



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/076

Judgment No.: UNDT/2020/080

Date: 28 May 2020

Original: English

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**Before:** Judge Alexander W. Hunter, Jr.

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

BENCHE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Mohamed Abdou, OSLA

**Counsel for Respondent:**  
Matthias Schuster, UNICEF

## **Introduction**

1. The Applicant, a Procurement Assistant at the GS-5 level with the United Nations Children's Fund (“UNICEF”) in Copenhagen, Denmark, contests the decision of 15 November 2017 to recover overpayment of entitlements resulting from an administrative error which occurred in March 2011. The case was initially filed with the Geneva Registry.

2. For the reasons stated below, the Tribunal rejects the application.

## **Facts**

3. The Applicant joined UNICEF on 22 February 2010 as a Procurement Assistant at the GS-5 level, step 2 on a temporary appointment.

4. The Applicant was separated from UNICEF on 30 October 2010 and re-appointed as a Procurement Assistant at the GS-5 level, step 2 on a fixed-term appointment on 1 November 2010.

5. In March 2011, the Applicant received a within-grade step increment from GS-5, step 2 to GS-5, step 3. Thereafter, the Applicant received within-grade step increments every year in March.

6. On 14 November 2017, UNICEF advised the Applicant that it erroneously awarded her a step increment in March 2011, eight months earlier than the date on which the increment was due, namely in November 2011. UNICEF explained that when a staff member separates from the Organization and returns upon reappointment, a step increment date should be aligned with the new entry-on-duty date.

7. On 15 November 2017, UNICEF informed the Applicant that the gross amount of DKK18,448.84 would be recovered from her salary, which represents the salary difference after the adjustment of the Applicant’s in-grade step between March 2016 and October 2017.

8. On 12 January 2018, the Applicant submitted a management evaluation request for review of the decision to recover this overpayment.

9. On 26 February 2018, the Applicant received a response to her management evaluation request upholding the contested decision. UNICEF advised the Applicant that the Administration is obligated to correct administrative errors and that it limited the recovery of overpayment to two years since UNICEF determined that she could not reasonably have been aware that she had been overpaid.

10. On 3 May 2018, the Applicant filed the present application.

### **Consideration**

11. Having reviewed the parties' submissions, the Tribunal considers that the issues in this case are (a) whether the Applicant's step increment took effect in November 2011 and not in March 2011, and (b) if so, whether the Administration lawfully corrected an error and recovered overpayment.

12. The Tribunal recalls that it is undisputed that the Applicant initially joined UNICEF in March 2010 at the GS-5 level, step 2 on a temporary appointment and was separated on 31 October 2010 and then on 1 November 2010, she was reappointed on a fixed-term appointment at the GS-5 level, step 2.

13. Staff rule 4.17 (Re-employment) provides that "[a] former staff member who is re-employed ... shall be given a new appointment unless he or she is reinstated under staff rule 4.18" and "[t]he terms of the new appointment shall be fully applicable without regard to any period of former service. When a staff member is re-employed under the present rule, the service shall not be considered as continuous between the prior and new appointments".

14. Staff rule 4.18 (Reinstatement) is applicable to a former staff member who held a fixed-term or continuing appointment and who is re-employed under a fixed-term or a continuing appointment within twelve months of separation.

15. Since the Applicant held a temporary appointment before her re-employment on a fixed-term appointment on 1 November 2011, her re-employment was governed by staff rule 4.17(b).

16. Staff rule 4.17(b) provides that in such case “[t]he terms of the new appointment shall be fully applicable without regard to any period of former service” and “the service shall not be considered as continuous between the prior and new appointments”.

17. Therefore, the terms of the Applicant’s appointment were applicable from 1 November 2010, irrespective of her prior temporary appointment.

18. The Applicant argues that she should have been re-employed at a higher step than step 2 on 1 November 2010 given that she had over 13 years of relevant experience for a position requiring five years of experience, and therefore the Administration’s failure to re-employ her at a higher step on 1 November 2010 was “a clear and discernible error warranting rescission of the contested decision”.

19. Since any challenge to the determination of the step awarded in November 2010 is time-barred, the Tribunal will not consider this argument.

20. With regard to the frequency of a step increment, as para. 4 of Annex 1 to the Staff Regulations provides, “[s]ubject to satisfactory service, salary increments within the levels ... shall be awarded annually”.

21. Therefore, the Applicant was entitled to a step increment in November 2011, one year after her employment on a fixed-term appointment, and thus the Administration made an administrative error by awarding a step increment in March 2011.

22. Having found that the Administration made an administrative error in March 2011 by awarding a step increment eight months early, the next question is whether the Administration lawfully corrected this error in November 2017.

23. The Applicant claims that the Administration cannot unilaterally modify the terms of the Applicant’s current or previous letter of appointments, which reflected that

the grade and step resulted from the award of a salary increment in March 2011. The Applicant argues that this action violates her contractual and acquired rights and contravenes the basic prohibition on retroactive application of rules and regulations.

24. In his reply, the Respondent submits that the Administration did not unilaterally modify the terms of the Applicant's appointment but corrected an administrative error, which is lawful under *Cranfield* 2013-UNAT-367. Further, the Respondent submits that the Administration recovered overpayment under UNICEF's policy.

25. In *Cranfield*, the Administration retracted its decision to award an indefinite appointment after discovering that the applicant was ineligible for an indefinite appointment. The Appeals Tribunal held, at para. 36, that "[i]n situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation".

26. Accordingly, the Administration herein was entitled to correct the wrongful award of the step increment as of March 2011.

27. With regard to the Applicant's argument that the contested decision violated her contractual and acquired rights, the Appeals Tribunal provides a detailed explanation of acquired rights in *Lloret Alcañiz et al.* 2018-UNAT-840. Staff regulation 12.1 provides that the regulations may be supplemented or amended, "without prejudice to the acquired rights of staff members", and the Appeals Tribunal held, at para. 91, that the purpose of staff regulation 12.1 is "to ensure that staff members are not deprived of a benefit once the legal requirements for claiming the benefit have been fulfilled" and "the doctrinal protection of acquired rights is essentially an aspect of the principle of non-retroactivity. The aim is to protect individuals from harm to their vested entitlements caused by retrospective statutory instruments".

28. In this case, the Applicant was not legally entitled to a step increment in March on a yearly basis. Therefore, she did not have any acquired rights to step increments resulted from an administrative error. Accordingly, the Administration's correction of

an error did not prejudice the Applicant's acquired rights, nor did it constitute a retroactive application of rules and regulations. As the Appeals Tribunal held in *Cranfield*, the Administration is entitled to remedy a situation when it has made an unlawful decision or illegal commitment, which is the case in this matter.

29. The Applicant submits that overpayment may not be recovered beyond two years. The Tribunal notes that the Administration in fact limited the amount to be recovered for the period between March 2016 and October 2017 in accordance with sec. 5.1 of CF/AI/2009-002 (Recovery of overpayments), which provides that while overpayments will normally be recovered in full, when it is determined that "the overpayment resulted from an administrative error on the part of UNICEF and that the staff member was unaware or could not reasonably have been expected to be aware of the overpayment, recovery of the overpayment will be limited to the amounts paid during the two-year period".

30. Accordingly, the Tribunal finds that the Administration lawfully recovered overpayment of entitlements resulted from an administrative error.

**Conclusion**

31. In light of the foregoing, the Tribunal rejects the application.

*(Signed)*

Judge Alexander W. Hunter, Jr.

Dated this 28<sup>th</sup> day of May 2020

Entered in the Register on this 28<sup>th</sup> day of May 2020

*(Signed)*

Nerea Suero Fontecha, Registrar, New York