Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2012/051
Judgment No.:	UNDT/2012/141
Date:	24 September 2012
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

CRANFIELD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Alexandre Tavadian, OSLA
Louis-Philippe Lapicerella, OSLA

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. The Applicant contests the decision of 17 January 2012 by which the United Nations High Commissioner for Refugees ("the High Commissioner") modified her appointment so that it was no longer of indefinite duration.

2. She requests that the Tribunal rescind the contested decision and order the Respondent to grant her an indefinite appointment. In the alternative, she requests compensation equivalent to several months of her net salary. She also requests compensation equivalent to six months' net salary for the moral damage incurred.

Facts

3. The Applicant was recruited locally by the Office of the United Nations High Commissioner for Refugees ("UNHCR") in Dublin, Ireland, in January 2002 as an Administrative Secretary, at the G-4 level. In March 2002, she was granted an indefinite contract. She was appointed to the post of Administrative/Finance Assistant, at the G-6 level, in January 2006. With effect from January 2007, the Applicant, who up until then held grade G-5, was promoted to the G-6 level.

4. By an email dated 23 June 2009, the Director of the Division of Human Resources Management ("DHRM") informed the staff of UNHCR that, in view of the contractual arrangements resulting from the new Staff Regulations and Rules and in order to protect staff members' acquired rights, the UNHCR would conduct a one-time review of staff members eligible for conversion from fixed-term to indefinite appointments.

5. On 1 July 2009, the provisional Staff Regulations and Rules entered into force.

6. On 21 July 2009, the Applicant was informed that she had been selected for an Administrative/Programme Assistant post, at the G-6 level, in the UNHCR Regional Office in Brussels, Belgium.

7. In order to take up her new position, the Applicant, by a memorandum dated 30 September 2009, submitted her resignation from the post she held in Dublin, with effect from 31 October 2009.

8. On 2 November 2009, she signed her letter of appointment for the post of Administrative/Programme Assistant in Brussels. The 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. By an internal memorandum IOM/004-FOM/005/2011 dated 21 January 2011 and entitled "One-Time Review for the Granting of Indefinite Appointments", the High Commissioner informed the staff of UNHCR that in view of the entry into force on 1 July 2009 of the new Staff Regulations and Rules and the fact that indefinite appointments had thereby been abolished, a one-time review would be undertaken in order to consider the candidacies of staff members who, as of 30 June 2009, met the eligibility criteria of five years of continuous, satisfactory service, for conversion from a fixed-term appointment to an indefinite appointment.

10. By an email dated 23 February 2011, the Director of DHRM announced that staff members who were eligible for an indefinite appointment had been informed through individual emails. Staff members who had not received such notification but considered that they met the eligibility requirements were invited to contact the Recruitment and Postings Section. The Applicant did so on that same day.

11. On 24 February 2011, DHRM advised the Applicant that she had initially been considered ineligible based on her new date of entry on duty with UNHCR, namely 1 November 2009, but confirmed that the Applicant did indeed meet the criterion of five years of continuous service.

12. On 12 October 2011, the Applicant was informed that her appointment had been retroactively converted to an indefinite appointment effective 1 November 2009. She signed her new letter of appointment on 20 October 2011.

13. By an email dated 17 January 2012, the Personnel Administration and Payroll Section at the UNHCR headquarters in Geneva notified the Administration of the UNHCR Regional Office in Brussels, and the Applicant, that the Applicant could not be considered to have met the eligibility requirements for the conversion of her appointment and that the letter of appointment with effect from 1 November 2009 could not be considered legally valid and should therefore be cancelled.

14. On 14 March 2012, the Applicant submitted a request for management evaluation of the decision of 17 January 2012.

15. In the absence of a response to her management evaluation request, the Applicant submitted her application to the Tribunal Registry on 31 May 2012. The Respondent submitted his reply on 2 July 2012.

16. By Order No. 134 (GVA/2012) of 27 August 2012, the Tribunal informed the parties that it deemed a hearing unnecessary and invited them to file their comments on the matter within one week. On 31 August 2012, the Applicant requested the opportunity to respond to the arguments put forward by the Respondent, either at an oral hearing or in writing, and she filed observations that same day. The Respondent did not file any comments.

Parties' submissions

17. The Applicant's contentions are:

a. According to the case law of the Appeals Tribunal, an offer of employment produces legal effects upon unconditional acceptance by a candidate even before the letter of appointment is issued. *A fortiori*, a letter of appointment confers legal rights to and imposes obligations on the contracting parties. Moreover, the Dispute Tribunal recently confirmed the binding character of a complete letter of appointment. Further, staff rule 4.1 states as follows: "All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment." The letter of appointment signed by the Applicant on

20 October 2011 contained the essential terms of the agreement and constituted a binding contract;

b. The contested decision is based on the eligibility criteria set forth in the Procedural Regulations of the Appointments, Postings and Promotions Committee ("APPC"), which were promulgated in inter-office memorandum No. IOM-FOM/42/2006. These Procedural Regulations are not binding rules within the meaning of the case law of the former United Nations Administrative Tribunal but rather mere guidelines for the members of APPC. Unlike the Staff Rules, guidelines are not part of the employment contracts of staff members of the Organization. Moreover, they cannot prevail over administrative issuances such as the Secretary-General's bulletins or administrative instructions, and the Staff Rules, which includes the aforementioned staff rule 4.1, were promulgated in a Secretary-General's bulletin. Finally, the purpose of guidelines is to assist the Administration in the decision-making process. Although they may be binding on the Administration which has adopted them, they are not binding on staff members. Guidelines, therefore, cannot override the explicit terms agreed to by the parties to an employment contract, and UNHCR could not rely on guidelines in order to revoke the Applicant's valid and binding contract;

c. Before deciding to revoke her appointment, the Administration had notified the Applicant twice that she was eligible to apply for conversion of her appointment, which created a legitimate expectation and conferred rights;

d. In revoking the Applicant's appointment, the Administration asserted, first, that at the date of 30 June 2009, she had held an indefinite contract, and second, that she had relinquished that appointment in order to take up her new position in Brussels. These two assertions are unfounded and wrong in law. On the first point, an indefinite appointment should entitle the holder to at least the same advantages as those deriving from fixed-term appointments. Although she held an indefinite

appointment, that appointment should have been regarded as a fixed-term appointment for the purposes of the one-time review for the granting of indefinite appointments. On the second point, it was solely for the purpose of assuming her new functions in Brussels that the Applicant had to make the decision to resign and relinquish her indefinite appointment, thereby following the Administration's unlawful instructions. This resignation cannot therefore be considered a break in service for the purposes of the one-time review;

e. During the month of October 2011, several human resources officials expressly inquired about the Applicant's particular situation before she was granted an indefinite appointment. Furthermore, neither civil law nor common law allow a party to rely on its own errors or negligence. In the current case, the Administration made an informed decision to grant her an indefinite appointment;

f. While it is true that the letter of appointment should have specified that the indefinite appointment was granted to the Applicant retroactively starting from 30 June rather than 1 November 2009, this consideration alone does not render the contract null and void;

g. Even if it is assumed that the Applicant's resignation constituted a break in service, that break lasted only a few hours, from the time of her resignation on 31 October 2009 until she assumed her new functions the following day;

h. By modifying her appointment so that it was no longer of indefinite duration, the Administration deprived the Applicant of specific, quantifiable rights. In respect of the claim for compensation for moral damages, the Administration itself acknowledged in exchanges with her early in 2012 that the contested decision had caused anxiety and inconvenience.

18. The Respondent's contentions are:

a. The Administration did not unilaterally revoke the letter of appointment that the Applicant signed on 20 October 2011; the letter was null and void *ab initio*; this letter has no legal value and thus could not be considered a valid employment contract. At the time when the Applicant relinquished her contract in order to take up her new position in Brussels on 1 November 2009, UNHCR was not competent to grant indefinite appointments because such appointments had been abolished with effect from 1 July 2009 with the entry into force of the new Staff Rules and Regulations. The one-time review for the granting of indefinite appointments was carried out *a posteriori* with retroactive effect to 30 June 2009, on which date the Applicant was already in possession of an indefinite contract. Therefore, she could not have had, in parallel, an acquired right to an indefinite appointment. Moreover, the letter of appointment was issued without prior legal advice and despite the fact that it was no longer possible, at the time when the Applicant took up her position in Brussels, to grant an indefinite appointment. The letter was the result of a regrettable error which the Administration is entitled to correct;

b. The Under-Secretary-General for Administration and Management delegated to the High Commissioner the authority to administer his staff. By virtue of this authority, the High Commissioner is empowered to establish internal policies that are binding in nature as long as they do not contradict the Staff Rules and Regulations, or their intention. Furthermore, it was precisely because the former Staff Rules contained no provision for the granting of indefinite appointments that UNHCR established its own legal framework, namely the Procedural Regulations of APPC. These Procedural Regulations were promulgated by IOM/FOM/42/2006 following a formal process that included staff consultations. Internal memorandum IOM/004-FOM/005/2011, which provided for the one-time review for the granting of indefinite appointment, was adopted under the same process;

c. Even if the letter of appointment could have led the Applicant to entertain certain hopes, it is null and void. Moreover, the letter of appointment did not induce the Applicant to undertake or refrain from undertaking any action that could have affected her rights, and it is therefore possible for the Administration to rectify its mistake by regularizing the Applicant's situation;

d. It is illogical to consider the candidacy of a staff member for an appointment that he or she already holds. Furthermore, even if an indefinite appointment had been granted to the Applicant retroactively under the one-time review, the Applicant was still employed at the Dublin office of UNHCR on 30 June 2009. She subsequently submitted her resignation and so in any case she would have had to be rehired in Brussels under a fixed-term appointment;

e. Since the administrative issuances of the United Nations do not apply directly to UNHCR, and the latter has the authority to establish internal policies implementing the Staff Rules and Regulations, the staff selection rules of UNHCR are contained in the Procedural Regulations of APPC. Moreover, the rights and obligations of locally recruited staff are geographically limited to the office that recruited them. By virtue of the Flemming principle, whereby the conditions of service of staff in the General Service category must be aligned with the best prevailing conditions at each duty station, such staff cannot simply be transferred from one country to another, and must therefore resign before taking up posts in other countries. In any event, the Applicant voluntarily relinquished her indefinite appointment because, as she herself acknowledges, she feared a downgrading and abolition of posts in Dublin, and she did not contest the granting of a fixed-term contract when she took up her position in Brussels. She did so in the full knowledge that under the new Staff Rules and Regulations she could no longer be granted an indefinite appointment;

f. The length of the Applicant's break in service has no bearing on the legality of the decision;

g. The Applicant's claim for material damages is based on speculation. Any loss of rights that she may have suffered arose as a result of her own decision to relinquish her indefinite appointment. Furthermore, the Applicant has submitted no evidence of her moral damage, and that request should therefore be rejected.

Consideration

19. Although the Applicant has requested an opportunity to respond to the arguments put forward by the Respondent, either at an oral hearing or in writing, the Tribunal has considered the observations she submitted on 31 August 2012 and finds that a hearing is unnecessary.

20. The Applicant contests the decision of 17 January 2012 by which the High Commissioner rescinded the decision communicated on 12 October 2011 that retroactively converted her fixed-term appointment into an indefinite appointment with effect from 1 November 2009.

21. In requesting rescission of the decision of 17 January, the Applicant maintains that the previous decision granting her an indefinite appointment was lawful and therefore could not be rescinded, and that in any case this decision had conferred rights upon her and could not be unilaterally retracted by the Administration.

22. If it is assumed that, as the Applicant first maintains, the decision communicated on 12 October 2011 was lawful, it is indisputable that the Administration could not lawfully reverse that decision. If the decision of 12 October 2011 was unlawful, as the Respondent maintains, the Tribunal must consider whether its unlawfulness meant that the Administration could reverse the decision several months after the Applicant had been informed of it.

23. Contrary to what the Respondent maintains, this initial decision did indeed have the effect of converting the Applicant's fixed-term appointment into an

indefinite appointment as of 1 November 2009. It was therefore an individual decision that was favourable to the Applicant and conferred rights upon her when she accepted the appointment offered by signing her new letter of appointment on 20 October 2011.

24. In *Castelli* 2010-UNAT-037, the Appeals Tribunal found that:

> 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, i.e., where the impropriety was entirely attributable to the administration.

25. If it is assumed that the decision to grant the Applicant an indefinite appointment was unlawful, it is indisputable that this unlawfulness was entirely the responsibility of the Administration and that the Applicant's good faith is not being challenged.

26. 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 (see *Boutruche* UNDT/2009/085 and *Diara* UNDT/2011/062), 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.

27. The Tribunal must first of all determine which provisions in force allow the Administration to reverse unlawful decisions that it has taken. In respect of decisions on financial matters, administrative instruction ST/AI/2009/1 (Recovery of overpayments made to staff members) stipulates the cases in which an "overpayment" that the Organization has made to a staff member may be recovered.

28. While the Staff Regulations and Rules contain no general provisions on reversal of other individual decisions that confer rights on staff members, this circumstance is envisaged in staff rule 11.2, which specifically governs the

procedure whereby a staff member may request a management evaluation of an administrative decision that could confer rights upon a third party. Not only does this provision permit the Administration to reverse an administrative decision that it considers unlawful, it actually requires that the Administration do so.

29. Thus, for example, when the selection of a staff member for a post, a decision that confers rights upon that person, is contested by another staff member who submits a management evaluation request, the Administration must retract the decision if, upon re-examination, it deems it unlawful, even though the decision conferred rights upon the staff member selected. Moreover, this is the objective sought by the management evaluation process: to enable the Administration to reconsider its unlawful decisions without the need for recourse to the Tribunal. However, in order to guarantee legal certainty, very tight deadlines are set for exercise of this power to retract decisions which confer rights, under staff rule 11.2(c), which sets a deadline of 60 days from the date on which the staff member received notification of the administrative decision for him or her to submit a request for a management evaluation, and under staff rule 11.2(d), which provides that the Administration has 30 days to respond to that request, or 45 days if the staff member is stationed outside New York.

30. The Tribunal is of the view that there is no need to draw a distinction depending on whether the Administration itself becomes aware that one of its decisions is flawed or it recognizes the irregularity after a management evaluation request has been submitted by a staff member; consequently, the same deadlines should apply to both situations. The Tribunal is of the view, therefore, that when the Administration itself concludes that it has taken an unlawful administrative decision conferring rights on a staff member, it has the right to retract it within 90 calendar days from the date on which the decision was communicated to the staff member. This deadline encompasses the deadline within which a staff member may submit a request for management evaluation, as well as the deadline prescribed for the Administration to respond to such a request, without the need to take into account the additional deadline that is applicable when the staff member concerned is stationed outside New York. Indeed, this additional deadline is

unwarranted in cases where the Administration is reconsidering its decision on its own motion.

31. It follows from the above 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. While there is therefore no need to rule on the legality of the decision of 12 October 2011, the decision of 17 January 2012 should be rescinded.

32. Given that the effect of rescinding the decision, as noted above, is that the decision of 12 October 2011 is once again in effect, the Applicant has suffered no material damage.

33. The Applicant's moral damage consists solely of her disappointment with the Administration's unlawful retraction of a decision that was favourable to her, and, on this basis, she should be granted compensation in the amount of EUR1,000.

Conclusion

34. In view of the foregoing, the Tribunal DECIDES:

a. The decision of 17 January 2012 is rescinded;

b. The Respondent shall pay the Applicant compensation in the amount of EUR1,000;

c. The aforementioned compensation shall bear interest at the US prime rate with effect from the date on which this Judgment becomes executable, plus five per cent 60 days from the date on which this Judgment becomes executable until payment of the said compensation.

(*Signed*)

Judge Jean-François Cousin

Dated this 24th day of September 2012

Entered in the Register on this 24th day of September 2012

(*Signed*)

René M. Vargas M., Registry, Geneva