



Introduction

1. The Applicant is a former employee of the Office for the Coordination of Humanitarian Affairs (OCHA) who was assigned to Port-au Prince, Haiti, as the Head of the OCHA Field Office (OCHA Haiti FO) at the D-1 level.

2. On 11 February 2012, the Applicant filed the current Application with the United Nations Dispute Tribunal (Tribunal) to contest the decisions to: temporarily reassign him from Haiti to Dakar; abolish his D-1 Post as Head of the OCHA Haiti FO and to offer him an appointment at the P-5 level instead of his personal D-1 level.

Procedure

3. In reply, the Respondent alleged that the Application was not receivable. The Tribunal, by its Judgment UNDT/2012/189 of 3 December 2012, ruled that it is receivable.

4. 4.

- b. Was the Applicant appointed to a new fixed term contract at the P-5 level in Dakar or reassigned to that position?

- c. If the Applicant was reassigned, was it lawful for the reassignment to

2010, he was informed of his reassignment

who has a valid D-1 contract through August 2011 but has had to leave his current post due to health reasons”. The letter also said that the Applicant required more direct access to medical care following his recent medical evacuation.

20. On 10 December 2010, the Applicant wrote to his senior management team in Haiti announcing his departure from Haiti to Senegal in which he said:

Dear Colleagues,

Trust all is fine and this email finds all of you well, despite the difficult context in Haiti aggravated by the ongoing post electoral violence. I am writing today to update all of you on my health situation and to share with you my future carrier [sic] plans.

As some of you may be aware, I took the advantage of being in Nairobi on R&R and leave to undergo additional medical tests in order to get a second opinion. The results were good and reassuring, however, to avoid being subjected to similar conditions, which may affect my health, OCHA, SMT accepted to reassign me from Haiti to Senegal, taking the advantage of a suitable opening in Dakar (Head of Regional Office for West Africa).

Awaiting the conclusion of administrative procedure for reassignment at my current level, my plans to return to Haiti on 6 December 2010, were modified due to the recent developments in Cote d’Ivoire. I have been asked by Philippe Lazzarini to go to Abidjan as part of the OCHA temporary deployment in the country in connection with the current crisis. As such my return to Haiti has been postponed to 13 January 2011 to hand over and proceed to my new duty station.

Finally allow [sic] to take this opportunity to say good bye to Imogen, Jessica and Bernard who will be leaving OCHA Haiti the beginning of next year (if there plans are still maintained). I would have loved to be with you to bid them farewell and to thank them for their hard work, professionalism and excellent collaboration. Since I will not be there I would like to say to Bernard, Jessica and Imogen “I enjoyed working with you and sincerely hope our paths will cross again”. For the other members of the team, let me conclude by saying “de courage, bonne continuation, merry Xmas and happy new year in advance”.

21. The Applicant explained that this letter was an attempt to calm his senior management team since he was absent from Haiti, to update them on his health issues after his return from medical leave and to avoid rumors. He pointed out that his acceptance of the Dakar post was conditional on it being upgraded to the D-1 level. He denied that the letter was evidence of his unconditional acceptance of his reassignment.

22. Ms. Amos' request for the Dakar post to be upgraded to D-1 was rejected by the Controller on 28 December 2010 on the grounds that the reasons for the upgrade did not reflect a change in duties and responsibilities of the post and hence could not be used as the basis for reclassification. The Controller noted: "Since the temporary relocation of extra-budgetary posts and staff under OCHA is within the purview of OCHA, consideration should be given to accommodating the situation of the incumbent of the post of Head of office, Haiti, using available vacant posts".

23. In early 2011 a decision was made to restructure the Haiti mission. This included the abolition of the D-1 Haiti post which would only be required for eight months in 2011.

24. Ms. Amos told the Tribunal that OCHA is funded 95% by donors and only 5% from the regular United Nations budget. She is accountable to the General Assembly for the budget and the prudent use of donors' money. She further explained that the number of D-1 posts available in OCHA is limited. They fall into three categories:

- a. Temporary D-1 posts that she can apply for to cover a specific period of time;
- b. A pool of D-1 posts created to give greater flexibility. In theory these posts can be moved around to meet OCHA's needs but in reality because of the number of complex emergencies in a number of places most of these posts have remained static;

c. Posts created to manage a crisis with no time limits. Typically such situations call for a temporary upgrading of the Head of Office post to D-1 to initially manage a huge coordination task. The concurrence of the ACABQ is required for such posts. After a year the need is reassessed.

25.

his post expired there was no mechanism to offer him a D-1 grade unless he was appointed through a competitive process to a vacant D-1 post. He gave an example of another staff member who had moved to a lower graded post and said this was common practice in OCHA. Finally, he indicated that he looked forward to the Applicant's decision about the P-5 appointment in Dakar.

35. Ms. Amos explained that OCHA was trying to maximize the number of staff appointed to D-1 posts but after P-5 there are few such posts. She said that very often Headquarters (HQ) staff will take a position in the field to be temporarily promoted to a higher grade for the experience but do not expect to maintain the grade when they return to HQ.

36. On 10 June 2011, the then Haiti Head of Office sent a cost plan to Mr. Ging, which showed that the D-1 post would be required for 8 months. This was approved by the Senior Management team. Ms. Amos told the Tribunal that there had been a budget review for Haiti, which reduced the budget substantially. The operations were being reduced and there was no longer a need for a D-1 post.

37. On 24 June 2011, the Applicant requested management evaluation of the decision to appoint him to a fixed-term appointment as Head of OCHA Regional Office in Dakar at the P-5 level once his current fixed-term contract expired on 24 August instead of an appointment at an equivalent D-1 level elsewhere. The management evaluation was held in abeyance pending the conclusion of informal resolution. The Applicant sought to reactivate the management evaluation but in either December 2013 or January 2014, the Management Evaluation Unit (MEU) informed him of the closure of his case because it was before the Dispute Tribunal.

38. On 21 July 2011, Mr. Lazzarini informed the Applicant that the D-1 post of Head of Office OCHA Haiti had been abolished effective August 2011. He reiterated the offer of the P-5 post at Dakar and stated, "[a]s your contract expires on 24 August 2011, we need to clarify on your intentions". The Applicant advised that he had consulted the Ombudsman's office and hoped for a mutually accepted conclusion.

He copied this to the acting Executive Officer, who in turn wrote to Mr. Moses Tefula, Officer-in-Charge (OiC), Administrative Service Branch, OCHA, as follows.

Please have your HR team review this case and advise on how to resolve it. I found it strange that CRD is communicating directly to

42.

47. In response to a question from the Tribunal, Ms. Amos explained that in her request she was not asking for ACABQ's agreement for an additional D-1 post but for the D-1 post in Haiti to be used for South Sudan. In effect this letter was a political document. She was showing ACABQ she was being prudent but it did not mean that the D-1 post in Haiti had not been abolished in August 2011.

Submissions of the Respondent

48. The Respondent summarized his case as follows:

a. There is no doubt the Applicant wished to maintain the D-1 level he had been promoted to. There is also no doubt that the Administration made efforts to accommodate him. However, under the Staff Rules and Regulations there was no legal basis for the Applicant to insist on a reappointment at the D-1 level after the expiry of the D-1 head of office post he had held in Haiti.

b. Staff members are bound by the agreement they enter into with the Organization. The Applicant's fixed-term appointment had no expectancy of renewal. Having accepted the fixed-term appointment at the P-5 level, the Applicant is bound by that agreement.

c. To maintain a position at the D-1 level following the expiry of his appointment, the Applicant needed to succeed in a competitive selection exercise for an alternative D-1 position. The Applicant's appointment was for a fixed term of 18 months, which expired on 30 September 2011. The Applicant's appointment was for a fixed term of 18 months, which expired on 30 September 2011. The Applicant's appointment was for a fixed term of 18 months, which expired on 30 September 2011.

f. The temporary assignment of the Applicant from Haiti to Dakar was in accordance with staff regulation 1.2(c) and a rational discharge of the discretion to reassign.

g. The Respondent submitted that the appointment of the Applicant to the P-5 post was not a demotion but the offer of a new appointment after a fixed-term appointment had run its natural course to expiry.

Submissions of the Applicant

49. The Applicant stated his case as follows:

a. The reassignment to Dakar was conducted without real consultation. This is shown by Mr. Lazzarini's statement that the decision was managerial and not subject to discussion.

b. He always made his acceptance of the temporary assignment conditional on an upgrade of the Dakar post to D-1.

c. In cases of abolition of post due to budgetary necessities the Administration must act in good faith.

d. The Haiti post was not abolished in August 2011 but continued to exist at least until March 2012 when the ACABQ authorised its transfer to Juba, South Sudan.

e. The cost plans submitted by the Respondent do not prove abolition of the post. It should have been abolished by the ACABQ, and as this was not done it remained in existence.

f. The Respondent should have taken the advice of the Controller on 28 December 2010 and accommodated his situation by using available vacant posts. The Applicant was not appointed to any of the available D-1 posts.

taken according to Staff Regulation 1.2(c) and ST/AI/2006/3 applicable at the time.

53. Additionally, in *Rees* 2012-UNAT-266, the Appeals Tribunal held that:

It is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures. An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and, whether he or she had substantial experience in the field.

54. The reassignment of the Applicant to Dakar until 24 August 2011 fulfilled each of the factors listed above. It was at his same grade; as head of office he had the same responsibilities as those in the Haiti post albeit in a

was made in his interests given the stressfulness of the post in Haiti and the stress he suffered while working there. There was no evidence of unlawful motivation.

57. The Tribunal finds that the temporary reassignment of the Applicant to Dakar at the D-1 level was a lawful exercise of the managerial discretion vested in the USG.

Was the Applicant appointed to a new fixed term contract at the P-5 level in Dakar or reassigned to that position?

58. The Respondent maintains that the Applicant was reassigned from Haiti to the Dakar post for the remainder of his fixed term D-1 contract but his employment in the P-5 post was not a reassignment but an appointment following the end of a fixed-term contract.

59. Article IV of the Staff Regulations relates to the appointment and promotion of staff. Article 4.1 reflects article 101 of the Charter of the United Nations (the Charter), which provides that the power of appointment of staff members rests with the Secretary-General. Pursuant to staff regulation 4.3, so far as practicable, selection shall be made on a competitive basis.

60. Under section 2.5 of ST/AI/2010/3, heads of departments have the authority to laterally move/transfer staff members to job openings at the same level without advertisement of the job opening or further review by a central review body.

61. Section 3.1 of ST/AI/2010/3 states that “the staff selection system applies to the selection and appointment of all staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the Staff

63. The Applicant moved from the D-1 post in Dakar to which he had been assigned to the fixed-term P-5 post without any break in service. His tenure with OCHA did not end although his D-1 post in Haiti did.

64. In Mr. Ging's 25 April 2011 email to the Applicant and in Mr. Lazarrini's offer of the P-5 post on 21 July 2011, both referred to an appointment. Apart from these, all of the other documentary evidence concerning the Applicant's employment on the P-5 post in Dakar referred to it as a reassignment. On 24 August 2011, Mr. Ging officially requested the OIC of the Administration office to reassign the Applicant from D-1 to P-5. The Applicant was sent a letter of reassignment that he signed (with reservation).

65. Counsel for the Respondent maintained that the documents referring to reassignment were confused and do not reflect the legal situation. However, the Ging and Lazarrini emails upon which the Respondent relied were only offers of appointment whereas the signed letter of reassignment, which expressly stated the appointment was a reassignment, is the contractual basis upon which the appointment was agreed. It was prepared in accordance with Mr. Ging's instructions to reassign the Applicant. By signing this letter on 6 September 2011 the Applicant accepted the

The Respondent rejected the Applicant's submission that a grade is personal to the incumbent.

68. The Tribunal does not accept the Respondent's submission that the grade of a post is determinative of the grade of a staff member. Posts have grades but so do individual staff members. As determined in *Rees* when reassigning staff members their personal grade is a relevant factor in assessing the suitability of the reassignment.

69. This was also recognised by the OCHA Human Resources staff when the downgrading was discussed internally although Ms. Amos and Mr. Lazzarini maintained that this was common and an accepted practice in OCHA. The question is whether the practice of OCHA in downgrading staff on a regular basis is in

76. Staff rule 4.1 stipulates that:

The letter of appointment issued to every staff member contains expressly or by reference all the terms and conditions of employment. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment.

77. The letter which appointed the Applicant to the D-1 post at Haiti did not state that the Applicant was liable to be appointed at a lower grade once his fixed-term in Haiti ended. Whatever the need or the practice of OCHA is in this regard, it was not reflected in any of the letters of appointment signed by the Applicant while he was employed by OCHA.

78. In the cases of **Reesand Kamunyj** UNAT recognized the importance of the retention of grade when reassignment is being considered. It held that a reassignment should be at the staff member's grade⁷.

79. The only reference in the United Nations Staff Rules to reducing the personal grade of a staff member is in the disciplinary procedures set out in staff rule 10.2, which provides for loss of one or more steps in grade or demotion with deferment, for a specified period of eligibility for consideration for promotion.

80. There was no evidence that the reassignment of the Applicant to the P-5 post by the OCHA Administration was intended as a disciplinary measure against the Applicant warranting a demotion.

81. If, on the other hand, this was an appointment to a post other than by assignment there was no selection process as required by section 2.3 of ST/AI/2010/3 and is also in breach of the staff rules.

82. The Tribunal holds that in the absence of a disciplinary measure (the only explicit justification for demotion in the Staff Rules) the Organization should maintain the personal grade of a staff member unless the staff member agrees to such

⁷ At paragraphs 58 and 35 respectively.

a reduction. In this case the Applicant consistently refused to agree to the reduction of his grade from D-1 to P-5 grade and only accepted the Dakar position with a reservation.

83. The Tribunal accepts that an organisation like OCHA operates in an environment in which it must respond to urgent international emergency situations. It needs flexible staffing arrangements. To this extent, in assigning the Applicant to the P-5 post in Dakar OCHA may have acted in the best interests of the Organization, however, as required by UNAT in *Rees* the decision has also to be in accordance with mandatory procedures which in this case are the Staff Rules. In the absence of any rules to meet its own particular needs, OCHA is bound by the general staffing rules that apply throughout the United Nations.

84. In summary, if the appointment to another post was by way of a reassignment or a lateral move it can only be lawful if the post is at the same level as the applicant's personal grade. If it is not a reassignment or lateral move it can only have been filled after a competitive selection process.

85. The Tribunal finds that on either view OCHA's insistence that the Applicant must take a reduction of grade in order to retain his employment with OCHA was unlawful. This decision is therefore rescinded.

Was the D-1 post in Haiti abolished or transferred from Haiti to South Sudan?

86. There is no doubt that the Applicant's appointment to Haiti was for a fixed term. It coincided with the budget agreed to by ACABQ to fund a D-1 post to meet OCHA's immediate needs after the earthquake and subsequent disasters. The Cost Plans produced by the SMT show the reduced needs of the post. During the time that the Applicant served as a D-1 in Dakar, the person who replaced him as Head of Office in Haiti did so at the P-5 level.

87. In her submission to the ACABQ on 17 January 2012, Ms. Amos referred to the Haiti D-1 post as if it still existed and requested that it be converted into a pool post for use elsewhere. The Tribunal accepts that this reference to the Haiti D-1 post was not an acknowledgment by Ms. Amos that the post was still in existence and operational in Haiti. It was her attempt to have ACABQ agree to use the funds allocated for that post elsewhere as the need for a D-1 in Haiti no longer existed.

88. The Tribunal is satisfied that the reasons given by the USG for the abolition of the Haiti D-1 post were genuine. The abolition was not intended to prejudice the Applicant. The Haiti Head of Office post, normally at a P-5 grade, had been temporarily upgraded to D-1 to meet the extraordinary needs of Haiti following the 2010 earthquake. Those needs diminished and, following a budget review, the decision was made to revert the post to a P-5 position.

89. Although budgetary approval by ACABQ is required for the establishment of posts, the Tribunal accepts that there is no requirement for ACABQ to make the decision to change the grade of a post at a particular duty station. Based on operational needs, the USG makes an internal administrative decision about the deployment of an approved post. The D-1 post which had been approved by ACABQ was temporarily unused and available to be utilized elsewhere. In this case, Ms. Amos used her discretion to re-grade the Haiti post to its former P-5 status and held the resulting vacant D-1 post after August 2011 until its use could be justified elsewhere. There was a need for it in South Sudan at which time the D-1 post was reactivated.

90. The Tribunal finds that to the extent that the D-1 post was no longer justified in Haiti it was abolished and the post reverted to a P-5 status.

Summary of conclusions

91. The Applicant's temporary reassignment from Haiti to Dakar at the D-1 level was a lawful exercise of the managerial discretion vested in the USG/OCHA.

contested decisions, including the documentation about the abolition of the post which were only provided once the case reached the Tribunal.

97. The Tribunal finds that the Applicant suffered harm as the result of the unlawful demotion and is entitled to compensation for moral damages⁸.

98. Under article 10.6 of the UNDT Statute, the legal costs of

Case No. UNDT/NBI/2012/008

Judgment No.: UNDT/2014/082

(Signed)

Judge Coral Shaw

Dated this 25th day of June 2014

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