



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/047

Judgment No.: UNDT/2014/007

Date: 28 January 2014

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

FIALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

George Irving

Counsel for the Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By an Application dated 1 April 2010, the Applicant, a staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), is contesting the decision not to revise her recruitment level from FS-4 to FS-5 with effect from 1 June 2006 when she was appointed to the then United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUC).
2. The Applicant is seeking retroactive rectification of her recruitment level to the FS-5 level with interest, compensation for lost career opportunities, stress, moral injury and additional legal costs.

Facts

3. The Applicant joined the Organization in Vienna in 1979. She joined the United Nations Mission in Sierra Leone (UNAMSIL) on 16 February 2000 at the FS-4 level and served there until 31 December 2005 at the same level, when the Mission closed.
4. While employed at UNAMSIL, the Applicant applied through the GALAXY system to a generic Vacancy Announcement, VA-05-ADM-PMSS-408823-R-Multiple D/S (VA 408823), issued on 22 December 2005, for an Administrative Assistant at the FS-5 level with the Department of Peacekeeping Operations (DPKO), and was technically cleared by the Office of Human Resources Management (OHRM) on 26 February 2006.
5. From late 2005, UNAMSIL was downsizing to transition to the follow-up mission, the United Nations Integrated Office in Sierra Leone (UNIOSIL). UNAMSIL requested that the Personnel Management Support Service (PMSS) at United Nations Headquarters in New York provide re-assignments for their staff to other DPKO missions in accordance with a Master List for Redeployment.
6. From 1 January 2006 to 31 May 2006, the Applicant was engaged in a series of short term assignments with UNIOSIL at the FS-4 step 10 level.

7. In response to the Applicant's application and technical clearance in GALAXY, she was called for an interview in mid-April 2006 for the vacant FS-5 Administrative Assistant post in the Office of the Regional Administrative Officer (RAO) by Martin Bentz, Program Manager and RAO (Region One) and Alfred Podritshnig, Field Office Manager, MONUC.

8. By an email dated 28 April 2006, Mr. Bentz informed the Offices of the Director of Administration (DOA) and Personnel in MONUC that the Applicant was the selected candidate and recommended recruitment at the FS-5 level and simultaneously requested that Personnel speed up the process in order to avoid a break-in-service.

9. Upon receipt of the Letter of Appointment from PMSS, the Applicant noticed that she was offered a lateral move (FS-4) and immediately called Mr. Alexander Sokol, then Team Leader, Recruitment and Placement Section/PMSS and Mr. Bentz in MONUC to inform them of the apparent error.

10. Mr. Sokol informed the Applicant that she featured on a list of staff members to be re-assigned and had been processed as a lateral move as a result of the downsizing of UNAMSIL. The Applicant informed him that she had successfully gone through a competitive selection process for an FS-5 level post. Mr. Sokol offered to re-visit her case, but needed time.

11. Mr. Bentz advised that the most expedient way to deal with the matter was for the Applicant "to sign the Letter of Appointment with her present grade and level, and take up the matter once she was in MONUC".

12. A facsimile of 9 May 2006 from Ms. Hazel Scott, DOA/MONUC, to Mr. Chaste Abimana, then Officer-in-Charge (OIC), PMSS, stated that the Applicant was interviewed and recommended for appointment against an FS-4 position of Administrative Assistant. The fax highlighted that as UNAMSIL could not maintain her status beyond expiration of her accumulated leave, she should be given the Offer of Appointment with MONUC at the earliest convenience in order to avoid a break-in-service.

13. On 17 May 2006, the Applicant signed a contract offer for a fixed-term appointment as Administrative Assistant at the FS-4, step 10 level. The Applicant joined MONUC on 1 June 2006.

14. On 7 September 2006, Mr. Bentz wrote to Mr. Paulin Djomo, then Chief Civilian Personnel Officer (CCPO), MONUC, requesting advice on the steps to be followed in order to rectify the Applicant's recruitment level from FS-4 to FS-5.

15. On 26 September 2006, Ms. Drissa Soro sent an e-mail on behalf of the Head of the International Staff Recruitment Unit of MONUC to Mr. Bentz stating that the Applicant was on a shortlist of technically cleared candidates to be evaluated for the post of Administrative Assistant at the FS-5 level in relation to VA 408823. The shortlist of technically cleared candidates was attached to the email.

16. On 27 September 2006, Mr. Bentz received an email from Mr. Hayamoon Mubtakir, Human Resources Officer, International Staff Recruitment Unit, MONUC,¹ indicating that he should complete a comparative evaluation sheet to enable the Applicant to be regularized.

17. On 28 September, Mr. Masaki Sato, OiC Africa II, Field Personnel Division of the Department of Field Support (FPD/DFS), sent a memorandum to the Applicant indicating that upon a review of her personnel records, he wished to confirm that the selection fax received from MONUC was for a post at the FS-4 level and that she was properly recruited at the FS-4 level.

18. During the following 10 months, the Applicant attempted informally to rectify her recruitment level from FS-4 to FS-5. By memorandum dated 15 April 2007, the Applicant officially requested revision/correction of her entry level. This was within a year of her recruitment to MONUC on 1 June 2006.

19. The Applicant received a response from FPD/DFS on 28 September 2007 stating that she had been properly recruited at the FS-4 level.

¹ Annex 4(b) to Application.

20. Consequently, the Applicant requested access to her personnel file in MONUC and discovered that there were no documents in her file evincing her FS-5 recruitment process. Her file contained a copy of a fax to PMSS, which had been drafted and authorized by the CCPO and signed by the DOA on 9 May 2006, re-confirming Mr Bentz' selection process but quoting an FS-4 instead of FS-5 recruitment level.

21. In a facsimile dated 22 February 2009, Mr. Hany Abdel-Aziz, Director of Mission Support (DMS), MONUC, requested that Mr. Paul Johnson, Chief of Operations FPD/DFS revisit the case based on new evidence that was adduced by the Applicant from archived files of individuals involved in her recruitment process that suggested there was an administrative error in her recruitment.

22. An unsigned facsimile dated 27 February 2009 from FPD/DFS to the DMS/MONUC states that after careful review of the relevant recruitment material, FPD could not grant the Applicant's request as she had been properly recruited at the FS-4 level.

23. Based on a 4 September 2009 memorandum from the Management Evaluation Unit (MEU) to FPD/DFS, it appears that this 27 February 2009 facsimile was never received by MONUC.

24. According to the Applicant, while MONUC was pursuing her case with FPD/DFS in 2009, she authorized the former Panel of Counsel to raise the matter with the Chief of Operations of FPD/DFS, which resulted in four months of silence.

25. By an e-mail dated 29 June 2009, a representative from the Panel of Counsel informed her that FPD/DFS had confirmed that it was not in a position to revise her recruitment level as she had, in fact, been interviewed and selected for an FS-4 position in 2006.

26. The decision not to revise the Applicant's grade was taken by FPD/DFS on 29 June 2009 and the Applicant was notified the same day by the Panel of Counsel. The decision was orally communicated by Paulin Djomo, Officer in Charge, Africa II Section, Field Personnel Operational Services, FPD/DFS.

Procedural history

27. A request for management evaluation was filed by the Applicant on 29 August 2009. She received a response from MEU on 30 November 2009. Thus, pursuant to the provision of article 8.1(d)(1) of the Tribunal's Statute, she had until 28 February 2010 to submit an application to the UNDT.

28. By an application dated 26 February 2010, the Applicant requested extension of the time limit within which to file her application due to illness. By Order No. 45 (NBI/2010), dated 18 March 2010, she was instructed to submit, by 23 March 2010, a medical certificate or report in support of her request for an extension of the time limit. The Applicant complied with Order No. 45 on 18 March 2010. Pursuant to art. 8.3 of the UNDT Statute, by Order No. 48 on 19 March 2010, the Tribunal granted the Applicant an extension to 1 April 2010 to file her application.

29. An Application was subsequently filed on 1 April 2010 and served on the Respondent on 6 April 2010.

30. The Respondent filed his Reply on 6 May 2010, requesting that the Application be dismissed as not being receivable.

31. By Order No.73 (NBI/2010) dated 7 May 2010, the parties were invited to inform the Tribunal if they were prepared to consider a mediated settlement. As the Respondent did not consider that mediation was a viable option for resolution of this matter, a case management hearing was held on 27 May 2010 pursuant to Order No. 73. The Applicant, her representative, and the Respondent's representative were present at the hearing via audio link.

32. At the case management hearing, and in a subsequent filing dated 24 June 2010, the Respondent maintained his position that the Application was not receivable.

33. After consideration of the documentary and oral evidence, in Order No. 136, the Tribunal concluded that the Application is receivable and requested the Parties to make submissions on the further management of the case.

34. On 7 September 2010, the Applicant filed her response to Order No.136, informing the Tribunal that she wished to present statements from three witnesses: Mr. Martin Bentz, Mr. Alfred Podritschnig and Ms. Ghislain Maertens. She described these witnesses as former MONUC officials “personally involved in [her] recruitment process”.

35. In anticipation of an oral hearing in the matter, on 28 December 2011 the Registry wrote to the Applicant’s Counsel and asked him to inform the Tribunal of the witnesses the Applicant proposed to call. On 6 January 2012, the Applicant’s Counsel named the witnesses as the Applicant, Mr. Martin Bentz and Mr. Paulin Djomo. On 23 January 2012, the Respondent informed the Tribunal that since Mr. Djomo had been selected as a witness by the Applicant, he had no further witnesses to call.

36. On 31 January 2012, the Applicant filed a request for leave to submit documentation in connection with the oral testimony of Messrs. Djomo and Bentz. The Applicant included a statement of Mr. Podritschnig in the bundle. By submission dated 31 January 2012, the Respondent objected to the Applicant producing the statement for the reason that Mr. Podritschnig had not been named as a witness.

37. A hearing in this case was conducted on 7 and 8 February 2012. At the conclusion of the hearing, the Judge informed the Parties that the Tribunal would review the material presented in the case and consider whether or not the Tribunal would call an expert in Human Resources Management as a witness in the matter or, alternatively, the hearing was closed.

38. On 20 February 2012, the Applicant filed her request for leave to submit additional evidence and closing arguments. The Applicant asserted that at the hearing “some additional issues have been raised with respect to the procedural requirements for staff selection for mission service during the period in question” and she requested leave to “introduce some additional evidence in the form of statements from the Field Service Union representative at the time and from Human Resources officials familiar with mission service”.

39. By e-mail dated 22 February 2012, the Tribunal granted the application to submit additional evidence and indicated that upon receipt of the statements and subject to the Respondent's views, the Tribunal would decide whether or not to hold a further hearing for the oral testimony of the witnesses to be heard.

40. On 15 March 2012, the Applicant filed four additional statements which were served on the Respondent.

41. The Respondent filed his response to the additional evidence on 28 March 2012. The Respondent argued that the Applicant had not established the grounds necessary to reopen her case in the manner sought as the new evidence could have been produced at the hearing, the proposed additional evidence was not relevant or probative and the Respondent was prejudiced by the late submission of this evidence. The Tribunal decided not to admit the additional statements into evidence in this case, nor to reopen the case for further hearing. The Tribunal subsequently directed the Parties to submit their closing submissions, which were not to include references to the additional witness statements adduced by the Applicant on 15 March 2012.

42. On 25 July 2012, the Applicant and Respondent both filed their closing submissions which were served the same day.

Applicant's submissions

43. The Applicant submitted that standard United Nations recruitment procedures were followed to select her for the FS-5 position, which was vacant in the immediate office of Mr. Bentz. Both the Programme Manager, Mr. Bentz, and the Field Office Manager, Mr. Alfred Podritschnig, confirmed this fact. There were interviews, shortlisted candidates, and a fair and transparent recruitment process to select available candidates for a number of posts that were then to be filled.

44. There was no objection to the recruitment procedures or lack thereof or to the selection of the Applicant for the recommended recruitment level. On the contrary the then CCPO, Mr. Djomo, re-confirmed in his official "Recruitment Fax" to PMSS the successful selection process conducted by the Programme

Manager “finding her suitable for the position”. The Applicant added that the original subject title “Recruitment” on the fax of 9 May 2006 signed by the CCPO was correct with the exception of the level of the post, which was unilaterally changed by the same person who later tried to cover up his actions with multiple excuses and evasive actions.

45. Throughout the entire recruitment process the Office of the CCPO not only failed to assist or advise the Programme Manager on the applied procedures, but also failed to adhere to ST/AI/2002/4 (Staff selection system), ANNEX IV, para. 1 (P) which clearly stipulates under “Responsibilities of the Office of Human Resources Management, Executive Offices and local personnel offices” that they are responsible and accountable for “exercising authority under section 11 of this instruction for the placement of staff outside the normal process in consultation with heads of departments/offices and the staff member concerned”. Neither the Programme Manager nor the Applicant was ever contacted by the CCPO’s Office in this regard.

46. There was no policy-based reason preventing the Applicant from being appointed to the FS-5 level, nor a rule in ST/AI/2002/4 that prevented her selection to the FS-5 level based on the procedures that were followed. Even if the initial step was to be seen as an exception due to the urgency created by the downsizing of the prior mission, it would not preclude appointment to a higher level if all the requirements were met. The testimony of Mr. Bentz further elaborated on the actual steps that occurred and explained why he has consistently supported the Applicant’s efforts in seeking rectification of her recruitment level.

47. In answer to the argument that the whole exercise was a lateral transfer, the Applicant submitted that had this been the case there would have been no need for a formal recruitment process and a comparative evaluation. The Applicant also pointed out that on 7 September 2006 the Programme Manager filed a formal request to the CCPO for a correction of her recruitment level. This was followed by emails from MONUC’s International Recruitment Unit proposing to “regularize [the Applicant’s] case as she was interviewed and recommended for the FS-5 level”.

Respondent's submissions

48. The Respondent submitted that when the Applicant was recruited for MONUC, she was offered and accepted her appointment at the FS-4 level and was therefore bound by the terms of her appointment when she took up the position on 1 June 2006.

49. Prior to her transfer to MONUC, the Applicant had been granted technical clearance for positions at the FS-5 level. In answer to the Applicant's claim that since she had been technically cleared to be considered for FS-5 positions, she had a right to be appointed at the FS-5 level with MONUC, the Respondent submitted that technical clearance is the first step that must be achieved by a staff member seeking promotion. Technical clearance to participate in a promotion exercise does not give a staff member any right to be appointed at that level. The documentary record and the evidence of Mr. Djomo and Mr. Bentz, demonstrate that the Applicant was transferred to MONUC as a priority candidate from a downsizing mission.

50. No promotion exercise had taken place and if one had taken place it would have been reflected in the contemporaneous documents and would have been known to the Administration. As explained by Mr. Djomo, at the most basic level, a promotion exercise would have started with PMSS issuing a short-list of technically cleared candidates at the FS-5 level. This did not happen. There is no documentary trace of any promotion exercise being conducted.

51. Mr. Bentz acknowledged in his evidence before the Tribunal that he did not receive a group of candidates cleared for consideration for appointment at the FS-5 level and that he did not conduct a competitive promotion exercise for an FS-5 position. Instead, having received the Applicant's personal history profile (PHP), he and Mr. Podritschnig evaluated the Applicant's suitability and recommended her appointment. There was no comparative evaluation of technically cleared candidates at the FS-5 level.

52. ST/AI/2002/4 did not regulate appointments in the field service category as stipulated at section 3.2(f) and therefore did not regulate the appointment of the

Applicant's appointment in MONUC. Nevertheless, for field service appointments, the policies and practices underlying and expressed in ST/AI/2002/4 were, in many instances, applied by the Administration in order to establish practices for mission appointments.

53. The Administration assisted the Applicant by reassigning her from a downsizing mission. If the Administration had not done so, her appointment would have expired. The Applicant has not suffered any loss, any distress or any emotional harm as a result of the Administration's actions, in fact, she has benefited from the Administration's proactive efforts to place her at MONUC.

Issues

54. The Tribunal will examine the following issues:
- a) Whether ST/AI/2002/4 is applicable to the Applicant;
 - b) Whether the Applicant was interviewed and selected for the FS-5 post; and
 - c) Whether the Administration had a duty to implement the Programme Manager's selection decision.

Considerations

Whether ST/AI/2002/4 is applicable to the Applicant

55. The recruitment of staff within the Organisation is governed by Article 101 of the Charter of the United Nations that reads: "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly". The scope and purpose of the Staff Regulations are set out as follows:

Scope and purpose

The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. For the purposes of these Regulations, the expressions "United Nations Secretariat", "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of

Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter. The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary”.

56. It is very clear from the provisions quoted above that the status of United Nations staff and their recruitment conditions are governed solely by the Staff Regulations and Rules and by any administrative instructions issued by the Secretary-General in application thereof.

57. ST/AI/2002/4 deals with the staff selection process. Section 3.1 of this administrative instruction states, *inter alia*, that the system shall apply to staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the 100 series of the Staff Rules.

58. Section 3.2 excludes certain categories of individuals from the staff selection system. For the purposes of the present case, section 3.2(f), which reads as follows, is most relevant:

The system shall not apply to the following: appointment and movement of staff selected for field mission posts and the appointment of Professional staff for mission replacement posts when the temporary vacancy resulting from the mission detail cannot be filled through temporary reassignment from within the office.

59. It was the contention of the Respondent that ST/AI/2002/4 regulated appointments other than those in the field service category and therefore did not regulate the Applicant’s appointment to MONUC. Nevertheless, for field service appointments, the policies and practices underlying and expressed in ST/AI/2002/4 were, in many instances, applied by the Administration in order to establish practices for mission appointments. On a request for further clarification on the issue, the Respondent submitted that the procedures set out in ST/AI/2002/4, though not applicable to staff selected for field mission posts “were the best practices at the time, accordingly, the Administration applied these procedures where appropriate”.

60. The Respondent further submitted that:

[I]n 2006, there was no regulatory framework setting out mandatory procedures for the appointment of staff to field mission posts. As a result, the Administration was required to ensure that procedures were developed and consistently applied that ensured fairness in the recruitment process and that those recruited or promoted exhibited the highest standards of efficiency, competence and integrity. The procedures detailed in ST/AI/2002/4 were the best practices developed at the time. As such, where applicable, the Administration adopted these procedures as a means of managing the appointment, transfer and promotion of staff in field missions.

61. The Respondent referred to Article 101.3 of the Charter of the United Nations and staff regulation 4.2 to submit that recruitment can only be made after a candidate has demonstrated the highest standards of efficiency, competency and integrity. In pursuing this mandate, the Administration has been vested with discretion to employ procedures for the assessment of staff that ensure that the competency of staff have been assessed. One way of fulfilling this mandate was applying the procedures detailed in ST/AI/2002/4. So long as the Administration engaged in a comprehensive competitive competency based assessment process - whether this process complied with ST/AI/2002/4 or not - it satisfied the mandate set out under staff regulation 4.2. Since the procedures set out in ST/AI/2002/4 provide an example of best practice, it was within the Administration's discretion to apply these procedures where appropriate. The procedures detailed in ST/AI/2002/4 ensure fairness for candidates in a selection exercise and require that the Administration perform a complete and thorough assessment of each candidate in order that the mandate set out in staff regulation 4.2 is achieved.

62. The Applicant also referred to the same administrative instruction to submit that the treatment meted out to her was against the most basic notion of fair treatment. In further submissions, the Applicant's Counsel explained that it was not the Applicant's case that ST/AI/2002/4 was applicable to her. Mission staff was exempt from these provisions precisely to facilitate rapid redeployment between missions.

63. In two recent cases, the UNDT has dealt with the legal implication and effect of policies in regard to the contract of employment of a staff member. In

Valimaki-Erk UNDT/2012/004, Cousin J held that a policy decision of the Secretary-General requiring an individual to renounce his/her permanent residence in a country prior to being offered a contract in the Organization was unlawful as that was a practice that had no legal basis. The decision in *Valimaki-Erk*² was affirmed by the United Nations Appeals Tribunal (UNAT) where the Appellate Judges observed “although the Secretary-General has discretion in the appointment of staff, he has no discretion to impose unwritten regulations and rules that are prejudicial to staff members”.

64. In *In re Léger*³, the Administrative Tribunal of the International Labour Organisation (ILOAT) addressed the issue of administrative practices potentially forming part of a staff member’s terms of employment. ILOAT held that:

A statement by the Director of a practice which he intends to follow can under certain conditions create such an obligation. Such statements of practice often relate, as in this case, to the way in which the Director intends to administer a staff rule and thus clarify and amplify it. But just as a staff rule must not conflict with the staff regulation under which it is made, so a statement of practice must not conflict with the rule which it is elaborating.

65. Additionally, the Administrative Tribunal of the World Bank held in *Louis de Merode and Others v. The World Bank*⁴ that:

The practice of the organization may also, in certain circumstances, become part of the conditions of employment. Obviously, the organization would be discouraged from taking measures favorable to its employees on an ad hoc basis if each time it did so it had to take the risk of initiating a practice which might become legally binding upon it. The integration of practice into the conditions of employment must therefore be limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation.

66. The Tribunal is of the view that since ST/AI/2002/4 excludes field mission staff members, like the Applicant, from its ambit it cannot be made applicable in

² *Valimaki-Erk* 2012-UNAT-276.

³ ILOAT Judgment No. 486, *In re Léger* (1982).

⁴ WBAT Decision No. 1 [1981].

the current matter. Nor can ST/AI/2002/4 be made applicable to the Applicant by invoking the best practices rule or argument.

67. In *Manco* UNDT/2012/135, it was held that a policy decision could not be regarded as a legal instrument that formed part of the contract of a staff member unless it was expressly incorporated in a rule, regulation or resolution of the General Assembly. Should the principle be different when, as in the present case, it is contended that the policies are based on what an administrative instruction enunciates? The Tribunal unhesitatingly answers in the negative. There is no indication as to a formal decision being taken by the Secretary-General or someone with the requisite delegated authority to make ST/AI/2002/4 applicable to a staff member who is clearly excluded from its purview.

Was the Applicant interviewed and selected for the FS-5 position?

68. In April 2006 there was an FS-5 position available in Mr. Bentz' office. He explained that at the material time he was occupying the position of Regional Administrative Officer at the P-5 level in MONUC. In this position, he had the authority to fill in vacant posts and had been tasked by the DOA to fill as many posts as possible. He was also vested with full authority from the DOA to decide on the level and structure of posts in the mission up to the FS-5 level. He was looking for administrative support for the Regional Office and needed a person at the FS-5 level to coordinate all activities of engineering, transport and aviation to assist him. The Applicant also produced a document⁵ listing at least four vacancies for FS-5 positions.

69. The name of the Applicant appeared on the list of candidates and this is how Mr. Bentz came to know about her. He and Mr. Podritschnig interviewed her in April 2006 and he subsequently recommended that her selection for the post be at the FS-5 level. He sent emails dated 28 April 2006⁶ to Mr. Goncalves, the Administrative Officer and one dated 2 May 2006⁷ to Ms. Yvrose Strachan, OiC of the Personnel Office, notifying them of his choice. There was no follow up

⁵ Annex 8a to Application.

⁶ Annex 2 to Application.

⁷ Annex 2 to Application.

request for additional information or documents from either the DOA's office or Personnel.

70. Mr. Bentz added that he was never copied on any recommendation for an FS-4 position and was not asked to prepare a comparative evaluation sheet for an FS-4. Further, he was never told that his recommendation would not be implemented and that the Applicant would be laterally transferred instead.

71. The selection fax for the Applicant from MONUC to PMSS, dated 9 May 2006, indicated that there were no technically cleared candidates in the Nucleus roster for comparison purposes but that once the Mission received the short-list of technically cleared candidates in that occupational group from PMSS, a comparative evaluation would be prepared and forwarded to DPKO. The Mission then requested in the fax that PMSS reassign the Applicant from UNAMSIL to MONUC at the FS-4 level.

72. In response to Mr. Bentz' memorandum of 7 September 2006 seeking rectification of the Applicant's grade level, the MONUC International Staff Recruitment Unit sent him a shortlist of the technically cleared candidates to be evaluated for the post of Administrative Assistant at the FS-5 level in relation to VA 408823 on 26 September. The Applicant was on the shortlist.

73. Then on 27 September 2006, Mr. Mubtakir, also of the MONUC International Staff Recruitment Unit, sent an e-mail to Mr. Bentz advising the following:

In order to regularize [the Applicant's] case as she was interviewed and recommended for the FS-5 level, PMSS has sent us the attached list of candidates. Enclosed please find a copy of the relevant VA and a blank "Comparative Evaluation" form which we would like to request that you kindly arrange to have it completed and returned to us. Additionally, we would also like to request for [the Applicant's] latest e-PAS covering the period of March '05 – April '06.

74. Thus in September 2006, MONUC sought to regularize the Applicant's case as indicated in the 9 May 2006 selection fax but it sought to regularize her at the FS-5 level and not at the FS-4 level upon which she had been reassigned. It

seems to the Tribunal that the Mission was finally trying to give effect to Mr. Bentz' recommendation that the Applicant be recruited at the FS-5 level. Unfortunately, this attempt failed because Mr. Bentz refused to fill out the comparative evaluation sheets on candidates he had not interviewed.

75. The Applicant checked her status file in MONUC and found an unsigned FS-4 comparative evaluation sheet. Mr. Bentz told her that he had never interviewed the persons whose names appeared on that document⁸. The Applicant alleged that the document in her personnel file was fabricated. The Administration explained that the documents were not fabricated but were in fact similar to matrixes used by human resources sections to evaluate candidates shortlisted for positions in preparation for interview. The Administration further explained that they were working documents routinely prepared at the initial stages of a recruitment process listing the summary educational background and relevant experience of shortlisted candidates⁹.

76. The evidence has established that the Applicant was interviewed and selected by Mr. Bentz for the Administrative Assistant post in his office, which was at the FS-5 level. The evidence also indicates that Mr. Bentz specifically recommended that the Applicant be recruited at the FS-5 level. The Respondent's failure to effect the programme manager's recommendation does not negate the fact that the Applicant was interviewed and selected for an FS-5 post.

Was it incumbent on the Administration to implement Mr. Bentz's selection decision?

77. Once Mr. Bentz informed the Offices of the DOA and Personnel of his selection decision, it was incumbent upon the Administration to implement this decision and to do so fully. The Tribunal finds that Mr. Bentz' selection decision was implemented only in part when the Applicant was offered the reassignment from UNAMSIL to MONUC. The problem though was that his recommendation as to her recruitment level was not implemented. It is unclear to the Tribunal why

⁸ Annex 9 to Application.

⁹ Annex 12 to Application.

MONUC decided to go against Mr. Bentz' recommendation when he had the delegated authority to recruit staff up to the FS-5 level.

78. The Tribunal notes the contradictory actions of the Administration after the recruitment process had been carried out. In emails dated 26 and 27 September 2006, MONUC sought to regularize the Applicant's case at the FS-5 level and yet on 28 September, FPD/DFS took a biometrically opposite view and confirmed that the Applicant had been properly recruited at the FS-4 level. The icing on the cake came from Mr. Djomo who stated that Mr. Bentz could not have recommended the Applicant for an FS-5 position because no such position existed. This evidence is in complete contradiction to what Mr. Bentz, Ms. Soro and Mr. Mubtakir indicated.

79. What has become apparent from the evidence is that in the absence of a staff selection system governing peacekeeping staff in 2006, the Administration played around with the status and fate of the Applicant. The overall impression is that those who wielded high power at the material time in this case were either ill-versed with the intricacies of appointment in field missions or were just acting in a bureaucratic manner and failed to deal with what they perceived as an inconsequential administrative issue. They little realized that there was a human factor involved.

80. Although the Mission attempted to remedy the situation in September 2006 by sending the comparative evaluation sheets to Mr. Bentz to complete, the Tribunal finds that this attempt was lukewarm and inappropriate and was an attempt to save face in the light of the administrative errors. It should have dawned on the Administration that it could not and should not have asked a staff member to fill out comparative evaluation sheets on candidates he had never interviewed without giving a proper explanation or justification for the request.

Conclusion

81. The Tribunal concludes that the circumstances of this case are exceptional in that not only was the Applicant technically cleared and interviewed for an FS-5 post, she was in fact selected for the post and informed of the selection decision

by the Programme Manager who was in charge of the recruitment process. This, in the Tribunal's view, created a legitimate expectation in the Applicant that she would be offered what she had been selected for and informed of. Regrettably, she was offered the post at the FS-4 level and compelled to accept due to the fact that she was facing the harsh reality of being downsized from UNAMSIL within a matter of days and sincerely believed that her situation would be regularized upon her arrival in the Democratic Republic of the Congo.

82. It is worth noting that even though she signed the offer and accepted the post at the FS-4 level, she did not do so without objection. She lodged a complaint with Messrs. Sokol and Bentz immediately upon receipt of the offer and engaged in sustained efforts from June 2006 to obtain rectification of her grade. The Applicant is not to be faulted or penalized for the omissions or mistakes of the administration.

83. Further, the Tribunal finds the circumstances of this case to be exceptional because in September 2006, MONUC sought to regularize the Applicant at the FS-5 level but failed to do so because of Mr. Bentz' discomfort at the procedure that was proposed to him. The Tribunal therefore finds it an abuse of process for the Respondent to pretend that the selection process of April 2006 and the regularization effort never occurred and to unreasonably contend, year after year, that the Applicant had no basis for her claim.

84. In view of the fact that the Applicant was interviewed, selected and recommended for the Administrative Assistant post at the FS-5 level by Mr. Bentz and informed of said selection decision, the decision to appoint her at the FS-4 level was erroneous and should be rescinded.

Judgment

85. Pursuant to Article 10 of its Statute, the Tribunal may rescind a contested administrative decision and order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10.5(b) provides for

an order of compensation which, in exceptional cases, may exceed the equivalent of two years net base salary.

86. The Tribunal orders rescission of the decision to appoint the Applicant at the FS-4 level and orders the Respondent to re-appoint her at the FS-5 level with immediate effect and also orders that the Respondent pay the Applicant the difference between the salary and entitlements of an FS-4 and FS-5 from 1 June 2006 to the date of this judgment.

87. In the event that rescission of the decision is not possible, the Respondent is to pay the Applicant for loss of earnings at the FS-5 level from 1 June 2006 to the date of this Judgment.

88. The Applicant is also entitled to moral damages. She stated that she was greatly affected by the situation in which she found herself after the rejection of all efforts to have her status rectified from FS-4 to FS-5. There was no more possibility for her career development and her career was blocked. This had a financial impact on her. Her health suffered and she was distressed.

89. UNAT has held that it is within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case.¹⁰

90. The Tribunal recognizes the stress caused to the Applicant by the circumstances of this case and awards USD10,000 as moral damages.

(Signed)

Judge Vinod Boolell

Dated this 28th day of January 2014

¹⁰ *Cieniewicz* 2012-UNAT-232; *Morsy* 2012-UNAT-330 and *Wu* 2010-UNAT-042.

Entered in the Register on this 28th day of January 2014

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi