



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

OAKES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Robbie Leighton, OSLA

Counsel for the Respondent:

Steven Dietrich, AAS/ALD/OHR, UN Secretariat

INTRODUCTION AND PROCEDURAL HISTORY

1. The Applicant is an Administrative Officer with the United Nations Support Office in Somalia (UNSOS) in Mogadishu, Somalia.
2. He filed an application on 16 February 2017 challenging the following: (a) “the implied decision to refuse to either promote or roster him at the P-4 level following his initial 2010 recruitment to the P-4 level and subsequent satisfying of the reference check procedures and minimal education requirements”; (b) “the decision to cancel his promotion to the P-4 level effective 1 August 2014”; (c) “the decision to claw back payments provided to him under his P-4 letters of appointment”; and (d) “the failure to pay benefits and entitlements accruing from his work in Mogadishu” (the Contested Decisions).
3. The Respondent filed a reply on 22 March 2017 in which he submitted that the Applicant’s challenges to the decision not to promote or roster him at the P-4 level and the rescission of his P-4 appointment effective 1 August 2014 are not receivable. The Respondent further asserted that the Applicant’s remaining claims were without merit and that the application should be dismissed.
4. On 22 September 2017, the Respondent, in compliance with Order No. 151 (NBI/2017), filed a submission containing clarification to questions the Tribunal had raised in relation to the Applicant’s qualifications, the selection process, the Applicant’s performance and the cause and impact of the alleged error that had occasioned the claw back of payments to the Applicant.
5. The Applicant filed observations on the Respondent’s submission on 27 September 2017.
6. The Tribunal has decided, in accordance with art. 16.1 of the Tribunal’s Rules of Procedure, that an oral hearing is not required in determining the issues raised in this case and will rely on the parties’ pleadings.

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.

stated and accepted was for a level at P-4/1 and all clearances have been received from FCRB, Medical Services Division and FPD. “Designation” for Administrative Officer at the P-4 level is awaited with this promotion scheduled to be effective from 04 June [2010]. This does not in any way amend any current process for review presently being undertaken separately by DFS, FPD.”

12. Sometime after 10 October 2010, the Applicant submitted copies of his certificates to FPD/DFS for further review and on 10 October 2010 and 15 December 2010, FPD informed him that none of the certificates he had submitted were considered equivalent to a first-level university degree but that the Master of Business Administration (MBA) programme he had just enrolled in would meet the education requirements. FPD further informed the Applicant that it would soon advise him about the actions to be taken to support him “within the scope of the UN rules”.¹⁰

13. Since the Applicant continued working on the P-4 Administrative Officer post, he was subsequently granted a Special Post Allowance (SPA).

14. The Applicant completed his MBA programme in April 2012¹¹ and informed UNSOA and FPD accordingly with a request for his promotion to the P-4 level. FPD informed him on 21 July 2012 that he could not be promoted unless he applied for a suitable job opening and underwent a competitive selection exercise. The Applicant responded that he had undergone a competitive selection exercise for his post in 2009 and sought guidance from FPD on his status.¹²

15. Between 2 March 2012 and 1 May 2013, the Applicant was on sick leave. Upon his return to work, he continued to perform the functions of the P-4 post although his personal grade remained at the P-3 level.¹³

16. The Applicant sought management evaluation of the decision not to promote him to the P-4 level on 5 July 2013. On 12 July 2013, he was informed by the

¹⁰ Ibid, Annex 3.

¹¹ Ibid, Annex 4.

¹² Respondent’s reply, annex R6.

¹³ Application, pages 3 & 4.

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

17. In August 2013, the Applicant renewed his requests for promotion and payment of SPA¹⁵ and on 12 September 2013, he requested management evaluation of the non-promotion decision and the failure to process his SPA.¹⁶ The MEU informed him on 20 September 2013 that his challenge against the non-promotion decision was time-barred but that the management evaluation of the SPA decision would be communicated to him no later than 27 October 2013.¹⁷ The MEU did not respond to the Applicant's request by 27 October 2013.

18. Between 31 October 2013 and 17 January 2014, the Applicant communicated with the MEU with a view to resolving his claims. On 2 January 2014, the MEU informed the Applicant that the "next step is for the Mission to take a decision on [his] non-promotion".¹⁸

19. The Applicant filed an application to the Tribunal on 24 January 2014 contesting the failure to pay him SPA.¹⁹ He withdrew the application due to satisfaction of his claims and the Tribunal dismissed the application on 22 July 2014.²⁰

20. In February 2014, a Temporary Job Opening (TJO) was advertised for a P-4 Administrative Officer post in Mombasa with an initial duration of six months.²¹ The Applicant applied for the TJO.

21. On 26 April 2014, the Applicant had a meeting with the UNSOA Chief Civilian Personnel Officer (CCPO) regarding his roster status.²²

22. The Applicant emailed the CCPO on 28 May 2014 to follow up on his request

¹⁴ Respondent's reply, annex R7.

¹⁵ Application, Annex 6.

¹⁶ *Ibid*, Annex 7.

¹⁷ Respondent's reply, annex R8.

¹⁸ Application, Annex 7.

¹⁹ Case No. UNDT/NBI/2014/008.

²⁰ Order No. 182 (NBI/2014).

²¹ Application, Annex 8.

²² *Ibid*, Annex 9.

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 and was informed by the CCPO on 21 July 2014 that “[his] promotion would be effected accordingly” and that the CCPO was “having consultations with NY on the steps we need to take to bring this matter to a close. The discussion will also explore the payment of SPA.”²⁵

25. On 14 August 2014, the Applicant signed a Letter of Appointment for a fixed-term appointment (FTA) for the UNSOA P-4 Administrative Officer post effective 1 August 2014 through 31 July 2015. His FTA was extended on 6 August 2015 for an additional year until 31 July 2016.²⁶

26. By email dated 17 February 2016, the Chief of the UNSOS Human Resources Section (Chief/HRS) informed the Applicant of his redeployment to Mogadishu effective 1 April 2016 to temporarily perform the functions of Regional Administrative Officer “at [his] current level of P-3 [...] pending the advertisement and selection process against the post as proposed in the budget for 2016-2017 cycle.” On 18 February, the Applicant acknowledged the redeployment date and indicated he was waiting for the formal confirmations from HRS as to the modalities of the assignment.²⁷

27. By memorandum dated 23 February 2016, the Chief/HRS formally informed

²³ Respondent’s reply, annex R9.

²⁴ Application, Annex 10.

²⁵ *Ibid*, Annex 11.

²⁶ *Ibid*, Annexes 12 & 13.

²⁷ Respondent’s reply, annex R10.

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 appointment would be voided retroactively effective 1 August 2014 and that payments made under his previous contracts would be recovered. UNSOS further informed him that an SPA might be provided for the period from 1 August 2014 to 31 March 2016 but that no SPA payment would be made in relation to the period he had served and would serve in Mogadishu.³¹

30. In August and September 2016, the Applicant was paid an assignment grant³², relocation grant³³ and danger pay³⁴. UNSOS approved payment of SPA for the Applicant effective 1 June 2014 “through such time he is relieved of the higher level functions of Administrative Officer, P-4 level.”³⁵

31. On 7 October 2016, the Applicant sought management evaluation of the

²⁸ Application, Annex 14 and Respondent’s reply, Annex R11.

²⁹ Ibid, Annexes 20-22.

³⁰ Ibid, Annex 16.

³¹ Ibid, Annex 17.

³² Respondent’s reply, Annexes R12 & R13 (payments of USD9,400.51 as a lump sum and USD2,820 as DSA).

³³ Ibid, Annex R14 (payment of USD5,000).

³⁴ Ibid, Annex R15.

³⁵ Ibid, Annex R16.

Contested Decisions listed at paragraph 2 above.³⁶

32. The Under-Secretary-General for Management (USG/DM) responded to the Applicant's management evaluation request by memorandum dated 17 March 2017. The USG/DM informed the Applicant that his challenge against the promotion/rostering decisions were not receivable and his challenge against the failure to pay his benefits and entitlements was moot. The Applicant was further informed that the Administration would take recovery actions with respect to the payment of salary at the P-4 level and to grant him SPA starting from the first day of service under the 2014 TJO.³⁷

CONSIDERATIONS

Receivability

Is the Applicant's challenge to the implied decision to refuse to either promote or roster him at the P-4 level following his initial 2010 recruitment to the P-4 level receivable?

33. The Respondent's asserts that this claim is not receivable because the Applicant is challenging a decision that was notified to him on 15 December 2010. Although the Applicant continued to make requests to the Administration after 15 December 2010, the Administration never conveyed a new administrative decision, express or implied, concerning the Applicant's promotion to the P-4 level. Reiteration of the decision did not reset the deadline for the Applicant to request management evaluation. As such, this claim is time-barred.

34. The Tribunal finds that the Respondent is correct that the 15 December 2010 decision is time-barred. The Applicant conceded this at page 7, paragraph 34, of his application thus this is not the issue. The Respondent, however, is incorrect in his assertion that the Administration never conveyed a new administrative decision, express or implied, concerning the Applicant's promotion to the P-4 level; and that all

³⁶ Application, Annex 18.

³⁷ Respondent's reply, Annex R17.

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, notwithstanding the completion of his degree, he was not eligible for promotion unless he applied for a suitable job opening and underwent a competitive selection exercise. It was neither an implied decision nor a reiteration of the 15 December 2010 decision. The Tribunal finds that FPD's communication of 21 July 2012 was an appealable administrative decision under art. 2.1(a) of the UNDT Statute; therefore, under staff rules 11.2(a) and 11.2(c), the Applicant ought to have submitted a request for management evaluation within 60 calendar days of 21 July 2012 or no later than 19 September 2012. The Applicant however did not request management evaluation until nearly a year later, on 5 July 2013, when he had clearly run afoul of the 60-day deadline in the staff rules. Since art. 8.3 of the UNDT Statute enjoins the Tribunal from suspending or waiving management evaluation deadlines, this portion of the Applicant's claim is not receivable.

36. The Applicant's management evaluation request, as described in para 17 above, was rejected as belated. To the extent the Applicant interprets the 2 January 2014 email from a legal officer from MEU, "next step is for the Mission to take a decision on your non-promotion", as re-opening of the issue of promotion unrelated to the encumbered post, the Tribunal finds it unfounded. It transpires clearly from the subsequent communication, as well as from the actual turn of events, that the term "promotion" was used not in the sense of a personal grade (a construction inapplicable to staff of the Secretariat), but in relation to the opportunity to compete for job openings on a P-4 level in the Mission. The Applicant confirms the same in his application, as described in para 45 f. below. Such job opening, albeit of a temporary nature, indeed happened a month after the January 2014 email and apparently brought the matter between the

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 any decision in this regard. Whereas claims arising from the subsequent revocation of the Applicant's appointment to this post are separately articulated and subject to consideration below in this judgment.

37. In conclusion, the Tribunal finds that, other than the decisions of 21 July 2012 and of 10 August 2016, the present application failed to put before the Tribunal any further ones, express or implied.

Is the Applicant's challenge against the decision to cancel his promotion to the P-4 level effective 1 August 2014 receivable?

38. The Applicant indicated in his application that he was notified of the decision to retroactively cancel his promotion to the P-4 level on 10 August 2016. The Respondent, however, asserts that this claim is time-barred because the Applicant knew or should have known that there had been an administrative decision to rescind his P-4 appointment at least as of 23 February 2016 when he received the memorandum from the UNSOS Chief/HRS reassigning him to Mogadishu at his current level of P-3. Consequently, the Applicant should have submitted a request for management evaluation no later than 23 April 2016 but he did not do so until 7 October 2016.

39. There are documented facts and indeed no dispute that the Applicant applied for a P-4 Administrative Officer post with UNSOA in Mombasa in February 2014 and that he was selected for this post in May 2014. The Applicant was informed by the CCPO on 28 May 2014 that his team would proceed with his assignment at the P-4 level and on 18 July 2014 that "his promotion would be effected accordingly". The CCPO also stated that he was "having consultations with NY" with a view to bringing the matter to a close. The Applicant was thereafter appointed to the post at the P-4 level on 14 August 2014. This appointment was subsequently extended for another year to

³⁸ Application, Annex 9.

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 assignment to Mogadishu be attributed the force of a decision cancelling the P-4 appointment he held in Mombasa, Kenya, for almost two years when this new assignment was in a different duty station, Mogadishu, Somalia, and offered different benefits and entitlements. Even if it signalled that the issuing office had a doubt as to the appropriateness of the Applicant's then grade, the memorandum is irrelevant for the being of the appointment; moreover, further representations by UNSOS Chief/HRS indicated that the matter of payments due during the assignment remained a live issue. In any event, a letter of appointment is a solemn and express act by which the Organization legally undertakes to employ a person as a staff member.³⁹ For this reason alone, leaving momentarily aside the question of whether the Organization is at all authorized to void appointment *ab initio*, it is absurd to expect a staff member to "presume" or "infer" that his or her appointment has been so voided. The argument of the Respondent in this respect is frivolous.

41. The Tribunal holds that only the decision of 10 August 2016 is controlling because it informed the Applicant in no uncertain terms that his P-4 appointment was going to be voided. He requested management evaluation on 7 October 2016, which was well within the 60-day delay set out in staff rules 11.2(a) and 11.2(c).

42. This claim is therefore receivable.

Is the Applicant's challenge against "the failure to pay benefits and entitlements accruing from his work in Mogadishu" receivable?

43. The Respondent submits that this claim is moot because the Administration has paid all the benefits and entitlements due to the Applicant for his P-3 level assignment

³⁹ *Gabaldon* 2011-UNAT-120.

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 FCRB review and approval, resulted in his being granted a letter of appointment at the P-4 level. Since he has previously been FCRB cleared for the P-4 post, this should not be used as an impediment to his promotion.

b. The minimum education requirements are the same for the P-3 and P-4 level posts thus if he can continue being employed at the P-3 level, there is no justification for barring his employment at the P-4 level.

c. He was granted and signed two consecutive letters of appointment for a fixed term appointment at the P-4 level and he performed the functions of a P-4 Administrative Officer. Since all elements of the contract were honoured, the Administration ought not be allowed to unilaterally repudiate said contract.

d. He has an acquired right to appointment at the P-4 level which the Administration cannot seek to correct by reference to an alleged error or their interpretation of the statutory framework. The UNADT Judgment No. 19, Kaplan (1953) pronounced on the issue of acquired rights that contractual elements such as "contract, salary and grade" cannot be changed without the agreement of the two parties. The Applicant submits that these are the elements the Administration is trying to change unilaterally in his case.

e. The “mistake” the Administration purports to correct was made more than two years ago. The Administration has benefited from the Applicant’s service at the P-4 level for six years and have colluded in misapplying the staff rules to maintain his employment at the P-3 level. Because of the Administration’s actions the Applicant has been kept from the P-4 roster and thus prevented him from moving laterally within the system, which has had a negative impact on his career prospects.

f. The Administration sent him mixed messages about his promotion, which on one hand made it seem as if the issue was still under review, and on the other hand, made it seem as if the matter had been resolved when he was granted a fixed term appointment at the P-4 level in August 2014.

g. The Administration’s failure to address the issue of the Applicant’s promotion indicates it has not acted in good faith as is required.

46. The Respondent’s case is that:

a. The United Nations Appeals Tribunal (UNAT/Appeals Tribunal) held that the Administration has an obligation to correct an unlawful decision and in *Cranfield* 2013-UNAT-367 condoned a decision to retroactively rescind an indefinite appointment where the staff member did not fulfil the requirement of at least five years of continuous service.

b. Similarly, the Applicant’s P-4 appointments dated 1 August 2014 and 1 August 2015 were invalid. There was no legal basis to retroactively appoint the Applicant to the P-4 level; he was not a roster candidate for P-4 Administrative Officer positions as set out in ST/AI/2010/3 (Staff selection system); and the Applicant’s candidacy was not reviewed by a central review body before his appointment to the TJO.

c. The Applicant’s claim that he has an acquired right to an appointment at the P-4 level is without merit. The principle of acquired rights generally protects staff members from retrospective modifications to critical contractual

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.

Considerations

47. The key issue remains the lawfulness of the 10 August 2016 decision to void the Applicant's appointment. Determination of this matter will be controlling for the question of whether the Administration had the standing to recover payments made pursuant to this appointment and refuse other ones. Regarding the Applicant's arguments and claims summarised under para 45 a. and b. above, they are irrelevant as they do not concern any receivable part of the application; as such, they will not be entertained.

48. At the outset, it needs to be noted that the applicable legal framework does not determine the cases of an *ex lege* nullity of an administrative decision, as such, speaking of "voidance" or "invalidity" of decisions has not much foundation and, *de jure*, denotes rather invalidation (abrogation) or revocation of a decision through a unilateral act of the administration. Neither does the legal framework determine the basis on which the administration would be authorised to abrogate a decision taken in a breach of the rules with the *ex nunc* effect, nor those where it would be authorised to revoke an illegal decision with the effect *ab initio*. Altogether, this situation largely leaves the matter to be determined on a case by case basis, which is not the most

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. Certainly, a line must be drawn between putting the unlawful situation to an end, which could be applied with a greater latitude, and rescinding the decision with an *ab initio* effect, which should be reserved for exceptionally grave irregularities.

49. Whereas it is correct that the Appeals Tribunal has consistently held that the administration was entitled to correct its mistakes⁴¹, this was not unqualified. As rightly pointed out by the Applicant, in *Castelli* the Appeals Tribunal held that, notwithstanding that the employment relation between the staff member and the Organization is defined not just contractually but by staff rules and regulations, this employment relation falls to be protected even where it would have been concluded in breach of the applicable rules:

Unless it is fake or fraudulent, a staff member’s appointment contract gives rise to entitlements upon the signing and acceptance by the staff member of his/her letter of appointment. This holds true even where the administration improperly handled the recruitment process, provided that the staff member acted in good faith. [...]. Where the administration commits an irregularity in the recruitment procedure, it falls to it to take such measures as are appropriate to correct the staff member’s situation. It is only where such correction is manifestly impossible to effect owing to the nature or gravity of the irregularity that the administration may terminate a staff member.⁴²

50. As seen here, the determinant factors are good faith on the part of the staff member plus availability of corrective measure before a termination may happen. The Tribunal, in any event, disallowed a retroactive action whereby the administration purported to invalidate an appointment, in part, in order to avoid paying a relocation

⁴⁰ A lacuna already pointed out in *D’Hooge* UNDT/2010/044.

⁴¹Eg *Cranfield* 2013-UNAT-367, *Kellie* 2018-UNAT-875; *Kule Kongba* 2018-UNAT-849; *Cicek* 2016-UNAT-636.

⁴² *Castelli*, 2010-UNAT-037., at paras 24, 26.

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; *Castelli, ibid.*, at para. 24

⁴⁶ *Cranfield, ibid.*, at para.44 citing to *Sprauten* 2012-UNAT-219, at para. 1.

⁴⁷ *Cranfield, ibid.*, at para. 50; *Wang, ibid.*, at para. 67.

⁴⁸ *Cranfield, ibid.*, para 46 does not contain any explanation.

⁴⁹ *Cranfield, ibid.*

⁵⁰ E.g., in France an abrogation or revocation of a decision conferring rights is, in principle, not allowed after 4 months from the date of the issuance, see Conseil d'État, *Ternon* C.E. 26 octobre 2001; *Soulier*, C.E. 6 novembre 2002; *Coulibaly* C.E. 6 mars 2009; in Germany within a year from the discovery of the illegality, *VwVfG* para 48 (4).

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

53. Approaching the problem as belonging in the area of administrative discretion, the Tribunal finds, nevertheless, that the general concepts of mutual good faith and fair dealing which are implicit conditions of the contract between the United Nations and its employees must apply.⁵² These will generally speak for protecting legitimate expectations of a staff member who acts in good faith and for resorting to retroactive, *ab initio* revocation only in exceptional cases. Moreover, the requirement of proportionality in balancing legitimate interests remains valid.

54. Applying the above considerations to the case at hand, the Tribunal recalls that, indeed, under Section 3.7 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments), a candidate holding a fixed-term appointment, who is offered a temporary appointment, will retain his/her fixed-term appointment and will be assigned to the position to be temporarily encumbered for a period not exceeding the duration of their fixed-term appointment. Assuming that at the relevant time, the Applicant held a fixed-term appointment at the P-3 level, his 1 August 2014 appointment to the temporary position P-4 Administrative Officer based in Mombasa should have been also at the P-3 level. Appointing him at a P-4 level was therefore in breach of Section 3.7 of ST/AI/2010/4/Rev.1. However, as admitted by the Respondent⁵³, the Applicant had fulfilled the requirements for the P-4 temporary job opening in question and did undergo a competitive selection process in accordance with Section 3.5 of ST/AI/2010/4/Rev.1. The Tribunal finds, therefore, that the irregularity did not concern a fundamental matter.

55. Further, it is admitted that the Applicant did not occasion the error and his good faith is not being questioned.⁵⁴

⁵¹ *Ten Have* 2015-UNAT-599.

⁵² *E.g., Obdeijn* 2012-UNAT-201, para. 33; *Ahmed* 2011-UNAT-153, para. 45

⁵³ Respondent's response to Order No 151 (NBI/2017)

⁵⁴ *Ibid.*

56. On the other hand, when asked about the actual onerousness posed for the Organization by the irregularity in the appointment, the Respondent indicated that it lies in an “unlawful selection decision” and overpaying the Applicant. In the first respect, as discussed earlier, not just any irregularity may justify a retroactive revocation of appointment and the one at hand was not found to be grave. In the second respect, the Tribunal notes that the Applicant did complete the assignment and did perform the duties satisfactorily.⁵⁵ As such the Organization received services equivalent to the P-4 position and its pay; the Organization may have missed an opportunity to save on the Applicant’s work, but it did not “overpay” beyond the legal limits and the budgeted funds for the position that it advertised. Besides, the difference in remuneration between a P-3 with an SPA and a regular salary at a P-4 level, is not colossal. As such, the Organization’s financial interest in revoking the appointment *ab initio* is moderate compared with onerousness for the Applicant.

57. The Applicant’s “unlawful” appointment had come to an end and did not produce lasting unlawful consequences.

58. In conclusion, the Tribunal finds that revoking the Applicant’s appointment *ab initio* was disproportionate and thus illegal.

59. Recovery of the Applicant’s paid emoluments is accordingly without basis.

Has the Administration failed to pay the Applicant the appropriate benefits and entitlements accruing from his work in Mogadishu?

60. The Applicant’s case is that since his redeployment to Mogadishu, the Administration has failed to quantify and pay him for various entitlements that accrued from his work in Mogadishu, including post adjustment, under his P-4 appointment. For four years, he operated at the P-4 level without being remunerated at that level. The decision to strip the Applicant of his P-4 appointment is contrary to the right to equal pay for equal work affirmed in *Chen* 2011-UNAT-107. Equal pay is not limited to salary but includes all benefits and entitlements that accrue from the P-4 appointment,

⁵⁵ *Ibid.*

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 found unlawful, the refusal to pay the Applicant's benefits attaching to service in Mogadishu at the P-4 grade was unlawful.

⁵⁶ *Rees*, 2012-UNAT-266 paras 57-58.

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. Payment of all benefits and entitlements previously unpaid in relation to his P-4 appointment in Mogadishu.

66. The Tribunal concurs that the decision to void the Applicant's P-4 appointment falls to be rescinded. Accordingly, all sums recovered consequent to the decision to cancel that appointment must be returned. Likewise, benefits and entitlements previously unpaid in relation to the deployment in Mogadishu must be paid at the P-4 level, taking into account payments that have already been effected at the P-3 level.

67. As concerns claims for remedies described as per points b and c. above, the Tribunal finds that they have no relation to decisions effectively impugned in this case. The Applicant had been appointed at the P-4 level for a finite term of two years and to this extent his status has been restored. The issue before the Tribunal does not form the basis to grant him any different appointment or to place him on a P-4 roster. In this respect, therefore, the application fails.

JUDGMENT

68. The decision communicated on 10 August 2016 whereby the Administration unilaterally revoked the Applicant's fixed-term appointment for the UNSOA P-4 Administrative Officer post from 1 August 2014 to 31 July 2016 and the attendant decision communicated on the same date to recover payments corresponding to this

appointment, are rescinded.

69. Payments recovered from the Applicant in execution of the decision of 10 August 2016 shall be returned within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of recovery to the date of payment. If the total is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

70. The Administration shall calculate payments due to the Applicant in accordance with the Letters of Appointment for the UNSOA P-4 Administrative Officer in relation to the Applicant's deployment to Mogadishu and effect any outstanding payments within 60 days of this judgment becoming executable.

71. All other claims related to the 10 August 2016 decision are dismissed.

72. In the remaining part, the application is rejected as irreceivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 29th day of March 2019

Entered in the Register on this 29th day of March 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi