



Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko

JOCONDO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Victor Rodriguez

Counsel for the Respondent:
Stephen Margetts, ALS/OHRM

Introduction

1. The Applicant is a former employee of the Office for the Coordination of Humanitarian Affairs (OCHA) who was assigned to Port-au Prince, Haiti, as the Head of the OCHA Field Office (OCHA Haiti FO) at the D-1 level.

2. On 11 February 2012, the Applicant filed the current Application with the United Nations Dispute Tribunal (Tribunal) to contest the decisions to: temporarily reassign him from Haiti to Dakar; abolish his D-1 Post as Head of the OCHA Haiti FO and to offer him an appointment at the P-5 level instead of his personal D-1 level.

Procedure

3. In reply, the Respondent alleged that the Application was not receivable. The Tribunal, by its Judgment UNDT/2012/189 of 3 December 2012, ruled that it is receivable.

4. In response to case management orders¹ the parties filed supplementary submissions and evidence.

5. On 20 August 2013, the case was transferred to the undersigned judge in accordance with Order No. 184 (NBI/2013).

6. The case was heard by the Tribunal in Nairobi from 7 to 10 April 2014 by video and teleconference. The witnesses who gave oral evidence at the hearing are named in this judgment.

Issues

7. The issues for determination are as follows:

- a. Was the decision to reassign the Applicant from Haiti to Dakar lawful?

¹ Order Nos. 154 (NBI/2012), 020 (NBI/2013) and 101 (NBI/2013).

- b. Was the Applicant appointed to a new fixed term contract at the P-5 level in Dakar or reassigned to that position?
- c. If the Applicant was reassigned, was it lawful for the reassignment to result in his downgrading from the level of D-1 to P-5?
- d. Was the D-1 post in Haiti abolished or transferred from Haiti to South Sudan?

Facts

8. The Applicant joined OCHA in 2001 as a Humanitarian Affairs Officer and Head of the OCHA Office in Rwanda at the P-3 level. He has since served OCHA as Head of Office or Deputy Head in nine field locations in Africa and Latin America. From 2006, he served at the P-5 level holding positions as Head of Office in Somalia, Eritrea, Cote d'Ivoire and Addis Ababa. In 2009 his appointment was converted from an intermediate contract under the 200 series to a fixed-term appointment.

9. In April 2010, he was placed on a roster of candidates endorsed by the Central Review Board (CRB) for the function of Head of Office at the D-1 level for multiple duty stations in OCHA for a period of two years from 1 May 2010 until 30 April 2012.

10. Following the 12 January 2010 earthquake in Haiti, in June 2010 the Advisory Committee on Administrative and Budgetary Questions (ACABQ)² concurred with the request of the Controller to establish a D-1 extra budgetary post to serve as Head of the OCHA Haiti FO. On 28 June 2010, the then Under-Secretary-General for OCHA (USG/OCHA) endorsed the Applicant's selection as Head of Office for one year through the interim procedures for filling critical field positions. On 7 July

² The ACABQ is a subsidiary body of the General Assembly, which is responsible for expert examination of the programme budget of the United Nations and assisting the Administrative and Budgetary Committee (Fifth Committee) of the General Assembly (Rule 157 of the Rules of Procedure of the General Assembly).

2010, he was informed of his reassignment to Haiti from Addis Ababa. He took up his duties on 29 August 2010. This was his first D-1 post.

11. The Applicant's letter of appointment stated that the post was funded through 31 March 2011 and was subject to the availability of funds after that. The letter said that the appointment would expire without prior notice on 24 August 2011.

12. Shortly after the Applicant's appointment, Haiti suffered a tropical storm which left 15,000 families homeless, an outbreak of cholera and a hurricane. The Applicant told the Tribunal of the demands on his office and the staff and the very long hours they worked to deal with these multiple crises.

13. During this time the Applicant had discussions with the Deputy Director of the Coordination and Response Division (CRD) for OCHA, Mr. Philippe Lazzarini, concerning difficulties between him and his direct supervisor, the Deputy Special Representative of the Secretary-General and the Resident/Humanitarian Coordinator, who had returned from retirement to assist in Haiti. A mission was sent from New York to sort out the conflict. However, the Applicant said the relationship between him and his supervisor actually worsened.

14. Mr. Lazzarini told the Tribunal that in the course of these conversations in late October 2010, the Applicant asked to be reassigned out of Haiti to a family duty station. He said it was common knowledge that the Applicant was not happy and had a difficult relationship with his direct supervisor. The Applicant adamantly denied this. He said he told Mr. Lazzarini that **after** his assignment in Haiti he wanted to go to a family duty station but did not ask to go earlier than the expiry of his fixed-term appointment. He said he was used to hardship posts and did not ask to be relieved of his post in Haiti. He said that Mr. Lazzarini did not talk to him about reassignment until he was on leave in Nairobi.

15. On 10 November 2010, a little over two months after his arrival in Haiti, the Applicant felt tired and a little dizzy. He was given an initial medical examination

and, due to lack of medical facilities in Haiti, was then medically evacuated to the Dominican Republic. He was medically cleared two days later and returned to Haiti. On 15 November he left Haiti again to take a scheduled rest and recuperation (R&R) break and annual leave in Nairobi.

16. While the Applicant was in Nairobi he had another medical checkup which cleared him of health issues. At that time, he was contacted by Mr. Lazzarini, who told him that taking into account the medical evacuation from Haiti and the potential implications for his medical conditions should he return to Haiti, he proposed that the Applicant should be reassigned for the remaining period of his fixed-term appointment to Dakar, Senegal, as Head of Office at the P-5 level in the Regional Office for West and Central Africa (ROWCA). The Applicant was very familiar with West Africa and Mr. Lazzarini believed the post would suit him. It was during this time that the Applicant said he told Mr. Lazzarini of his desire to eventually take a post in a family duty station.

17. The Applicant told the Tribunal that he told Mr. Lazzarini that his concern was that the Dakar post was at the P-5 level and not a D-1. Mr. Lazzarini said OCHA would try to have the post upgraded to a D-1 post but the decision was a managerial one and not subject to discussion.

18. While waiting for the decision on the upgrade, the situation in Cote d'Ivoire deteriorated. The United Nations office was closed and staff was evacuated. As the Applicant was familiar with Cote d'Ivoire from his previous experience, Mr. Lazzarini asked him to go there on mission from 13 December 2010 to 7 January 2011 to help the surge mission and do a needs-assessment for OCHA. The Applicant says that this surge mission was more dangerous and stressful than Haiti and questions if he was fit to go to Cote D'Ivoire why was he not fit to return to Haiti?

19. On 6 December 2010, USG/OCHA, Ms. Valerie Amos, wrote to the Controller to request the upgrading of the P-5 post in Dakar to a D-1 Head of Office post from December 2010 to August 2011 "in order to accommodate a staff member

who has a valid D-1 contract through August 2011 but has had to leave his current post due to health reasons”. The letter also said that the Applicant required more direct access to medical care following his recent medical evacuation.

20. On 10 December 2010, the Applicant wrote to his senior management team in Haiti announcing his departure from Haiti to Senegal in which he said:

Dear Colleagues,

Trust all is fine and this email finds all of you well, despite the difficult context in Haiti aggravated by the ongoing post electoral violence. I am writing today to update all of you on my health situation and to share with you my future carrier [sic] plans.

As some of you may be aware, I took the advantage of being in Nairobi on R&R and leave to undergo additional medical tests in order to get a second opinion. The results were good and reassuring, however, to avoid being subjected to similar conditions, which may affect my health, OCHA, SMT accepted to reassign me from Haiti to Senegal, taking the advantage of a suitable opening in Dakar (Head of Regional Office for West Africa).

Awaiting the conclusion of administrative procedure for reassignment at my current level, my plans to return to Haiti on 6 December 2010, were modified due to the recent developments in Cote d’Ivoire. I have been asked by Philippe Lazzarini to go to Abidjan as part of the OCHA temporary deployment in the country in connection with the current crisis. As such my return to Haiti has been postponed to 13 January 2011 to hand over and proceed to my new duty station.

Finally allow [sic] to take this opportunity to say good bye to Imogen, Jessica and Bernard who will be leaving OCHA Haiti the beginning of next year (if there plans are still maintained). I would have loved to be with you to bid them farewell and to thank them for their hard work, professionalism and excellent collaboration. Since I will not be there I would like to say to Bernard, Jessica and Imogen “I enjoyed working with you and sincerely hope our paths will cross again”. For the other members of the team, let me conclude by saying “de courage, bonne continuation, merry Xmas and happy new year in advance”.

21. The Applicant explained that this letter was an attempt to calm his senior management team since he was absent from Haiti, to update them on his health issues after his return from medical leave and to avoid rumors. He pointed out that his acceptance of the Dakar post was conditional on it being upgraded to the D-1 level. He denied that the letter was evidence of his unconditional acceptance of his reassignment.

22. Ms. Amos' request for the Dakar post to be upgraded to D-1 was rejected by the Controller on 28 December 2010 on the grounds that the reasons for the upgrade did not reflect a change in duties and responsibilities of the post and hence could not be used as the basis for reclassification. The Controller noted: "Since the temporary relocation of extra-budgetary posts and staff under OCHA is within the purview of OCHA, consideration should be given to accommodating the situation of the incumbent of the post of Head of office, Haiti, using available vacant posts".

23. In early 2011 a decision was made to restructure the Haiti mission. This included the abolition of the D-1 Haiti post which would only be required for eight months in 2011.

24. Ms. Amos told the Tribunal that OCHA is funded 95% by donors and only 5% from the regular United Nations budget. She is accountable to the General Assembly for the budget and the prudent use of donors' money. She further explained that the number of D-1 posts available in OCHA is limited. They fall into three categories:

- a. Temporary D-1 posts that she can apply for to cover a specific period of time;
- b. A pool of D-1 posts created to give greater flexibility. In theory these posts can be moved around to meet OCHA's needs but in reality because of the number of complex emergencies in a number of places most of these posts have remained static;

c. Posts created to manage a crisis with no time limits. Typically such situations call for a temporary upgrading of the Head of Office post to D-1 to initially manage a huge coordination task. The concurrence of the ACABQ is required for such posts. After a year the need is reassessed.

25. Ms. Amos said that the D-1 Haiti post was in the last category. It was created to meet the 2010 crisis. Although ACABQ concurrence is required for the establishment of such posts there is no understanding that there has to be consultation on their abolition. As USG she takes an administrative decision on this and subsequently advises the ACABQ. The decision to abolish the D-1 Haiti post in 2011 was made by her after assessing the ongoing need for the post.

26. The Applicant went to New York from 7-11 January 2011 to be inducted for the Dakar post. The USG met with him during that visit and informed him that in light of the restructuring at the Haiti mission his appointment could not be renewed beyond August 2011. She made him the offer of a temporary re-assignment to the post of Head of Office, ROWCA, at the D-1 level for the remainder of his fixed-term appointment expiring on 24 August 2011. She also offered him a fixed-term appointment as Head of Office, ROWCA at the P-5 level following the expiry of his fixed-term appointment in Haiti.

27. The Applicant refused this offer and on 8 February 2011 sent an email to Ms. Amos in which he said, "As my original acceptance of the new position [in Dakar] was contingent on the successful completion of the upgrade which is not the case now, I would like to return to Haiti and continue to contribute to the work of the organisation's work until another and more suitable D1 opportunity (such as the DRC or Chief of Branch, Geneva) becomes available".

28. Ms. Amos refused this proposal. She told the Tribunal that this was due to her concerns about his health. While she understood that the Applicant had received medical clearance to return to work, he had suffered from a stress-related condition and she had a duty of care not to return him to the difficult duty station and stressful

working environment in Haiti. She told him she would make every effort to get the Dakar post upgraded. The Applicant told her that health was not an issue as he had been cleared by the Medical Services Section at the United Nations Office at Geneva (UNOG) prior to his return to Haiti on 13 November 2010.

29. Ms. Amos said there were a lot of discussions about all of this with Mr. Lazzarini. They did not want the Applicant to suffer any financial loss due to his reassignment to Dakar so they decided to move him to Dakar at the D-1 level until the expiry of his D-1 Appointment to Haiti.

30. On 9 February 2011, the Applicant accepted the extension of his D-1 Haiti fixed term appointment effective 1 January to 24 August 2011 and signed his letter of appointment. On 20 February 2011 he went to Dakar.

31. In March 2011, the Applicant was interviewed for the D-1 Head of Office post in the Democratic Republic of the Congo (DRC) and applied for the D-1 Chief of Branch post in Geneva. He was not appointed to either of these posts.

32. In April 2011, Mr. John Ging, Director of CRD, and the Applicant discussed his future in OCHA. On 25 April, the Applicant wrote to Mr. Ging about an OCHA vacancy announcement (VA) for roster purposes for Head of Office, D-1 posts which included a reference to Haiti. He sought his guidance and advice on the best way to proceed as he was already rostered at the D-1 level.

33. Mr. Ging replied that the expiry of his current fixed term contract coincided with the reduction of grade of the D-1 Haiti post which had been temporarily authorised for that Mission only. He confirmed the offer of appointment for Dakar “which is at the P5 level once your current fixed term expires”.

34. Mr. Ging also told the Applicant that he was welcome to apply for any other post that became vacant and as he was already on the D-1 roster there was no need for him to apply for the vacancy notice which was for those not already on the roster. He pointed out that there were a limited number of D-1 posts in OCHA and that when

his post expired there was no mechanism to offer him a D-1 grade unless he was appointed through a competitive process to a vacant D-1 post. He gave an example of another staff member who had moved to a lower graded post and said this was common practice in OCHA. Finally, he indicated that he looked forward to the Applicant's decision about the P-5 appointment in Dakar.

35. Ms. Amos explained that OCHA was trying to maximize the number of staff appointed to D-1 posts but after P-5 there are few such posts. She said that very often Headquarters (HQ) staff will take a position in the field to be temporarily promoted to a higher grade for the experience but do not expect to maintain the grade when they return to HQ.

36. On 10 June 2011, the then Haiti Head of Office sent a cost plan to Mr. Ging, which showed that the D-1 post would be required for 8 months. This was approved by the Senior Management team. Ms. Amos told the Tribunal that there had been a budget review for Haiti, which reduced the budget substantially. The operations were being reduced and there was no longer a need for a D-1 post.

37. On 24 June 2011, the Applicant requested management evaluation of the decision to appoint him to a fixed-term appointment as Head of OCHA Regional Office in Dakar at the P-5 level once his current fixed-term contract expired on 24 August instead of an appointment at an equivalent D-1 level elsewhere. The management evaluation was held in abeyance pending the conclusion of informal resolution. The Applicant sought to reactivate the management evaluation but in either December 2013 or January 2014, the Management Evaluation Unit (MEU) informed him of the closure of his case because it was before the Dispute Tribunal.

38. On 21 July 2011, Mr. Lazzarini informed the Applicant that the D-1 post of Head of Office OCHA Haiti had been abolished effective August 2011. He reiterated the offer of the P-5 post at Dakar and stated, "[a]s your contract expires on 24 August 2011, we need to clarify on your intentions". The Applicant advised that he had consulted the Ombudsman's office and hoped for a mutually accepted conclusion.

He copied this to the acting Executive Officer, who in turn wrote to Mr. Moses Tefula, Officer-in-Charge (OIC), Administrative Service Branch, OCHA, as follows.

Please have your HR team review this case and advise on how to resolve it. I found it strange that CRD is communicating directly to a staff member that his post has been abolished and offering him a lower level post at the P-5 level while he was selected and appointed at the D-1 level through the CRB process. We need to review and provide expert advice to CRD Director to avoid any future litigation.

39. Ms. Amos told the Tribunal that she was surprised at this interchange. She explained that the acting Executive Officer had been recruited from the Department of Peacekeeping Operations (DPKO) and may not have been aware of how OCHA works. In her view, his letter was completely incorrect because OCHA, as an emergency organisation, has a system that enables changes to be made according to need. Offices are opened and closed and sometimes have to be supplemented at short notice. For this reason staff members are not guaranteed a post at the same level and may go back to a post at the level they had before being temporarily promoted. The staff in OCHA understand that they can apply for field level posts but recognise that the nature of the organisation means that there will come a point when they are not permanently in that position.

40. Ms. Amos also told the Tribunal that she took an interest in all cases where her managers were dealing with staff in difficult situations including hijacking. Decisions on such staff are taken at a managerial level. As the Applicant had been medically evacuated she became involved in the decision about him.

41. On 30 August 2011, the Applicant received a letter from the Human Resources Office confirming his reassignment as Head of ROWCA, Dakar. It said that his reassignment would become effective 25 August 2011. He was also given a letter of appointment to that post.

42. Mr. Paciaga, OCHA Human Resources Officer, told the Tribunal that the Applicant was temporarily assigned from his D-1 position in Haiti to Dakar on 25 February 2011. Until 24 August 2011, he had a lien on the Haiti post. After that he was reassigned without a lien. He said that a staff member can be placed on a lower level as a disciplinary measure and confirmed there were no disciplinary measures, reprimands or performance issues with the Applicant.

43. On 25 August 2011, Mr. Tefula received an official request from Mr. Ging for the reassignment of the Applicant from D-1 to P-5.

44. On 2 September 2011, the Applicant received a letter addressed to D-1 Roster candidates asking for their availability for deployment to hardship duty stations (including non-family duty stations) for the coming six months. The Applicant confirmed his availability on 5 September 2011.

45. On 6 September 2011, the Applicant signed the letter of reassignment and appointment adding a handwritten note which said: "I accept this reassignment with reservation and pending the outcome of the management evaluation and subsequent processes".

46. On 17 January 2012, Ms. Amos wrote to the Controller about D-1 Head of office posts. Among other things she sought the support of the ACABQ for conversion of the *ad hoc* posts in Afghanistan and Haiti into "pool" posts so they could be used in a more flexible manner. One would be used for Afghanistan and the other in South Sudan. She said she was demonstrating to ACABQ that OCHA was being responsible in the allocation of the D-1 posts that were no longer needed. This was the first opportunity she had to advise ACABQ that the Haiti D-1 post was no longer being used "in light of the improvement in the humanitarian situation in Haiti". By August 2011, Haiti no longer had a D-1 post as the temporary situation that existed in 2010 no longer prevailed.

47. In response to a question from the Tribunal, Ms. Amos explained that in her request she was not asking for ACABQ's agreement for an additional D-1 post but for the D-1 post in Haiti to be used for South Sudan. In effect this letter was a political document. She was showing ACABQ she was being prudent but it did not mean that the D-1 post in Haiti had not been abolished in August 2011.

Submissions of the Respondent

48. The Respondent summarized his case as follows:

a. There is no doubt the Applicant wished to maintain the D-1 level he had been promoted to. There is also no doubt that the Administration made efforts to accommodate him. However, under the Staff Rules and Regulations there was no legal basis for the Applicant to insist on a reappointment at the D-1 level after the expiry of the D-1 head of office post he had held in Haiti.

b. Staff members are bound by the agreement they enter into with the Organization. The Applicant's fixed-term appointment had no expectancy of renewal. Having accepted the fixed-term appointment at the P-5 level, the Applicant is bound by that agreement.

c. To maintain a position at the D-1 level following the expiry of his appointment, the Applicant needed to succeed in a competitive selection exercise for an alternative D-1 position. The Administration does not appoint directly from the roster without conducting a competitive exercise.

d. Although Ms. Amos asked ACABQ for a conversion of the Haiti post in January 2012, it was not in use at that time and OCHA no longer had funding for it.

e. The Haiti post was abolished from 25 August 2011 as approved after the mid-year budget review.

f. The temporary assignment of the Applicant from Haiti to Dakar was in accordance with staff regulation 1.2(c) and a rational discharge of the discretion to reassign.

g. The Respondent submitted that the appointment of the Applicant to the P-5 post was not a demotion but the offer of a new appointment after a fixed-term appointment had run its natural course to expiry.

Submissions of the Applicant

49. The Applicant stated his case as follows:

a. The reassignment to Dakar was conducted without real consultation. This is shown by Mr. Lazzarini's statement that the decision was managerial and not subject to discussion.

b. He always made his acceptance of the temporary assignment conditional on an upgrade of the Dakar post to D-1.

c. In cases of abolition of post due to budgetary necessities the Administration must act in good faith.

d. The Haiti post was not abolished in August 2011 but continued to exist at least until March 2012 when the ACABQ authorised its transfer to Juba, South Sudan.

e. The cost plans submitted by the Respondent do not prove abolition of the post. It should have been abolished by the ACABQ, and as this was not done it remained in existence.

f. The Respondent should have taken the advice of the Controller on 28 December 2010 and accommodated his situation by using available vacant posts. The Applicant was not appointed to any of the available D-1 posts.

g. A staff member cannot be demoted without due process and disciplinary proceedings.

h. The downgrading was done against the constant refusal of the Applicant.

Considerations

Was the decision to reassign the Applicant from Haiti to Dakar lawful?

50. Staff regulation 1.2(c)³ stipulates that:

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

51. The selection requirements of ST/AI/2010/3 (Staff selection system) including the application of evaluation criteria and referral to the central review body apply to appointments up to the D-1 level. An exception to this is in section 2.5 of this AI which provides that:

Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body.

52. In *Kamunyi* 2012-UNAT-194, the United Nations Appeals Tribunal (the Appeals Tribunal) held that:

Considering that Mr. Kamunyi was transferred to a position which was at the same level as his own, ... [it] was a valid exercise of the Administration's discretion to assign him to a different place of work, without economical prejudice to the staff member. ... It was

³ ST/SGB/2011/1 (Staff Rules and Staff Regulations of the United Nations).

taken according to Staff Regulation 1.2(c) and ST/AI/2006/3 applicable at the time.

53. Additionally, in *Rees* 2012-UNAT-266, the Appeals Tribunal held that:

It is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures. An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and, whether he or she had substantial experience in the field.

54. The reassignment of the Applicant to Dakar until 24 August 2011 fulfilled each of the factors listed above. It was at his same grade; as head of office he had the same responsibilities as those in the Haiti post albeit in a very different environment, and was commensurate with his skills. There was no suggestion he did not have substantial experience in the field. The USG/OCHA was not successful in having the Dakar post upgraded but she ensured that the Applicant retained his grade for the whole of the temporary assignment.

55. The dispute between Mr. Lazzarini and the Applicant as to whether the Applicant told him he wanted to leave Haiti for a family duty station does not affect the findings. Provided the factors listed in *Rees* are met; the interests of the Organization are served by ensuring the effective and efficient delivery of services; and the decision is properly motivated; where staff is reassigned to is in the discretion of the Secretary-General⁴.

56. Although the Applicant was suspicious of the motivation for the move, the Tribunal accepts the evidence of Ms. Amos that the decision to reassign him to Dakar

⁴ *D'Hellencourt* UNDT 2010/018.

was made in his interests given the stressfulness of the post in Haiti and the stress he suffered while working there. There was no evidence of unlawful motivation.

57. The Tribunal finds that the temporary reassignment of the Applicant to Dakar at the D-1 level was a lawful exercise of the managerial discretion vested in the USG.

Was the Applicant appointed to a new fixed term contract at the P-5 level in Dakar or reassigned to that position?

58. The Respondent maintains that the Applicant was reassigned from Haiti to the Dakar post for the remainder of his fixed term D-1 contract but his employment in the P-5 post was not a reassignment but an appointment following the end of a fixed-term contract.

59. Article IV of the Staff Regulations relates to the appointment and promotion of staff. Article 4.1 reflects article 101 of the Charter of the United Nations (the Charter), which provides that the power of appointment of staff members rests with the Secretary-General. Pursuant to staff regulation 4.3, so far as practicable, selection shall be made on a competitive basis.

60. Under section 2.5 of ST/AI/2010/3, heads of departments have the authority to laterally move/transfer staff members to job openings at the same level without advertisement of the job opening or further review by a central review body.

61. Section 3.1 of ST/AI/2010/3 states that “the staff selection system applies to the selection and appointment of all staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the Staff Rules at the [...] as well as to staff in the Professional and above categories [...], irrespective of the functions or source of funding”.

62. Section 3.2 lists the appointments that ST/AI/2010/3 does not apply to including lateral movements⁵ of staff by heads of department/office/mission.

⁵ Lateral moves are defined in section 1(q) of ST/AI/2010/3.

63. The Applicant moved from the D-1 post in Dakar to which he had been assigned to the fixed-term P-5 post without any break in service. His tenure with OCHA did not end although his D-1 post in Haiti did.

64. In Mr. Ging's 25 April 2011 email to the Applicant and in Mr. Lazarrini's offer of the P-5 post on 21 July 2011, both referred to an appointment. Apart from these, all of the other documentary evidence concerning the Applicant's employment on the P-5 post in Dakar referred to it as a reassignment. On 24 August 2011, Mr. Ging officially requested the OIC of the Administration office to reassign the Applicant from D-1 to P-5. The Applicant was sent a letter of reassignment that he signed (with reservation).

65. Counsel for the Respondent maintained that the documents referring to reassignment were confused and do not reflect the legal situation. However, the Ging and Lazarrini emails upon which the Respondent relied were only offers of appointment whereas the signed letter of reassignment, which expressly stated the appointment was a reassignment, is the contractual basis upon which the appointment was agreed. It was prepared in accordance with Mr. Ging's instructions to reassign the Applicant. By signing this letter on 6 September 2011 the Applicant accepted the terms offered in it (with reservations). It is the only relevant document that has legal effect and which is contractually binding.

66. The Tribunal finds that the Applicant was appointed to the Dakar P-5 post by reassignment.

Was it lawful for OCHA to reassign the Applicant to a post which resulted in his level being downgraded from D-1 to P-5?

67. It is the Respondent's case that there is no legal basis for the Applicant to have insisted on reappointment at the D-1 level after the abolition of the Haiti post as his employment at the D-1 level ended before he was reemployed on the P-5 post.

The Respondent rejected the Applicant's submission that a grade is personal to the incumbent.

68. The Tribunal does not accept the Respondent's submission that the grade of a post is determinative of the grade of a staff member. Posts have grades but so do individual staff members. As determined in *Rees*, when reassigning staff members their personal grade is a relevant factor in assessing the suitability of the reassignment.

69. This was also recognised by the OCHA Human Resources staff when the downgrading was discussed internally although Ms. Amos and Mr. Lazzarini maintained that this was common and an accepted practice in OCHA. The question is whether the practice of OCHA in downgrading staff on a regular basis is in accordance with the staff rules?

70. There are at least two references to personal grades in United Nations' instruments concerning staff members.

71. The notion of a grade being personal to a staff member is recognised in section 6.1 of ST/AI 2010/3 (Staff selection system), which states:

Staff members holding a permanent, continuing, probationary or fixed term appointment shall not be eligible to apply for positions more than one level higher than their **personal grade**.

72. Sections 4.2 and 4.3 of ST/AI/1998/9 (System for the classification of posts) provides:

4.2 The classification of a post shall not negatively affect the existing contractual status, salary or other entitlement of the staff member encumbering the post. Staff members whose posts are classified at a level below their personal grade level will retain their current grade and salary level, on the understanding that every reasonable effort will be made to reassign them to a post at their personal grade level.

4.3 Staff members whose posts are classified at a level above their current personal grade level in the same category may be considered for promotion in accordance with established procedures, including issuance of a vacancy announcement, where applicable.

73. To the extent that ST/AI/1998/9 applies to staff members who face the reclassification of their existing posts, it is distinguishable from the facts in the present case. However both AIs are relevant to the question of whether a grade is regarded as personal within the United Nations as they expressly refer to the “personal grade level” of staff members. If reclassification of a post does not result in the loss of grade for a staff member then logically neither should reassignment of a staff member after abolition of their post.

74. The cases of the Administrative Tribunal of the International Labour Organization (ILOAT)⁶ referred to by the Applicant are not directly applicable to this case as they were decided under a different regime of staff rules. However, in the wider context of the employment of international civil servants it is informative that other organisations have rules that expressly provide for the reduction of the personal grade of staff by reassignment in specific and limited circumstances. For example, in ILOAT Judgment No. 631, the relevant staff rule provided that reduction of a staff member’s grade as a consequence of reassignment may result from the staff member’s own request, for unsatisfactory performance or misconduct or as an alternative to termination in reduction of force.

75. The fact that other international organisations have rules to allow for a reduction of grade strongly suggests that the norm for the employment of international civil servants is that there shall be no reduction of a staff member’s personal grade without a statutory exception or an express and agreed term in the staff member’s letter of appointment.

⁶ Judgment Nos. 631 (1984), 1234 (1993) and 3041 (2011).

76. Staff rule 4.1 stipulates that:

The letter of appointment issued to every staff member contains expressly or by reference all the terms and conditions of employment. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment.

77. The letter which appointed the Applicant to the D-1 post at Haiti did not state that the Applicant was liable to be appointed at a lower grade once his fixed-term in Haiti ended. Whatever the need or the practice of OCHA is in this regard, it was not reflected in any of the letters of appointment signed by the Applicant while he was employed by OCHA.

78. In the cases of *Rees* and *Kamunyi*, UNAT recognized the importance of the retention of grade when reassignment is being considered. It held that a reassignment should be at the staff member's grade⁷.

79. The only reference in the United Nations Staff Rules to reducing the personal grade of a staff member is in the disciplinary procedures set out in staff rule 10.2, which provides for loss of one or more steps in grade or demotion with deferment, for a specified period of eligibility for consideration for promotion.

80. There was no evidence that the reassignment of the Applicant to the P-5 post by the OCHA Administration was intended as a disciplinary measure against the Applicant warranting a demotion.

81. If, on the other hand, this was an appointment to a post other than by assignment there was no selection process as required by section 2.3 of ST/AI/2010/3 and is also in breach of the staff rules.

82. The Tribunal holds that in the absence of a disciplinary measure (the only explicit justification for demotion in the Staff Rules) the Organization should maintain the personal grade of a staff member unless the staff member agrees to such

⁷ At paragraphs 58 and 35 respectively.

a reduction. In this case the Applicant consistently refused to agree to the reduction of his grade from D-1 to P-5 grade and only accepted the Dakar position with a reservation.

83. The Tribunal accepts that an organisation like OCHA operates in an environment in which it must respond to urgent international emergency situations. It needs flexible staffing arrangements. To this extent, in assigning the Applicant to the P-5 post in Dakar OCHA may have acted in the best interests of the Organization, however, as required by UNAT in *Rees*, the decision has also to be in accordance with mandatory procedures which in this case are the Staff Rules. In the absence of any rules to meet its own particular needs, OCHA is bound by the general staffing rules that apply throughout the United Nations.

84. In summary, if the appointment to another post was by way of a reassignment or a lateral move it can only be lawful if the post is at the same level as the applicant's personal grade. If it is not a reassignment or lateral move it can only have been filled after a competitive selection process.

85. The Tribunal finds that on either view OCHA's insistence that the Applicant must take a reduction of grade in order to retain his employment with OCHA was unlawful. This decision is therefore rescinded.

Was the D-1 post in Haiti abolished or transferred from Haiti to South Sudan?

86. There is no doubt that the Applicant's appointment to Haiti was for a fixed term. It coincided with the budget agreed to by ACABQ to fund a D-1 post to meet OCHA's immediate needs after the earthquake and subsequent disasters. The Cost Plans produced by the SMT show the reduced needs of the post. During the time that the Applicant served as a D-1 in Dakar, the person who replaced him as Head of Office in Haiti did so at the P-5 level.

87. In her submission to the ACABQ on 17 January 2012, Ms. Amos referred to the Haiti D-1 post as if it still existed and requested that it be converted into a pool post for use elsewhere. The Tribunal accepts that this reference to the Haiti D-1 post was not an acknowledgment by Ms. Amos that the post was still in existence and operational in Haiti. It was her attempt to have ACABQ agree to use the funds allocated for that post elsewhere as the need for a D-1 in Haiti no longer existed.

88. The Tribunal is satisfied that the reasons given by the USG for the abolition of the Haiti D-1 post were genuine. The abolition was not intended to prejudice the Applicant. The Haiti Head of Office post, normally at a P-5 grade, had been temporarily upgraded to D-1 to meet the extraordinary needs of Haiti following the 2010 earthquake. Those needs diminished and, following a budget review, the decision was made to revert the post to a P-5 position.

89. Although budgetary approval by ACABQ is required for the establishment of posts, the Tribunal accepts that there is no requirement for ACABQ to make the decision to change the grade of a post at a particular duty station. Based on operational needs, the USG makes an internal administrative decision about the deployment of an approved post. The D-1 post which had been approved by ACABQ was temporarily unused and available to be utilized elsewhere. In this case, Ms. Amos used her discretion to re-grade the Haiti post to its former P-5 status and held the resulting vacant D-1 post after August 2011 until its use could be justified elsewhere. There was a need for it in South Sudan at which time the D-1 post was reactivated.

90. The Tribunal finds that to the extent that the D-1 post was no longer justified in Haiti it was abolished and the post reverted to a P-5 status.

Summary of conclusions

91. The Applicant's temporary reassignment from Haiti to Dakar at the D-1 level was a lawful exercise of the managerial discretion vested in the USG/OCHA.

92. The Applicant was appointed to the fixed term Dakar P-5 post by way of reassignment. The reassignment was unlawful as OCHA insisted that the Applicant take a reduction of grade in order to retain his employment. The decision is rescinded.

93. The D-1 post in Haiti was abolished to all intents and purposes on 24 August 2011. From that time the Head of Office at Haiti reverted to a P-5 post.

Compensation

94. The Applicant sought the following remedies:

a. An order for the Organization to retroactively return him to the D-1 level and to pay retroactively the difference in salaries, allowances and entitlements;

b. The payment of adequate compensation and any additional relief that the Tribunal may consider appropriate for the moral damage, for the harassment and the humiliation suffered and “the anxiety caused about the prospects of his career”;

c. Payment of his legal costs; and

d. He also requested the Tribunal to refer individuals involved in the decision making to the Secretary-General under article 10.8 of the UNDT Statute.

95. The Applicant gave evidence of the effect on him of the imposed return to the P-5 level. He believed he was seen as having been demoted. He was unable to explain why he could no longer serve as a D-1 in Haiti after only one year. He was humiliated at the way he was removed from Haiti.

96. The Applicant also felt harassed by being demoted without respect for the Staff Rules. He suffered anxiety at the lack of information that he received about the

contested decisions, including the documentation about the abolition of the post which were only provided once the case reached the Tribunal.

97. The Tribunal finds that the Applicant suffered harm as the result of the unlawful demotion and is entitled to compensation for moral damages⁸.

98. Under article 10.6 of the UNDT Statute, the legal costs of an applicant can only be awarded where the Tribunal determines that a party has manifestly abused the proceedings before it. In this case these grounds have not been met

99. Further, there is no evidence to justify the Tribunal holding the decision makers in this case personally accountable for the legal errors made. The errors were systemic rather than egregious and deliberate abuses of the regulations and rules of the Organization.

Remedies

100. The Tribunal awards the following remedies:

- a. Rescission of the decision to reassign the Applicant to the Dakar post at the P-5 level;
- b. The payment of the difference between the salary, allowances and entitlements the Applicant received during his appointment at the P-5 grade level and what he would have received at the D-1 level; and
- c. The payment of \$10,000 in moral damages.

101. There is no award of legal costs to the Applicant.

⁸ Wu 2010-UNAT-042.

(Signed)

Judge Coral Shaw

Dated this 25th day of June 2014

Entered in the Register on this 25th day of June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi