

8. Union staff salaries are expressed in U.S. dollars, which presents a problem to staff based in high-expense duty stations with currencies other than the U.S. dollar. In respect to Geneva and Brussels offices, PER was introduced in the 1980s and had been used as a cushion against currency fluctuations until March 2020, when it was replaced by the U.N. exchange rate. The Tribunal understands that PER factors were not regularly monitored or revised in either office based

on foreign currency market conditions as related to the U.S. dollar, the Euro and Swiss Franc. For instance, an audit conducted in May 2011 at the Brussels office discovered that the rates applied in that office, established in 2002, had been used without any revision.

9. Over the last two decades, the Organization struggled, somewhat ineffectively, to address the issue decisively. Following studies conducted by the African Union Commission (Commission) and considered by the Permanent Representatives' Committee (PRC) in 2002-2003, the Executive Council began monitoring the issue in 2004, commissioning various studies on the matter including by an independent firm.

10. During its Fourth Session in March 2004, the Executive Council instructed the Commission to carry out a comprehensive study of the issue and present its proposals. At its next Session, the Council temporarily maintained PER and instructed the Commission to hire an independent consultant to study the issue and present its report during the Council's February 2005 session.

11. During the Eleventh Session, the Executive Council further instructed the Commission to comprehensively study the consultant's proposal to set African Union overall salary levels at 75% of that of the U.N. Subsequently in 2013, the Executive Council urged the Commission to expedite the study on salary scales as well as PER and report thereon in July 2014.

12. During its Twenty-Second Session, the Executive Council decided that the "…preferential exchange rate regimes for Geneva and Brussels Offices be maintained until a comprehensive review of AU salaries and allowances is carried out by independent consultants." The Executive Council next considered the issue during its Thirty-First Session when it deferred the phasing out of PER once more "pending the dissemination of the studies on AU salaries and allowances to Member States and their consideration by the Executive Council at the next Ordinary Session in January 2018."

13. The independent firm hired by the Commission (Birches Group) concluded its report in 2019. According to the Birches report, among other things, PER moved staff salaries in Geneva to 185% of U.N. remuneration in the same duty station, and 150% in Brussels. By way of illustration, a P-5 graded U.N. staff based in Geneva received $164,642.39 per annum, while a same-graded Union staff in Geneva received, after PER, $304,325.17 per annum.

14. The report also found that even with full removal of PER, the professional staff at the Geneva and Brussels offices would respectively receive 95% and 86% of the U.N. remuneration in the respective duty stations. These comparative ratios were still higher than the staff salaries at the headquarters in Addis Ababa, which approached mere 75% of U.N. remuneration levels in the same duty station.

15. The consultants, however, advised against cancelation of PER at once as it had been part of the "broader context of AU compensation." They instead recommended a phased approach to withdraw or reduce PER. The consultants illustrated that the U.N. often implemented similar benefit reductions in a phased fashion over an extended period of time.

16. Accordingly, the consultants recommended that PER be withdrawn in two stages: 50% after review of the consultants' report by the Executive Council and further reductions following a comprehensive review the Union's Compensation Policy. If the 50% reduction were adopted, the consultant recommended a form of temporary adjustment to allow for currency fluctuations.

17. In January 2020, after considering the recommendations of Birches Group, the Permanent Representatives Committee (PRC) recommended the cancellation of PER altogether, which was later endorsed with approval by the Executive Council and became the basis of the contested decision in these consolidated applications.

18. In February 2020, the Executive Council directed the Commission: (1) to discontinue PER in the Geneva and Brussels offices effective 1 March 2020; (2) that discontinuation of PER rates for both locations should take into consideration the local employment laws with respect to locally recruited GSB category staff for which a special allowance should be presented for consideration of Policy Organs in July 2020. EX.CL/Dec.1073 (XXXVI)

19. The decision to cease PER was implemented on 1 March 2020. Applicants from the Geneva and Brussels offices petitioned Respondent to review the decision on 20 April 2020 and 22 April 2020, respectively. Respondent did not reply to either petition.

20. Applicants ask the Tribunal to: (a) annul the decision and the pay slips issued since March 2020; (b) annul the Chairperson's failure to review the decision; (c) order Respondent to prepare new pay slips and pay Applicants all arrears with interest until full payment; (d) order Respondent to pay Applicants material and moral damages and additional equitable compensation.

Applicants' arguments

21. Under Staff reg. 5, the determination of staff salary scales, allowances and benefits is a function reserved for the Assembly. The decision to abolish PER was effectively a salary review taken without proper authority by the Executive Council.

22. Staff reg. 5 mandates a three-yearly review of staff salary and any change to staff remuneration, including PER, outside the mandated review period would be unlawful.

23. The decision to stop PER was taken in a process that lacked transparency. Applicants were not regularly informed as to Respondent's plans on the subject, the studies conducted on the topic and related matters.

24. The decision to stop PER violated the principles of equity and staff dignity. Applicants were not regularly informed and the substantial reduction in their salary affected their dignity.

25. The decision to stop PER violated the principle of acquired rights. Remuneration is a fundamental aspect of employment and any unilateral modifications of the same are restricted under the principle of acquired rights. The changes in salary resulting from the removal of PER was substantial – 50 % and 35% reduction respectively. Only minor changes to salary levels can be tolerated under the doctrine of acquired rights.

26. Finally, even assuming Respondent was justified to remove PER, the implementation was sudden and brutal, and as a result violated the principles of justice and fairness. No reasonable notice period was provided to Applicants. Upon deciding to vary their remuneration, Respondent should have considered mitigating measures. The sudden and sharp fall in their monthly pay was effectively punitive and vindictive.

27. The decision caused Applicants deep distress arising from the manner in which the decision was adopted and subsequently implemented. The decision affected the living conditions of Applicants and their ability to meet their personal finance obligations.

Respondent's arguments

28. The Executive Council took the decision with proper authority. Staff rule 19 authorize the Executive Council to "establish post adjustment indices at regular intervals… for all localities." The Executive Council took the decision under this authority. There was nothing unlawful for such review to occur outside of the mandated triennial review.

29. Respondent acted with transparency and treated Applicants fairly and with dignity. Applicants had notice of planned changes to PER since 2004.

30. Even after the removal of PER, staff at both locations continued to be remunerated at levels higher than other staff of the Union in other duty stations. In implementing the decision, Respondent ascertained that Applicants were not disadvantaged compared with other staff in other duty stations.

31. PER was not an acquired right as Applicants had been aware that a revision of the same had been under consideration since 2004, which did not conclude until 2020 due to "slow administrative process on the part of the Respondent."

32. Respondent is obligated to follow the Executive Council's decision as he did in this case. The new pay slips issued to Applicants as of March 2020 were lawful. Therefore, the consolidated applications must be dismissed.

Applicants' rejoinder

33. Respondent failed to establish that the Executive Council acted with proper authority. Staff rule 78.4 and Staff rule 19 do not support Respondent's argument that the Executive Council is competent to review salary scales, benefits or allowances. Staff reg 5.1(b) is the governing authority according to which only the Assembly could take a decision such as the one contested in this case.

34. Respondent's argument that the removal of PER had nothing to do with the required three-year review actually supports Applicants' contention that the Executive Council lacked authority.

35. Respondent did not meet its obligation to act with transparency. Counsel for Respondent established that the Executive Council had concerns regarding PER in 2004 but failed to justify the decision to stop it in 2020 with objective considerations.

36. Respondent's post-adjustment rates have not been revised since 2009, unlike the U.N. post-adjustment rates which are revised periodically with allowances for inflation and currency fluctuations. PER effectively protected staff from the

effects of the African Union's static post-adjustment rates – adopted in 2009 but have never been reviewed every three years as mandated by Staff rule 19.2.

37. The revision of PER was under consideration for a long period of time, but Applicants were not informed of Respondent's intentions to remove it and the affected staff were not invited to provide their observations. There were no bona fide consultations at all, which rendered the decision unlawful.

38. On the principle of acquired rights, Applicants never agreed to any revision of PER. That the changes had been envisaged since 2004 did not imply PER was not an acquired right.

39. The decision was not issued with sufficient notice to allow Applicants to prepare for the substantial reductions in pay. To illustrate the point, Applicants point out that the U.N. implemented in a graduated fashion a reduction in salary as little as 7.5% and such decision became effective over a period of fifteen (15) months. Finally, Applicants maintain that the reductions should not have entered into effect before 1 July 2020, and in any case, should not have exceeded 6% of their annual salary.

Discussion

40. Following a comprehensive review of PER as applied in the Brussels and Geneva representational offices of the Union, the Executive Council discontinued PER in respect to staff based in both offices as directed by the Executive Council. Respondent implemented the changes during the March 2020 pay period. Eighteen staff members based in both offices challenged their March 2020 pay slips with identical pleas, pressing five-pronged arguments to impugn the lawfulness of the contested decision, which the Tribunal addresses sequentially below.[1]

41. Applicants first contend the Executive Council's decision to stop PER was taken without proper authority. In support of this argument, Applicants point out Staff reg. 5 accords the Assembly the ultimate authority to determine "*scales of salaries, allowances and benefits of employees of the Union every three years*." The argument is misplaced. The Tribunal believes the consideration of PER, such as happened in this case, cannot be characterized as a salary review exercise as contemplated by Staff reg. 5. The contested decision affected two offices of the Union as opposed to a Union-wide compensation review, even then without in any way altering the level or structure of the affected staff members' salaries. In fact, the monthly payments transferred to Applicants under PER were neither an element of salary, allowances or benefits. Accordingly, Staff reg. 5 has no application in this matter, and as such the Tribunal does not find it necessary to reach the issue whether the Executive Council's decision was taken with proper authority under Staff reg. 5.

42. As a second ground of challenge, Applicants argue that the process leading to the contested decision lacked transparency because they were not adequately informed about the process of revising PER or how Respondent planned to address the issue. Given the history of the contested decision, the Tribunal can safely infer that Applicants were not entirely unaware of the precarious fate of PER since 2004. PER's revision and technical studies thereon have been under active consideration as far back as 2004, after PER had been called into question by the Executive Council. Respondent commissioned several studies that do not in any way appear to be undertaken *sub rosa*. In fact, the issue of PER was debated during multiple public proceedings of the Executive Council and the PRC. Therefore, the Tribunal finds Applicants' argument somewhat disingenuous and does not agree that Respondent's actions lacked transparency.

43. Turning to the argument based on the principles of equity and dignity, Applicants maintain that the substantial reductions in their monthly take-home pay resulting from PER's cancelation has affected their dignity. This plea is without merit. The Tribunal has considered that on account of PER Applicants received monthly take-home pays far exceeding the salary levels of staff in comparator organizations or even Union staff posted elsewhere when expressed as a ratio of salary paid by comparator organizations in their respective duty stations. These higher-levels of pay persisted for years despite changes in the market position of the U.S. dollar which perversely generated handsome windfall for Applicants. The cancellation of such unjustified payments cannot offend the principles of equity and staff dignity. On the contrary, the decision to cancel PER would enhance equity across Union staff by removing pay distortions created by the application of PER.

44. Applicants next argue that the elimination of PER breached their acquired rights. Borrowing from an ILO Administrative Tribunal's judgment " [an] amendment of a rule to an official's detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment."[2] The central purpose of

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[1] With respect to the second paragraph of EX.CL. Dec. 1073 (XXXVI), Respondent notified the Tribunal that it identified two Applicants in the GSB category covered by the directive and has corrected one Applicant's pay with a monthly special allowance and would accord the same administrative grace to the remaining Applicant retroactive to March 2020. Applicants have not countered that information and the Tribunal would accept that there are no controversies to resolve in relation to para. 2 of the Executive Council decision.

[2] *ILOAT Judgment No*. 4195, para. 7.

the doctrine is to protect staff members against unilateral alterations of their essential or fundamental terms of employment.

45. The Tribunal finds on the circumstances of this case that PER was not an acquired right. First, the Tribunal could not find any provision enumerating PER as a contractual obligation of the Union. It was not reflected in any of Applicants' terms of employment at all. Nor was it set forth anywhere in the provisions of the Staff Regulations and Rules. The Tribunal has not seen any legal document conferring the benefit on Applicants in the first place. Therefore, the Tribunal is not convinced that PER was a fundamental or essential term of appointment in consideration of which Applicants accepted appointment.

46. On the contrary, PER was a variable contingency the application of which depended on the relative market position of the U.S. dollar against the Euro and the Swiss Franc as appropriate. As the Tribunal understands it, PER was subject to periodic variation including removal altogether without affecting any of Applicants' terms of appointment. More importantly, PER's application had been continuously tentative since being contested in 2004; it survived through March 2020 purely as a result of the Union's glacial pace in addressing the issue. Thus, Applicants cannot in good faith argue that they held reasonable expectations that PER would continue indefinitely. To accept the notion that PER was an acquired right in these circumstances would imply, absurdly, that the unwarranted rates would have to continue throughout each Applicant's service with the Union.

47. The Tribunal finally addresses Applicants' plea that the contested decision's implementation was abrupt because it was done without prior notice and the resulting pay reductions were too sharp. First, the fact that PER's cancellation caused individual economic pain to Applicants posed no legal obstacle to the Executive Council to modify it or cancel PER altogether in the exercise of its statutory powers. Second, while the Tribunal is sensitive to Applicants' adjustment pain arising from the contested decision, Respondent had no choice but to mechanically implement the Executive Council's decision as directed. The text of the decision left no room for any extraneous considerations by Respondent.

48. The Tribunal also examined Applicants' plea in light of the fact that the issue of PER dragged on since 2004 – each delay working to Applicants' advantage. As discussed in para. 42, the Tribunal does not find it credible that Applicants were not aware of the protracted deliberations on the fate of PER. Rather, it should have long been apparent to them that given the changes in the U.S. dollar market position as well as the Executive Council's declared objections, the percentage factors of PER could not be expected to continue indefinitely.

49. Based on the foregoing, the Tribunal concludes that PER's cancellation cannot be successfully challenged with arguments premised on principles of transparency, fairness and dignity or acquired rights. Given the Birches Group report, currency market surveys and analyses contained therein, the Tribunal further concludes that there was a legitimate organizational basis to cancel it. For these reasons, the Tribunal affirms the decision to eliminate PER effective 1 March 2020 as rational and well-founded. The application is DENIED.

Date: 21 October 2022

/signed/

SYLVESTER MAINGA, PRESIDENT
JAMILA B. SEDQI
PAULO D. COMOANE

Secretary: