UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2013-UNAT-367

Cranfield

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Sophia Adinyira Judge Rosalyn Chapman
Case No.:	2012-415
Date:	17 October 2013
Registrar:	Weicheng Lin

Counsel for Ms. Cranfield:	Alexandre Tavadian
Counsel for Secretary-General:	Simon Thomas

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/141, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 24 September 2012 in the case of *Cranfield v. Secretary-General of the United Nations*. The Secretary-General appealed on 26 November 2012 and Ms. Mary Germaine Cranfield answered on 14 January 2013.

Facts and Procedure

2. Ms. Cranfield joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in January 2002 on a fixed-term contract at the G-4 level, based in Dublin, Ireland. In March 2002, she was granted an indefinite contract and promoted to the G-6 level. Within UNHCR, the granting of indefinite contracts ceased in November 2002**,** and the practice of recruiting with fixed-term appointments resumed until indefinite appointments were reintroduced through the 2003 Appointment, Postings and Promotions Board (APPB) Procedural Guidelines and the 2006 Appointments, Postings and Promotions Committee (APPC) Procedural Regulations.

3. These latter developments, however, did not affect Ms. Cranfield since she was already on a contract of indefinite appointment from March 2002.

4. On 1 July 2009, new Staff Regulations and Rules entered into force. Whilst indefinite and permanent appointments were thereby abolished, provision was made, within UNHCR, for eligible staff members holding fixed-term appointments to be considered for a contract of indefinite appointment.[1]

5. By internal memorandum IOM/004/2011-FOM/005/2011 dated 21 January 2011 and entitled "One-Time Review for the Granting of Indefinite Appointments", the High Commissioner informed UNHCR staff members that a one-time review would be undertaken in order to consider the candidacies of staff members who, as at 30 June 2009, met the eligibility criteria of five years' continuous satisfactory service for conversion from a fixed-term appointment to an indefinite appointment.

[1] Within the United Nations Secretariat and other United Nations organisations, staff members on fixed-term appointments could be considered for permanent appointments.

6. On 23 February 2011, the Director of the Division of Human Resources Management (DHRM) advised that UNHCR staff members considered eligible for contracts of indefinite appointment had been contacted via e-mail and that staff members who had not been contacted but who believed themselves eligible for an indefinite appointment could contact the Recruitment and Postings Section for clarification. Attached to this e-mail was IOM/004/2011-FOM/005/2011 and staff members were referred specifically to paragraphs 6 to 14 thereof which dealt, *inter alia*, with the eligibility requirements for the one-time review, in particular the requirement for five years' continuous service and the relevant cut-off date being 30 June 2009.

7. At the time of the promulgation of the "One-Time Review", Ms. Cranfield was working as an Administrative/Programme Assistant at the G-6 level in the UNHCR's regional office in Brussels, Belgium. She had been selected for the post on 21 July 2009. In order to take up her new posting, Ms. Cranfield resigned the indefinite post she held in Dublin with effect from 31 October 2009.

8. On 2 November 2009, Ms. Cranfield signed her letter of appointment for the Brussels post. That letter specified that she was employed under a fixed-term contract from 1 November 2009 to 31 December 2010. Her appointment was subsequently extended to 31 December 2011.

9. Following receipt of the Director/DHRM's e-mail of 23 February 2011, Ms. Cranfield requested "inclusion in the one-time review for granting of indefinite contracts". She advised:

> I have read the requirements and consider that I meet them. I also attach my current factsheet for your reference.
>
> I started as a local staff member of UNHCR in Dublin in January 2002 and was granted an indefinite contract in March 2002. I have been working for UNHCR continuously since that date, with fully satisfactory PARs and ePADs, and without disciplinary measures.
>
> In 2009 I got a new local staff member position in Brussels. For administrative reasons (because I was going from a local position in one country to one in another country) I was required by DHRM to formally resign in Dublin so that I could be rehired in Brussels. There was no interruption of service: I finished on 31 October 2009 in Dublin and started on 1 November 2009 in Brussels.

> Unfortunately, this administrative requirement meant that I lost my indefinite contract. Since that date I have been on consecutive annual fixed[-]term contracts.
>
> Since I have been on continuous indefinite and fixed[-]term contracts with the organisation since January 2002, with fully effective or higher performance reviews, I believe I should be included in this one-time review.

10. While it appears her ability to satisfy the five years' continuous service criterion was at some time in doubt, Ms. Cranfield was, on 24 February 2011, advised that her service met that requirement.

11. On 12 October 2011, she was informed that she had been granted "an indefinite appointment, retro-active to 1 September 2009".

12. Between 12 and 19 October 2011 inclusive, a series of e-mails passed between personnel in the DHRM which, *inter alia*, made reference to the fact that Ms. Cranfield had been on a contract of indefinite appointment up to 31 October 2009 and that she had been on a series of fixed-term appointments since her arrival in Brussels. One such e-mail noted personnel within DHRM agreeing "that the staff member could be granted the new indefinite appointment through the one-time review exercise effective from the date she was rehired in Brussels", a position confirmed in another internal e-mail of 19 October 2011 by the Chief of the Personnel Administration and Payroll Section (PAPS) and ultimately reflected in the "letter of appointment" issued on 20 October 2011 offering her an "indefinite appointment" as an Administrative/Programme Assistant at the G-6 level in UNHCR's Brussels Office, effective 1 November 2009.[2]

13. On 17 January 2012, PAPS at UNHCR, Geneva, notified the UNHCR regional office in Brussels, and Ms. Cranfield, that the latter could not be considered to have met the eligibility requirements for conversion to an indefinite appointment. The Geneva e-mail to DHRM in Brussels read, *inter alia*, as follows:

> It is noted from the MSRP/HR records, that contract was issued based on the email of 19/10/ 2011, wherein the Chief of PAPS has indeed confirmed his initial view that the staff member should be granted such a contract. However, we would like to clarify that this email exchange did not form a final decision and authorisation from DHRM

[2] Effectively the post she already held to that point in time, save the change to her tenure.

> to proceed with issuance of such contract, and in fact, the exchange was further shared with Legal Affairs Section [LAS] seeking their legal opinion in that respect.
>
> LAS has now confirmed to us that, from a legal point of view, Ms. Cranfield cannot be considered having met the eligibility requirements for the one-time review, given that she was the holder of an indefinite appointment (rather than a fixed-[-]term appointment) at the cut[-]off date of 30 June 2009. Furthermore, she relinquished her indefinite appointment when she left the Dublin office to take up her position in Brussels on 1 November 2009, in accord with the existing requirement applicable upon appointment of national staff to a position in another country as national staff cannot be reassigned between the two countries.
>
> In view of the above, and in view of the new UN Staff Regulations and Rules which do not provide for the granting of [indefinite (IND)] appointment as from 1 July 2009, the letter of appointment (IND without Undertaking) issued in respect of Ms. Cranfield, with effective date 1 November 2009, cannot be considered legally valid and should therefore be cancelled.
>
> We understand that Ms. Cranfield has already signed the above-mentioned letter of appointment, which regrettably puts the administration in a difficult situation having to inform the staff member that the [letter of appointment (LOA)] was erroneously issued.

14. Thus, on the basis of the legal advice as to the invalidity of the letter of appointment issued to Ms. Cranfield on 20 October 2011, the Administration e-mailed Ms. Cranfield on 20 January 2012 as follows:

> Dear Mary,
>
> [A]llow me first to apologise again, on behalf of DHRM and PAPS especially, for the wrong handling of the whole matter in relation to the eligibility and the granting of Indefinite appointment (without Undertaking) in your respect. We very much regret the anxiety and inconvenience this has caused to both yourself and the office in Brussels.
>
> In response to ... your request, and as advised in my initial email, this is to confirm that the Letter of Indefinite Appointment issued in October 2011 cannot be considered legally valid and should therefore be cancelled. This means your copy of the letter should be returned to the Administration for formal cancellation, and your previous contractual status – Fixed-Term Appointment – becomes valid again. Should this require that the new letter of fixed-term appointment is issued because the Fixed-Term Appointment you previously held had expired in the meantime, th[e]n the office in Brussels would follow the standard procedure for the issuance of its extension.
>
> I hope the above clarifies the situation.

15. In Judgment No. UNDT/2012/141, the Dispute Tribunal rescinded the decision of January 2012 on the basis that it was taken beyond the "prescribed deadline of 90 days". The UNDT concluded that when the Administration decided that it had taken an unlawful decision which affected a staff member's rights, it had the right to retract it, provided that it was done within 90 calendar days from the date on which the said decision was communicated to the staff member. The 90-day deadline was determined by the Dispute Tribunal by the addition of the prescribed 60-day time limit for requesting management evaluation and the prescribed 30-day time limit for the Administration's response thereto. In the present case, UNHCR notified Ms. Cranfield on 12 October 2011 of the decision to convert her fixed-term contract to an indefinite appointment, but the decision to cancel her conversion was not taken until 17 January 2012, beyond the 90-day deadline. Furthermore, as the Administration's "unlawful retraction of a decision that was favourable to her" caused Ms. Cranfield disappointment, the UNDT awarded her EUR 1,000 by way of moral damages.

Submissions

The Secretary-General's Appeal

16. The Secretary-General submits that the UNDT erred on a question of law by imposing a 90-day deadline for the Administration to correct erroneous administrative decisions. The error of law lies in the fact that the UNDT judicially created this deadline for which a statutory basis does not exist. Contrary to the UNDT's findings, Staff Rule 11.2 cannot be considered as the basis for this interpretation, as it only addresses one side of the coin, namely, the staff member's obligation to request management evaluation.

17. Imposing a strict 90-day time limit, as the UNDT has done in its Judgment, would be contrary to the interests of staff members and the Administration, as the latter would be precluded from correcting any unlawful decision outside of the 90-day window.

18. Furthermore, Article 10(4) of the UNDT Statute allows the Dispute Tribunal, with the Secretary-General's permission, to remand a case to the Administration for correction. It does not require that such a remand, and in particular, the correction, must be done within a 90-day deadline from the date of communication to the staff member.

19. The Secretary-General requests the Appeals Tribunal to affirm the decision of 17 January 2012, or in the alternative, to set an appropriate amount of compensation that the Secretary-General may pay in lieu of the rescission.

20. In the event that the Appeals Tribunal upholds the 90-day time frame as prescribed by the UNDT, the Secretary-General submits that the UNDT erred in failing to specify an amount of compensation as an alternative to the rescission of the decision. Pursuant to Article 10(5)(a) of the UNDT Statute, the Dispute Tribunal "shall also set an amount of compensation that the [Secretary-General] may elect to pay as an alternative to the rescission of the contested administrative decision", in cases of appointment, promotion or termination. The jurisprudence of the Appeals Tribunal has confirmed the mandatory nature of this provision.

21. The Secretary-General finally submits that the amount of alternative compensation that the UNDT should have fixed, but failed to do, should be commensurate with the negligible chance for Ms. Cranfield to be converted to an indefinite appointment and should reflect the fact that she has already been adequately compensated and satisfied by the UNDT Judgment.

Ms. Cranfield's Answer

22. Ms. Cranfield requests the Appeals Tribunal to dismiss the appeal in its entirety.

23. Ms. Cranfield submits that the UNDT correctly concluded that the 12 October 2011 decision to retroactively convert her appointment to an indefinite one was valid, and that UNHCR could not unilaterally determine that a letter of appointment was null and void. Ms. Cranfield asserts that as soon as this decision was issued, a binding contract was created. She maintains that this decision followed thorough deliberation on the part of the UNHCR Administration and was thus not due to a mistake. Even assuming that the Administration erred by making the conversion decision, this mistake could not invalidate, nullify or justify rescission of a valid contract established between her and UNHCR.

24. Ms. Cranfield agrees with the Secretary-General that the UNDT erred in law in creating a 90-day deadline for the Administration to correct its decisions.

25. Ms. Cranfield submits that UNHCR erred in interpreting and applying its internal guidelines and policies. Ms. Cranfield is of the opinion that UNHCR's initial interpretation and

application of its internal rules was reasonable and that its decision to change this position and to deem her ineligible to be considered for a one-time review was wrong in law.

26. Ms. Cranfield maintains that, contrary to the Secretary-General's submissions, as the UNDT did not order specific performance granting an appointment to her, it was not required to specify an amount of compensation payable in lieu thereof.

27. Ms. Cranfield requests that, if the Appeals Tribunal decides to order some form of compensation, it award her monetary compensation equivalent to two years' pay for actual material damages and an additional six months' pay for moral damages.

Considerations

28. Pursuant to Order No. 159 (2013), the Appeals Tribunal afforded the parties an oral hearing on the issues raised in the appeal and the hearing took place on 11 October 2013.

29. In the first instance, the issue for determination by the Appeals Tribunal is whether the UNDT was correct in law in finding that the Administration had ninety days within which to correct what the Administration claimed was its mistake in converting Ms. Cranfield's fixed-term contract to an indefinite appointment.

30. At paragraph 22 of its Judgment, the Dispute Tribunal stated: "If the decision of 12 October 2011 was unlawful, as the [Secretary-General] maintains, the [Dispute] Tribunal must consider whether its unlawfulness meant that the Administration could reverse the decision several months after [Ms. Cranfield] had been informed of it."

31. At paragraph 26, it opined:

> If, as the present Tribunal has already found, it is in the interest of the Organization to put a swift end to unlawful situations that might arise, ... this need must be reconciled with the need for legal certainty to which staff members are entitled. Similarly the Organization, whose decisions can be contested by staff members only within the prescribed time limits, is also entitled to legal certainty. The judge must therefore take a decision that balances these two needs.

32. The Dispute Tribunal's analysis of the applicable Staff Regulations and Rules found no general provisions addressing the time limit within which the Administration was entitled to reverse individual decisions that confer rights on staff members.

33. In the absence of express guidance from the Staff Regulations and Rules, the Dispute Tribunal fixed upon the provisions of Staff Rule 11.2, which specifically govern the procedure whereby a staff member may request management evaluation, as the operative timeframe to which the Administration ought to have adhered in Ms. Cranfield's situation.

34. The Dispute Tribunal rescinded the Administration's 17 January 2012 decision on the basis that "the High Commissioner missed the prescribed deadline of 90 days when, on 17 January 2012, he rescinded the decision he had taken on 12 October 2011".

35. The Appeals Tribunal is satisfied that the UNDT erred in law in the determination it made in this case. There is no legal basis for the Dispute Tribunal's decision to bind the Administration to a 90-day statutory time limit which was enacted to deal with circumstances other than those which pertain in the present case. Thus, the Appeals Tribunal accepts the Secretary-General's arguments in this regard. Indeed, in the course of her submissions, Ms. Cranfield agreed that the Dispute Tribunal's reasoning was wrong in law. Accordingly, the Dispute Tribunal's Order rescinding the 17 January 2012 decision is set aside.

36. 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. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.

37. In the present case, the UNDT did not embark on a consideration of the lawfulness or otherwise of the decision made on 12 October 2011 to grant Ms. Cranfield a contract of indefinite appointment, although at paragraphs 22 to 25 of its Judgment, the Dispute Tribunal did refer to this issue in a general way.

38. As a consequence of its erroneous determination as to the existence of a 90-day time limit which bound the Administration, the merits of Ms. Cranfield's application were not considered by the Dispute Tribunal. Thus, it falls to be considered whether her case ought to

be remanded to the UNDT. The Appeals Tribunal, however, does not consider that such a course is warranted as the issue which has to be determined in the case is a matter of law: namely, whether the Administration was entitled to revoke the indefinite appointment granted to Ms. Cranfield on 12 October 2011 and which became effective 1 November 2011.

39. In determining the lawfulness or otherwise of the Administration's decision on 17 January 2012 to retract Ms. Cranfield's indefinite appointment, the Appeals Tribunal must first address the Secretary-General's contention that the 12 October 2011 decision to grant her an indefinite appointment was invalid.

40. The eligibility criteria for conversion to an indefinite appointment are set out in IOM/FOM/75/2003 and IOM/FOM/42/2006.[3] The aforesaid statutory provisions are referred to in paragraph 6 of IOM/004/2011-FOM/005/2011 entitled "One-Time Review for the Granting of Indefinite Appointments".

41. Paragraph 10 of the latter document provides that:

> The reform of the UN Staff Regulations and Rules entered into force on 1 July 2009. As permanent and indefinite appointments are not provided for anymore under the

[3] These memoranda refer to the APPB Procedural Guidelines and the APPC Procedural Regulations. Section V.B of the APPB Procedural Guidelines, at para. 166, reads:

> The three conditions to qualify for an Indefinite Appointment are:
> a) Completion of five years of continuous service on Fixed-Term Appointments;
> b) PARs for the full period under review; and
> c) A minimum of two years service in a category D/E duty station.

Section VIII of the APPC Procedural Regulations reads:

> 74. DHRM will inform the relevant managers when a staff member meets the criteria to qualify for an Indefinite Appointment. The Committee (in HQ & Field) will hold an annual session, to review recommendations from the managers of GS staff members who have completed five years of continuous satisfactory service on Fixed-Term Appointments. Recommendations will be made to the Deputy High Commissioner at HQs and to the High Commissioner's designated Representative for field staff.
>
> 75. Satisfactory performance must be supported by PARs for the full period under review. The number of opportunities for granting Indefinite Appointments to GS staff considered consistent with the good administration of the Office will be determined each year by the High commissioner, based on advice from the Joint Advisory Committee.

> new Staff Regulations and Rules, they can only be granted with retroactive effect to 30 June 2009. Therefore, only staff members who fulfil the relevant criteria as at 30 June 2009 acquired the right to be considered for an indefinite appointment and will be considered in the one-time review.

42. It is indisputable that, as at 30 June 2009, Ms. Cranfield held, as a matter of law and fact, a contract of indefinite appointment and was, therefore, by virtue of her then status, outside of the remit of the statutory framework which had been enacted to make provision for the conversion to indefinite appointments of staff members *on fixed-term contracts* on 30 June 2009. In such circumstance, a fundamental requirement for conversion was not fulfilled by Ms. Cranfield and, equally, could not be conferred on her by an erroneous assumption by the Chief of PAPS or personnel within DHRM that she should be converted.

43. Moreover, we note that post 30 June 2009, contracts of permanent or indefinite appointment no longer existed and therefore there was no legal basis upon which to grant Ms. Cranfield an indefinite appointment effective 1 November 2009.

44. In *Sprauten*, we stated: "The Appeals Tribunal finds that a contract is formed ... by an unconditional agreement between the parties on the conditions for the appointment of a staff member, *if all the conditions of the offer are met by the candidate.*"[4]

45. Ms. Cranfield, by virtue of her status on 30 June 2009 could not meet a fundamental requirement which underpinned the offer being made in January 2011 in the "One-Time Review" to convert her contract to one of indefinite appointment.

46. Furthermore, the Appeals Tribunal is satisfied that the circumstances of the present case are such as to distinguish it from our decision in *Castelli*.[5]

47. Thus, the Appeals Tribunal finds that the Administration's assessment of the 12 October 2011 decision as invalid was correct in law. As we find the decision communicated to Ms. Cranfield on 12 October 2011 and crystallised in the letter of appointment of 20 October 2011 had no legal basis, many of the written and oral arguments

[4] *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219, para. 1 (emphasis added).
[5] *Castelli v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-037.

advanced on Ms. Cranfield's behalf are effectively rendered moot, premised as they are on the contention that Ms. Cranfield's 20 October 2011 contract was valid.

48. While the Administration, once alerted to the unlawfulness of the decision of 12 October 2011, is entitled to remedy that unlawfulness, the Appeals Tribunal nonetheless considered the question of whether, in the particular circumstances of this case, the Administration should be estopped from revoking the contract of indefinite appointment granted on 12 October 2011.

49. The erroneous assessment that Ms. Cranfield was entitled to a contract of indefinite appointment was made by personnel within DHRM/PAPS. Short of believing herself eligible for conversion, no blame can be laid at the feet of Ms. Cranfield for the Administration's mistake. For its part, once alerted that Ms. Cranfield was ineligible for conversion to a contract of indefinite appointment, the Administration sought to correct the situation within a timeframe of 97 days from the initial communication to her and after it received legal advice. The fact that Ms. Cranfield was left in a position where, for approximately three months, she believed she was converted to a contract of indefinite appointment does not, of itself, suffice to find that the Administration should be estopped from correcting the decision of 12 October 2011. Such a course could only be considered if the Appeals Tribunal was satisfied that Ms. Cranfield, in reliance on the 12 October 2011 decision, acted to her detriment to the extent that it would not be in the interests of justice to allow the indefinite appointment to be revoked.

50. Prior to October 2011, Ms. Cranfield had voluntarily resigned her contract of indefinite appointment in Dublin to take up a position in Brussels under a fixed-term appointment. She did not then challenge the requirement imposed by UNHCR that she resign from her Dublin position in order to be placed on a post in Brussels. The letter of 12 October 2011 did not cause her to resign her position or to relocate or otherwise change her terms and conditions of employment to her detriment save that for approximately three months she had the belief that she had regained the security of tenure she had lost through her voluntarily having given up her previous contract of indefinite appointment. However, it is our view that this is not sufficient, in the overall context of this case, to prevent the Administration from correcting its decision of 12 October 2011. This is so, in particular, when one has regard to the major flaw which underpinned Ms. Cranfield's 2011 application for conversion, namely her inability, by reason of being employed on a contract of indefinite

appointment on 30 June 2009, to satisfy the eligibility criterion requiring her to be the holder of a fixed-term contract at the relevant date.

51. In the course of her oral submissions, Ms. Cranfield, in response to the Secretary-General's contention that she did not rely to her detriment on the decision of 12/20 October 2011, countered that if on 12/20 October 2011 she had been denied a contract of indefinite appointment, she would have sought management evaluation of that decision. Ms. Cranfield submitted that this opportunity was now lost to her as she is time-barred.

52. We do not believe this argument to be well-founded since this appeal (notwithstanding our decision in favour of the Secretary-General) has afforded Ms. Cranfield the opportunity to argue her case for a grant in her favour of a contract of indefinite appointment and put forward arguments why the 12/20 October 2011 decision should be let stand.

53. Accordingly, in all the circumstances, we are satisfied that the Administration was entitled to correct its decision of 12 October 2011 and we find that there are no grounds upon which the Administration should be prevented from correcting its mistake. We hereby affirm the decision made by the Administration on 17 January 2012.

54. No doubt, the decision of 17 January 2012 was a disappointment to Ms. Cranfield, who had been advised (erroneously as we have found) that she was eligible for an indefinite appointment. The UNDT awarded EUR 1,000 to Ms. Cranfield by way of moral damages, albeit for different reasons, namely its determination that because it had not acted within a 90-day time limit, the Administration had, on 17 January 2012, unlawfully retracted the 12 October 2011 decision, a determination we have reversed.

55. While the Secretary-General appealed the Dispute Tribunal's rescission of the 17 January 2012 decision, he did not appeal the moral damages award. Thus, Ms. Cranfield remains the beneficiary of this award of moral damages.

Judgment

56. The Secretary-General's appeal is allowed. The Appeals Tribunal sets aside the Dispute Tribunal's Order rescinding the decision of 17 January 2012. On the merits, the Appeals Tribunal affirms the decision made by the Administration on 17 January 2012.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Faherty, Presiding	Judge Adinyira	Judge Chapman

Entered in the Register on this 2nd day of January 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar