



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1207

**Michelle Rockcliffe
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge John Raymond Murphy Judge Martha Halfeld
Case No.:	2020-1516
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: Francisca Lagos Pola

JUDGE GRAEME COLGAN, PRESIDING.

1. This appeal by a former United Nations Joint Staff Pension Fund (UNJSPF or Pension Fund) staff member relates to the lawfulness of the cancellation of an appointment process in which the staff member had an expectation of appointment in priority over other applicants. For reasons set out below, we allow the appeal, set aside the UNDT Judgment,¹ rescind the administrative decision at issue and, alternatively to rescission, set compensation payable to the staff member.

Facts and Procedure

2. Michelle Rockcliffe (Appellant) was previously a staff member with a permanent appointment at the P-4 level serving with the Pension Fund. She served as the P-4 Functional Expert on Entitlements for the Integrated Pension Administration System (IPAS) Project, a post that was abolished after the project was deemed completed on 1 August 2016.

3. Following the abolition of her post in 2016, Ms. Rockcliffe held only temporary positions and was not assigned to an established post. This was despite her being entitled to preferential consideration for appointment to an established post in accordance with Staff Rules 9.6 (e) and 13.1 (d), in view of her permanent contract status. It was also not for want of applying for such positions, but despite her entitlement to preferential status in such applications, she was not successful in obtaining a further permanent posting.

4. On 26 April 2018, the Ethics Office confirmed the completion of its investigation in which it determined that retaliation by senior staff of the Pension Fund had taken place against Ms. Rockcliffe in connection with a protected activity undertaken by her. The Ethics Office found that UNJSPF had attempted to terminate Ms. Rockcliffe's permanent appointment without making sufficient efforts to find a suitable position for her within the Pension Fund. The Ethics Office report recommended that a senior Fund official be investigated for possible disciplinary action in respect of the retaliation against the Appellant. Ms. Rockcliffe was the victim of a serious wrong committed against her by a representative of the Fund. In its recommendation to UNJSPF, the Ethics Office stated:

¹ *Rockcliffe v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/212 dated 18 December 2020.

Having consulted with the Complainant, the Ethics Office recommends that the Fund consider the Complainant on a preferred or non-competitive basis for any position she may apply at the P4 level within the Fund. Pursuant to UNAT's caselaw, this would require determining the Complainant's suitability for the post, considering her competence, integrity and length of service, as well as other factors such as nationality and gender. Only if the Complainant is not found suitable following these criteria, may the Fund then consider the other, non-permanent staff members who applied for the post.

5. On 23 May 2018, the Administration published a vacancy announcement for the post of Deputy Chief, Pension Entitlements Section, at the P-4 level (Deputy Chief, PES, Post).²

6. On 25 May 2018, that is while the application process for the Deputy Chief, PES, Post was still open, the Assistant Secretary-General for Human Resources Management (ASG/OHRM) informed Ms. Rockcliffe that the Administration had accepted the Ethics Office's recommendation that she be considered on a preferred or non-competitive basis for any position at the P-4 level within the Pension Fund for which she may express interest or apply. It may be significant that the assurance provided to the staff member went further than the Ethics Office's recommendation: that related to posts for which she may apply, the Pension Fund's offer included also posts in which she expressed an interest.

7. On 27 May 2018, Ms. Rockcliffe applied for the Deputy Chief, PES, Post and separately informed UNJSPF management of her interest in this post.

8. On 28 May 2018, UNJSPF management proposed three different assignments at the P-4 level to Ms. Rockcliffe. However, they were all temporary positions for which she had not applied or otherwise in which she had expressed any interest. Furthermore, unlike the Deputy Chief, PES, Post that she applied for, they were not established posts funded by the Pension Fund's regular budget. The positions which were offered to her included:

(a) Training Officer (P-4), Office of the Chief, Operations Service.

(b) Outreach Officer (P-4), Client Services, Operations Service.

(c) Programme Officer (P-4), Client Services, Operations Service.

9. On 11 June 2018, Ms. Rockcliffe declined the offer of the three temporary positions and instead reiterated her interest in the Deputy Chief, PES, Post for which she had already applied.

² Inspira Job Opening Number: 18-Administration-UNJSPF-95597-R-New York (R).

