
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/010

Judgment No.: UNDT/2019/049

Date: 29 March 2019

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar:

FACTS

7. The facts laid out below are uncontested and supported by the parties' pleadings and additional submissions.

8. The Applicant, who was a P-3 officer, joined the then United Nations Support Office for AMISOM (UNSOA) in December 2009 on a Temporary Duty Assignment (TDY) against a P-4 Administrative Officer post.¹ While on TDY, he applied for the post of Administrative Officer at the P-4 level (Generic Vacancy Announcement (GVA) #414778).²

9. After undergoing a competitive recruitment exercise, which was subject to Field Central Review Board (FCRB) approval,³ the Applicant was selected for a P-4 Administrative Officer post with UNSOA on 14 April 2010.⁴ Consequently, on 5 May 2010, UNSOA offered the Applicant a one-year fixed-term appointment as an Administrative Officer at the P-4 level in Mombasa, Kenya.⁵ The Applicant accepted the offer of appointment on 13 May 2010⁶ and was formally transferred to his new post with UNSOA on 4 June 2010.⁷

10. On 24 September 2010, the Field Personnel Division (FPD) of the Department of Field Support (DFS) informed UNSOA that the Applicant could not be promoted because a reference check had revealed that he did not have "a degree of any sort".⁸

11. In October 2010, the Applicant was given a revised Letter of Appointment (LOA) appointing him to the P-4 Administrative Officer post in Mombasa at the P-3/7 level effective 4 June 2010 to 3 June 2011.⁹ The Applicant signed the revised LOA on 3 October 2010 with the following proviso: "Note the offer of appointment originally

¹ Respondent's reply, para 6; Annex R1.

² *Ibid*; Annex R2.

³ Application, page 3.

⁴ Respondent's reply, Annex R3.

⁵ Application, Annex 1.

⁶ *Ibid*.

⁷ *Ibid*, page 3.

⁸ Respondent's reply, Annex R4.

⁹ Application, page 3; Annex 2.

Management Evaluation Unit (MEU) that his request was time-barred.¹⁴

17.

for SPA for the period 1 March to 30 June 2014. The CCPO responded to him the same day that he had been selected for the TJO and that his team would “proceed with [the Applicant’s] assignment at the P-4 level and make all necessary adjustments for the payment of pending SPA.”²³

23. The Applicant received an offer of appointment for the Administrative Officer post at the P-4 level for an initial period of one year, effective 1 June 2014. He accepted the offer on 16 June 2014.²⁴

24. The Applicant followed up on the clearance for his promotion on 18 July 2014

the Applicant of his redeployment to Mogadishu at his P-3 level from 1 April 2016 for an initial period of one year.²⁸

28. The Applicant continued to receive his salary at a P-4 level as per placement in Mombasa.²⁹ Between 25 May 2016 and 23 June 2016, the Applicant emailed the Chief/HRS on the non-payment of his entitlements attached to the posting in Mogadishu (i.e. post adjustment, hardship allowance, mobility allowance, hazard pay, assignment grant and relocation grant). The Chief/HRS informed him on 26 June 2016 that “the action of placing [him] against the position in Mogadishu has not been completed” but that it would be completed during the week. The claimed payments were not made so the Applicant followed up again between 2 July 2016 and 3 August 2016 to no avail.³⁰

29. On 10 August 2016, UNSOS informed the Applicant that his fixed-term P-4

subsequent decisions were mere reiterations of the 15 December 2010 decision. The Tribunal notes that the 15 December 2010 decision was made on the basis that the Applicant did not hold the requisite educational qualifications for the grant of a P-4 appointment. The Applicant then waited until he had completed his MBA and notified the Administration of this new and material fact to renew his request for promotion.

35. Thus, the decision communicated to the Applicant by FPD on 21 July 2012 was a separate and distinct decision that informed him unambiguously that

parties to a close; there is no showing that, other than in a telephone discussion on 26 April 2014 which was clearly inconclusive³⁸, the Applicant would have pursued the issue of promotion or placement on the P-4 roster and thus, that the Administration would have taken anr U2(r)-7(a)3 0.0 0.6ee6 647.001

31 July 2016. Considering the assurances given to the Applicant by the CCPO and the Applicant's subsequent appointment to the P-4 level from 1 August 2014 to 31 March 2016, the Tribunal finds that the parties at the time had no doubt about the grade attained by the Applicant at that position.

40. By no means can the 23 February 2016 memorandum from the UNSOS Chief/HRS on the Applicant's assie the P

to Mogadishu.

44. Since the payments were made at the P-3 level and the Applicant maintains that he should have been paid benefits and entitlements due to staff at a P-4 level, the Tribunal finds that the application is not moot.

Merits

Were the decisions to void the Applicant's P-4 appointment and recover payments provided to him under his P-4 letters of appointment lawful?

45. The Applicant's case is that:

- a. The 2010 recruitment process, which included a (Q(u)de)3()14(C)5(R)5(B)5(BT /F1 12.0

e.

elements because of amendments to staff regulations and rules. This is not the case here. The Applicant cannot claim entitlement to a fixed term P-4 appointment on the basis that the Administration previously issued him such an appointment in error.

d. The Applicant was erroneously remunerated at the P-4 level for two years. Upon rescinding the P-4 appointments, the Organization lawfully decided to recover those overpayments under ST/AI/2009/1 (Recovery of overpayments made to staff members). The Applicant has been approved for SPA payments for having performed higher level duties from 1 June 2014 to 31 March 2016.

apposite approach from the point of view of legal certainty.⁴⁰ However, reliance on the principle invoked by the Respondent that “the administration has an obligation to correct an unlawful decision” to construe a blanket authorisation to retract, at administrative convenience, decisions which confer rights upon staff members, would not be appropriate.

entitlement.

51. A different stance was expressed in *Cranfield* where such retroactive action was allowed:

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case.⁴³

52. As shown above, the Appeals Tribunal in *Cranfield* resigned from the identification of a discernible discriminating principle and of the criteria, whether positive or negative, for the authorisation of an abrogation or revocation of an appointment, and left the issue broadly defined as discretionary. Concerns identified in the jurisprudence as relevant here may include: whether the breached regulation concerned a fundamental matter or peripheral issues⁴⁴; whether the staff member acted in good faith⁴⁵; whether all conditions of the offer were met by the candidate⁴⁶; and what kind of detriment the corrective action entails to the staff member.⁴⁷ Whereas it is not apparent on what basis *Cranfield* was distinguished from *Castelli*⁴⁸, a viable question could also be whether the mistake would produce lasting consequences or concerns a singular matter. On the other hand, the Appeals Tribunal did not condone a criterion that a revocation of a decision on appointment be restricted by a time limit⁴⁹, a guarantee of legal certainty adopted in certain municipal systems⁵⁰, as well as

⁴³ *Cranfield*, *ibid.*, para. 36

⁴⁴ *Cranfield*, *ibid.*, at para. 42.

⁴⁵ ~~D'Hooge~~ UNDT/2010/044;

recognized by the Organization in reference to recovery of payments.⁵¹ In totality, however, the jurisprudence did not develop a coherent scheme of

including pension benefits.

61. Respondent's case is that the Applicant's reassignment to Mogadishu was at the P-3 level. The Administration correctly paid his benefits and entitlements at the P-3 level. The Applicant's argument that the Administration should have paid his benefits and entitlements at the P-4 level upon his reassignment to Mogadishu is without any basis.

62. The Tribunal takes as a starting point that, at the time of his redeployment to Mogadishu, the Applicant was a holder of a fixed-term appointment at a P-4 level. This appointment was honoured by the Organization, as evidenced, among other, by relevant salary slips. No other letter of appointment was offered to the Applicant at the time. The question whether a memo from the UNSOS Chief/HRS, informing the Applicant about the deployment at "his current P-3 level" could be attributed the power to demote the Applicant for the period of service in Mogadishu, must be, once again, answered in the negative.

63. Notwithstanding the wide discretion of the Secretary-General in assigning staff members to the activities or offices of the United Nations expressed in staff regulation 1.2(c), re-assignments, as confirmed in the Appeals Tribunal jurisprudence, for compliance with the staff member's contractual rights, must, as a starting point, be at the same grade.⁵⁶ Demoting the Applicant could effectively happen only through the acceptance of a new letter of appointment, which is not the case. It was moreover clear between the parties that the matter of emoluments remained debatable and that, in any event, the Applicant never conceded to accept the deployment to UNSOS on the conditions varied from his letter of appointment.

64. For the reasons set out above, and given that the purported revocation was

REMEDIES

65. The Applicant seeks the following remedies:
- a. Rescission of the decision to void his P-4 appointment;
 - b. Appointment at the P-4 level from 1 August 2014 to the present;
 - c. Rostering at the P-4 level;
 - d. All sums recovered consequent to the decision to cancel his P-4 promotion be returned; and
 - e.