10. There are no findings in the UNDT's Judgment about what happened to her application after it was made on 27 May 2018 or whether others applied for the same post. As the Ethics Office's recommendation set out above at paragraph 4 noted, in these circumstances the Pension Fund was then obliged to determine her suitability for the post, her competence, integrity, length of service and other relevant factors, and if these considerations did not preclude her from being appointed, to appoint her to the vacancy.

11. The Pension Fund was thus obliged to consider whether Ms. Rockcliffe was excluded from appointment and if she was not, to appoint her. The UNDT Judgment does not refer to, or analyse, whether she was excluded from appointment and why it offered, or proposed to her, three vacant, albeit less secure, posts. Indeed, that information lacuna covers the extraordinarily long period of more than a year before there was any further development in the appointment process, at least of which Ms. Rockcliffe was advised.

12. On 13 June 2019, more than one year after the vacancy announcement for the Deputy Chief, PES, Post was published and after Ms. Rockcliffe had applied for it, the Acting Chief Executive Officer of the UNJSPF decided to cancel the job opening and planned to abolish the post in the upcoming 2020 budget.

13. On 20 June 2019, Ms. Rockcliffe received brief written notification that the job opening for the Deputy Chief, PES, Post was cancelled (Contested Decision).

14. On 25 July 2019, the Pension Fund requested the United Nations Office of Human Resources (OHR) to reclassify the Deputy Chief, PES, Post at the P-4 level to one entitled Chief of Participation Unit, also at the P-4 level (Chief, PU, Post). The reasons provided for the abolition of the Deputy Chief, PES, Post and the creation of or reclassification to the Chief, PU, Post were, in relevant part, as follows:³

... [The Job Opening (JO)] has been cancelled due to a change in the organizational structure within the Operations Service. Since the change is within the same Service, it does not require budgetary approval. Please see below for a description of the justification for the change in structure:

At the time of publishing the JO, the P-5 Chief of PES post was under recruitment and two of the three P-3 Benefits Officer posts under PES were also unfilled. Since then the Chief of PES has been recruited and the two Benefits Officer P-3 posts also filled. Upon finalizing

³ Impugned Judgment, para. 12.

these important recruitment processes PES has been running more effectively exceeding the processing benchmark since August 2018. After being in the role for almost a year the new Chief of PES has determined that there is less of a need for the Deputy, PES (P4) role as things have been functioning much better with the 3 Benefit Officers and other team members continue to step up to lead projects. Also, there has been a shift of some of the functions the Deputy role would have been responsible for completing to the Operations Support Unit, including policy development, working on audit recommendations and training. Therefore, the recommendation would be to repurpose the post for Deputy Chief PES (P4).

The Chief of the Operations Service proposes that the Service will be better served if this P4 Deputy Chief PES is re-purposed to a head a newly established Unit with the Operations Service called the Participation Unit, which falls under the Operations Support Section. The Benefits Officer (Chief of the Participation Unit) P4 will head a small team (2 [General Service ("GS")] GTA [General Temporary Assistance] posts-within existing resources) who will look after the open (non-processable) workflows, including liaising with the Member Organizations to implement the end-to-end review recommendations, streamlining the separation process and following up on missing separation documentation. The team will also assist PES in the participants' data clean-up exercise. Finally, the incumbent will also develop the document quality assurance function which would be helpful in establishing appropriate quality control at the front-end office.

... Although the title and level of the post remains Benefits Officer, P-4, the previous [Job Description ("JD")] would not be usable, as it would be misleading to candidates for the following reasons:

- The duties and responsibilities listed are significantly different as the post will no longer be under PES/OS but be part of a new unit, Participations Unit/OS. Please find the ToR attached in the P.148 form attached.
- The number of posts directly supervised by the new position would not be in line with the previous JD. The new post will supervise 2 GS staff (within existing resources) only and not 3 [professional] staff and 27 GS Staff as per the previous JD.

15. On 19 August 2019, Ms. Rockcliffe filed a request for management evaluation of the decision to cancel the job opening for the Deputy Chief, PES, Post.

16. On 26 August 2019, OHR approved the reclassification request of the Deputy Chief, PES, Post to the Chief, PU, Post following a review of the organisational setting and the proposed description of the functions attached to the new post.

17. On 5 September 2019, the Acting Chief Executive Officer offered Ms. Rockcliffe the newly established Chief, PU, Post.

18. On 13 September 2019, the Management Evaluation Unit (MEU) upheld the Contested Decision to cancel the job opening for the Deputy Chief, PES, Post.

19. On 15 September 2019, Ms. Rockcliffe rejected the offer of placement to the newly established Chief, PU, Post on the premise that it appeared to be a temporary assignment, had significantly less managerial responsibility, had substantially fewer staff to supervise, and was a lower position in the hierarchy than had been the cancelled Deputy Chief, PES, Post. Following Ms. Rockcliffe's rejection of it, the Administration advertised the job opening for the Chief, PU, Post.

20. On 20 November 2019, Ms. Rockcliffe filed an application with the UNDT challenging the Contested Decision.

The UNDT Judgment

21. On 18 December 2020, the UNDT issued the Impugned Judgment, finding first that the application was receivable because the cancellation of the job opening was a final administrative decision, and not one in a series of preliminary steps leading to a final decision. There is no appeal by the Respondent against that preliminary conclusion.

22. Second, the Dispute Tribunal found that the cancellation of the Deputy Chief, PES, Post was lawful and there was no evidence that that the decision was ill-motivated. In particular, the tribunal reasoned:

[Ms. Rockcliffe] alleges that a restructuring exercise is a pretext for the cancellation of JO and it was a continued retaliatory act against her, but there is no evidence to conclude that the reclassification of the Post was not a genuine restructuring exercise. UNJSPF appropriately provided detailed reasons for its request for the reclassification and OHR approved it.

... Furthermore, [Ms. Rockcliffe], who bears the burden to prove any ill-motivation, fails to produce any evidence to support her argument that the decision was made in "violation of the Secretary-General's instruction to afford the Applicant priority consideration for suitable vacancies". In fact, UNJSPF offered the reclassified Post (i.e. Benefits Officer (Chief of the Participations Unit)) to [Ms. Rockcliffe] to fulfil its obligations in accordance with the Ethics Office's recommendations, and yet [she] rejected the offer.

23. Therefore, the UNDT dismissed Ms. Rockcliffe's application.

Procedure before the Appeals Tribunal

24. On 28 January 2021, Ms. Rockcliffe filed an appeal against Judgment No. UNDT/2020/212, and the appeal was registered with the Appeals Tribunal as Case No. 2020-1516. On 29 March 2021, the Secretary-General filed his answer.

25. In the Respondent's answer, the Administration advised the UNAT that the Appellant had, since rejecting the offer of the Chief, PU, Post, been offered a temporarily-funded P-4 position, which she had accepted. In those circumstances, we asked the parties for updated information on Ms. Rockcliffe's status. We were advised that Ms. Rockcliffe resigned from UNJSPF with effect from 30 September 2021. Her counsel attributed to the Appellant certain reasons for this resignation. The Respondent subsequently supplied a copy of relevant correspondence. There is an arguable disagreement about circumstances in which this temporary position was taken up and about the reasons for her resignation. In these circumstances, we consider that we should limit our conclusions to the uncontroversial facts up to and as at mid-September 2019. The correspondence and counsel's explanations will not assist us in the expeditious resolution of the case as is required of new evidence under Article 10 of the Appeals Tribunal Rules of Procedure. Other issues arising from this temporary appointment and her resignation are not before us for decision.

Submissions

Ms. Rockcliffe's Appeal

26. First, Ms. Rockcliffe submits the UNDT erred when it failed to order the Respondent to produce the records of the selection exercise in which she was purportedly the preferred candidate for the Deputy Chief, PES, Post. The Appellant claims these records were in the sole possession of Respondent and their production could have shed light as to why Ms. Rockcliffe was not selected for the Deputy Chief, PES, Post even though the recommendation from the Ethics Office was clear that she should be considered on a preferred or non-competitive basis for any position she may apply for at the P-4 level within the Pension Fund.

27. Second, Ms. Rockcliffe claims the UNDT erred when it failed to consider the evidence of a prior pattern of retaliation against her. Specifically, she argues a finding of retaliation by the Ethics Office creates a "*prima facie* presumption" that the Contested Decision was ill-motivated. As such, the tribunal ought to have engaged in a serious inquiry into the justifications proffered for

the cancellation of the post. Ms. Rockcliffe argues that the UNDT did not do so. Additionally, the Appellant also highlights and questions why the recruitment for the post of Chief and two Benefit Officers at the P-3 level in the same unit proceeded while the recruitment to the post she applied for was at first frozen and then cancelled.

28. Ms. Rockcliffe also raises issue with the timing of the cancellation of the Deputy Chief, PES, Post. She asks why this cancellation happened only after she had refused the offer of the other temporary assignments that the Acting Chief Executive Officer discussed with her.

29. Third, Ms. Rockcliffe argues that the repurposed and newly established Chief, PU, Post was also not offered to her in good faith. She maintains that the offer was made only after her legal challenge and arguably the Administration acted under pressure from the MEU. She adds that the new post was never an equivalent post and appeared to be temporary in nature. It was a mere distraction to preclude her from challenging the original decision.

30. Fourth, Ms. Rockcliffe also takes issue with the lack of transparency in the selection process for the Deputy Chief, PES, Post. She says the Administration provided no explanation for the long delay in processing the applications for the Deputy Chief, PES, Post and for not heeding the recommendations of the Ethics Office and OHRM regarding her placement.

31. Finally, Ms. Rockcliffe says that, given that there was a finding of a pattern of retaliation against her, it was a reasonable inference that the cancellation of the job opening was also ill-motivated.

32. Therefore, the Appellant asks this Tribunal to rescind the Contested Decision and to fully implement the instructions of the Secretary-General and the Ethics Office in assigning her a suitable position and to refrain from further acts of retaliation. She also asks compensation in the amount of two years' net base pay for the violation of her rights to work in an environment free from harassment and retaliation.

The Secretary-General's Answer

33. First, the Respondent submits that the Dispute Tribunal was correct to dismiss Ms. Rockcliffe's application as the cancellation of a job opening is a decision that falls within the Secretary-General's broad discretion in restructuring the Organisation's units and departments. In the case at hand, the Secretary-General argues the cancellation of the job opening was solely

motivated by operational and organisational considerations. Specifically, the Secretary-General argues as the new Chief of PES had been successful in meeting benefits processing performance benchmarks without the presence of a Deputy Chief in PES, there was no need to fill the post. Meanwhile, there was a need to address participation matters, which is why the Administration created a Participation Unit (PU) and thus repurposed the Deputy Chief, PES, Post to the Chief, PU, Post. Therefore, the cancellation of the job opening, and the creation of a new post was part of a genuine restructuring exercise.

34. Furthermore, the Secretary-General argues the Appellant has not submitted any clear and convincing evidence rebutting the presumption of regularity. On this point, the Respondent stresses that Ms. Rockcliffe has failed to produce any evidence that the decision was ill-motivated. The Secretary-General also maintains that the new position Chief, PU, Post was even offered to the Appellant before it was advertised. Hence, the UNDT was correct in finding that the job opening was lawfully cancelled and that there was no evidence of ill-motivation.

35. Second, regarding the allegation that the UNDT failed to order the production of records for the selection exercise, the Secretary-General submits no such records exist because the recruitment for the Deputy Chief, PES, Post never commenced. Additionally, even if Ms. Rockcliffe was the best candidate for the post, this does not divest the Administration of its discretion to cancel the job opening in light of its changing operational needs.

36. Regarding the allegation that the UNDT failed to consider the prior pattern of retaliation against the Appellant and ought to have viewed the cancellation of the job opening as yet another retaliatory act, the Respondent argues there is no evidence pointing to such and also a prior finding of retaliation by the Ethics Office does not imply that future acts are also retaliatory in nature. The Respondent maintains the cancellation was motivated by purely organisational reasons. In the same vein, the Respondent also submits that Ms. Rockcliffe has failed to show there was a link between any past retaliation and the Contested Decision.

37. Finally, regarding the allegation that the UNDT erred in its finding that the Appellant had not met her burden to establish ill-motivation through clear and convincing evidence, the Respondent argues Ms. Rockcliffe did indeed fail in this regard. First, the argument that four out of 20 job openings that Ms. Rockcliffe applied for in the space of 8 years were cancelled is not indicative of ill-motivation as the Administration has broad discretion to cancel job openings

because of organisational changes. Additionally, one of the four cancellations over the eight-year period was for a post at the P-5 level, so was not applicable to the Appellant's situation.

38. Regarding the allegation that the timing of the cancellation also shows ill-motivation on the part of the Administration as it purportedly happened only after the Appellant rejected the offer of the three available P-4 positions, the Secretary-General argues that it was pure coincidence. And very importantly, if the Administration was trying to discriminate against Appellant, it would not have offered the new post to her.

39. In response to Ms. Rockcliffe's argument about the reasons why other recruitment activities proceeded while the recruitment for the Deputy Chief, PES, Post was frozen, the Secretary-General clarifies for the record that at the time, there was only one selection exercise in process. The selection exercises for the Chief, PES, at the P-5 level and one Benefits Officer, at the P-3 level, had already completed when the Deputy Chief, PES, Post was advertised. It is submitted that the new Chief, PES, needed time to assess the work and operational needs of the section before making a final determination on whether a Deputy Chief was needed in the section.

40. Finally, the Secretary-General submits that after the Ethics Office recommendation, the Administration continued its good faith efforts to find a suitable placement for the Appellant. First, beginning in May 2018, the Organisation proposed three positions to Ms. Rockcliffe, which she rejected. More recently, on 16 March 2021, the Appellant was offered a temporarily funded P-4 level Programme Management Officer position. The Administration maintains that its efforts were then ongoing to find Ms. Rockcliffe a more permanent position at the P-4 level while giving due regard to her areas of interest. We infer in view of most recent advice, that the Respondent's efforts to find a permanent post necessarily ceased with her resignation.

41. Considering the above, the Secretary-General asks that the appeal be dismissed in its entirety.

Considerations

42. This appeal raises two preliminary questions. First, did the UNDT err when it failed to direct the Respondent to produce to it records of the selection exercise? Second, did the UNDT err by failing to consider the previous pattern of retaliation against the Appellant? If these issues (or either of them) are concluded in the Appellant's favour, questions of remedies will arise for consideration.

43. As to records of the selection exercise, the evidence is that this exercise which would have led to the selection for the position of Deputy Chief, PES, did not in fact eventuate. In these circumstances, such a direction could not have produced relevant evidence so that it cannot be said that the UNDT failed wrongly to make such a direction.

44. The second question (consideration of the background of retaliation against the Appellant) is less easily resolved. An alternative appointment was the remedy to which the Appellant was entitled, following a finding by the Ethics Office that she had been wrongfully retaliated against and the Pension Fund's acceptance of that situation and recommendation. Although this in itself does not mean that the subsequent impugned administrative decision was unlawfully motivated, it nevertheless required the UNDT to undertake a serious and detailed examination of the Pension Fund's decision to cancel the job opening.

45. The background of an unlawful termination of her post in 2016 affects the legal principle of the presumption of regularity of administrative decisions upon which the UNDT relied significantly in its rejection of Ms. Rockcliffe's case. That presumption does not apply automatically and irrespective of the circumstances in which a challenge to an administrative decision arises. While it does so when all things are equal between the parties, there may be cases in which the circumstances are such that the presumption does not apply and, thereby, does not need to be rebutted by the staff member before there is an onus on the Administration to establish the lawfulness of the administrative action. It is necessary to determine whether the facts of this case fall within that exception to the rule of practice.

46. What were the relevant circumstances in this case affecting the application of the presumption? There were a number of irrefutable facts in existence when the job opening for the Deputy Chief, PES, Post was cancelled and the post itself was abolished, both of which decisions were challenged by the Appellant so that pertinent events leading to them are relevant for consideration. They were:

- The Appellant's employment history with the Pension Fund was characterised by a pattern of recriminatory conduct against her after she had taken protected actions.

- In particular, the most recent retaliation event for which she had been exonerated, had related to an improper attempt to end her permanent employment with the Pension Fund
- The Ethics Office had recommended, and the Pension Fund had accepted, that these past injustices perpetrated against her should be rectified by prioritizing her appointment to a permanent role within the Organisation at no lesser than her then grade and which she either sought or agreed to.
- Such a role was advertised and was applied for timeously by Ms. Rockcliffe.
- If the Respondent's case is that there was no documentation generated in respect of other applications for that post, the appointment process appears to have been "frozen" almost immediately after Ms. Rockcliffe's application was received, and it may be inferred no other applications had then been received.
- On the next day and despite knowing of the Appellant's priority claim to the Deputy Chief, PES, Post, the Administration offered three separate but inferior appointments to Ms. Rockcliffe but apparently without any explanation as to why, in the circumstances, this happened.
- The recruitment remained "frozen" for more than the next 12 months, again apparently without explanation to the Appellant, who had a conditional expectation of appointment to that role.
- The recruitment for the advertised post and for which she was entitled to priority consideration was then cancelled and, a month later, the post's abolition was announced.

47. Taken together, the foregoing undisputed facts rebutted the presumption of regularity of the decisions to cancel the recruitment and to abolish the post.

48. In these circumstances, we conclude that the Organisation clearly bore the obligation to establish the lawfulness of its decision. The UNDT's decision that Ms. Rockcliffe bore, but failed to satisfy, that onus was erroneous.

49. There is a further issue arising from the case, which requires serious consideration. It is not insignificant that the Administration's reasons for taking the Contested Decision appear to have changed over time. The UNJSPF's reasons for cancelling the post at the time were:⁴

At the time of publishing the JO, the P-5 Chief of PES post was under recruitment and two of the three P-3 Benefits Officer posts under PES were also unfilled. Since then the Chief of PES has been recruited and the two Benefits Officer P-3 posts also filled. Upon finalizing these important recruitment processes PES has been running more effectively exceeding the processing benchmark since August 2018. After being in the role for almost a year the new Chief of PES has determined that there is less of a need for the Deputy, PES (P4) role as things have been functioning much better with the 3 Benefit Officers and other team members continue to step up to lead projects.

50. In response to this appeal, however, the Respondent says:

[A]t the time in which the Job Opening for the Position of Deputy Chief of PES was advertised, there was only one ongoing selection exercise in PES (i.e. a P-3 Benefits Officer). The selection exercises for Chief of PES (P-5 level), and another position of Benefits Officer (P-3 level), had already been completed. The candidate selected to head the section (i.e., Chief of PES, at the P-5 level) had joined UNJSPF in July 2018 and once onboard needed time to assess the work and operational needs of the section.

51. This apparent inconsistency calls into question the reason for the "freezing" of the P-4 job opening, while those for the P-5 and P-3 roles proceeded and were filled. It will be remembered that the settlement of her previous retaliation complaint involved her preferred appointment for any position for which she was suitable. The UNJSPF did not provide the UNDT with any explanation why it did not follow the Ethics Office's recommendations and the OHRM's acceptance of them. The Administration only cancelled the one opening for which the Appellant had expressed an interest in and to which she had submitted an application. Further, that cancellation occurred only after the Appellant had rejected the opportunity of appointment to three temporary posts that were proposed to her.

52. As to the good faith of the offer to the Appellant of the revised post, the Chief, PU, Post, the timing of this strategy also requires close examination. That offer was made after the Appellant's challenge to the cancellation of the job opening and after her application for management evaluation had been turned down. Further, the revised post was not truly comparable to the cancelled one. It appeared to be temporary rather than of indefinite duration as

⁴ *Ibid.*, para. 12 (emphasis added).

the cancelled Deputy Chief of PES post had been. It had significantly less managerial responsibility and involved supervisory responsibilities for only two general temporary assistance services staff, as compared to the cancelled post's supervision of a significantly larger three professional and 27 general services staff. The post was also located lower in the management hierarchy. When viewed thus, and except for its P-4 level, it appears to have been an offer made to ensure that whether she accepted or rejected it, the Appellant would not have continued permanent employment with the Pension Fund. Such a position was contrary to the Ethics Office's recommendation to compensate for previous retaliation, which had been accepted by the Administration. If so, it raised serious questions of legitimate motivation on the part of the UNJSPF, which then bore the onus of justifying its actions and omissions before the UNDT.

53. We cannot, and do not, make these as findings of deliberate and calculated ill-motivation by the Pension Fund. But together they give cause, and should have given the UNDT cause, to examine in detail the Respondent's justification for the cancellation of the job opening including by requiring it to produce all documentary records and other evidence leading to that decision. The UNDT erred in not taking that course. It expected Ms. Rockcliffe to persuade it of the wrongfulness of the administrative decision whereas the uncontested circumstances had effectively negated that onus and had moved it to the Respondent to justify the lawfulness of what it did.

54. It is not to the point that the Respondent has, as we confirm, the power and the discretion to cancel a selection process because of operational changes within the Organisation. Rather, this case illustrates that in circumstances such as this, the Pension Fund is obliged to establish the good faith and lawfulness of such a decision, when the largely uncontested facts raise serious questions about the propriety of that.

55. There is another error of law at paragraph 31 of the UNDT's Judgment. It declined the application on the basis that Ms. Rockcliffe had failed to prove ill-motivation by the Pension Fund. In response to the contention that that the decision to cancel the job opening was in breach of the Secretary-General's instruction to prioritise the Appellant in consideration for suitable vacancies, the UNDT held that the Appellant had been offered the re-classified post in fulfilment of the obligations to her, "yet the Applicant rejected the offer". That conclusion mis-applies the terms of the settlement reached with the Appellant for previous retaliation against her. The UNDT recorded those terms correctly at paragraph 6 of its Judgment: namely that she was to be

“considered on a preferred or non-competitive basis for any position that she may apply [for] or express interest [in] at the P-4 level within the Fund”.

56. Because the Appellant did not apply for, or express her interest in, the re-classified post (indeed she actively rejected applying for it), that did not relieve the Respondent of his obligation to continue to attempt to provide a permanent post of her preference to the Appellant. Ms. Rockcliffe was entitled to reject that offer because it did not meet the conditions of the settlement of her previous vindication and she was entitled not to be prejudiced, as she was, by her rejection of it. Contrary to the UNDT’s conclusion, her rejection of that offer of the re-classified post did not cause the cancellation of the original job opening to be lawful and obviate any question of unlawfulness on the part of the Respondent.

57. The UNDT erred by not requiring the Respondent to establish its justification in law for the cancellation of the job opening in all the circumstances outlined above. The UNDT having erred in law in its approach to the claim, its Judgment cannot stand and is set aside.

58. As to remedies for the Appellant, these are limited under the Appeals Tribunal Statute (Statute). To engage the alternative remedial powers contained in Article 9 (1)(a) of the Statute, the administrative decision must have been one that “concerned appointment, promotion or termination”. The challenged decision was one cancelling the existence of the vacant role and the selection process, which had been running to fill that role and in which process the Appellant was a participant. The impugned administrative decision therefore “concerned” the matter of an appointment. Thus, the alternative remedies set out in Article 9 (1)(a) are available to be ordered.

59. While we can and will formally order rescission of the impugned decision, we cannot ignore the reality that it is a *fait accompli* and has been for some time. The alternative relief to which the Appellant is entitled, at the election of the Administration, is a compensatory sum of money calculated by reference to her net base pay and, other than in exceptional circumstances, capped as to its amount.

60. The Respondent’s submissions opposing the appeal provided some pertinent information concerning events since the UNDT’s Judgment was delivered and concerning remedies for the Appellant. The Respondent advised the UNAT that the Administration attempted to identify, and continued to attempt to identify, a suitable vacant post for the Appellant after she declined several offers. The Administration says that on 16 March 2021 it met with the Appellant to discuss a

temporary GTA funded P-4 level Programme Management Officer position. The Respondent says that at the meeting, the Appellant accepted the position and is, or at least was, serving in that temporary P-4 level post. The Appellant, by counsel, says that she did not agree to accept it and did not do so. We are not in a position to determine that disagreement. The Administration says it made good faith efforts to find the Appellant a suitable post in consideration of her areas of interest and to abide by the recommendation of the Ethics Office. It committed itself to continue to make efforts to identify a more permanent position at the P-4 level for the Appellant.

61. Albeit belatedly, the Respondent should be given some credit for subsequently, although erroneously, trying to do the right thing by the Appellant. This should and will be reflected in the remedies granted to the Appellant.

62. We formally direct the rescission of the administrative decision cancelling the appointment process. In the circumstances outlined, however, if the impugned administrative decision is not rescinded as the Respondent is entitled to elect, and pursuant to Article 9(1)(a) of the Statute, we award the Appellant compensation in the amount of two years' net base pay for loss of opportunity and violation of her right to full and fair consideration.

Judgment

63. Ms. Rockcliffe's appeal is allowed, and Judgment No. UNDT/2020/212 is set aside. The administrative decision is rescinded; alternatively, at the election of the Respondent, Ms. Rockcliffe is entitled to payment of a sum equivalent to two years' net base salary.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

Entered in the Register on this 29th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar