



Case No. UNDT/GVA/2013/022

Judgment No. UNDT/2014/043

property (real estate), mother tongue and nationality of himself and his children, on 15 November 2010.

20. On 20 June 2011, the Applicant submitted an education grant request for the school year 2009/2010 for his daughter.

21. By notification of 22 June 2011, the Director, HR, UNOPS, informed the Applicant that his nationality for UNOPS purposes would not be changed to Albanian.

22. On 6 July 2011, the Applicant sent a message to the Executive Director and the Deputy Executive Director, UNOPS, expressing his disagreement with the decision of the Director, HR, UNOPS, to reject his request to change his official nationality with the UN, and requested whether there was still a chance that the merits of his case be reviewed.

23. The first payment of education grant for the Applicant's daughter was made to the Applicant on 31 July 2011.

24. On 4 August 2011, the Deputy Executive Director, UNOPS, replied to the Applicant, confirming the decision that his request for change of nationality for UN purposes was rejected.

25. On 1 March 2012, the Applicant submitted a request for payment of education grant for the school year 2010/2011 and of education grant advance for the school year 2011/2012; payment of the education grant 2010/2011 and the education grant advance 2011/2012 were made on 30 April 2012.

26. At a face-to-face meeting between the Applicant and the Director, HR, UNOPS, in April 2012, with respect to his request for change of nationality, the latter suggested to the Applicant to send him a new request, which he did on 30 April 2012. On 8 May 2012, the Director, HR, UNOPS, sent a message to the Applicant, noting that there was no new element which would justify reopening his case.

27. The Applicant was separated from UNOPS on 30 September 2012.

28. By email of 8 October 2012, a Team Lead and HR Associate, BES, informed the Applicant that as he had been advised earlier, in his offer of appointment and through subsequent email correspondence, he was not entitled to international entitlements and that he had nevertheless, unduly, received education grants for his daughter for the period 2009 through 2012, and that monies paid would need to be recovered upon his separation from UNOPS. The Applicant did not receive that email, since his UNOPS account had been removed as of 1 October 2012; it was, however, forwarded to his private email address on 2 November 2012.

29. The separation letter of 23 October 2012 referred to the email of 8 October 2012, and confirmed to the Applicant that the recovery of the overpayment of education grant amounts—totalling CHF53,644.83—had to be settled upon his separation from UNOPS and that no salary or repatriation grant from which the overpayment could be recovered were available.

30.

the non-payment of relocation grant of the Applicant and his family to Albania in December 2012, which warranted a new review of the decision;

d. While at the outcome of the new review, conducted after the new information was obtained, the previous decision was maintained, the new review process led to a new decision, notified to the Applicant on

Director, UNOPS, misrepresented the facts and provided false certifications and, as such, committed misconduct;

h. The decision was arbitrary, unreasonable and abusive; it was based on facts and arguments that were mainly misleading, untrue and not supported

pension contribution; BES, UNDP, and HR, UNOPS, should immediately provide the Fund with the relevant separation documents and the Fund should immediately release the payment of his pension;

r. He and staff under his supervision were subject to harassment and intimidation by UNOPS Management;

s. He requests that UNOPS officially recognizes Albanian as his first nationality and changes it retroactively as of 1 March 2009 in its system; that UNOPS releases all outstanding payments relating to his separation, including his pension contribution; that it provides an estimate of all “missed entitlements” since 1 March 2009 in view of his new status, and pays him a lump sum with the corresponding amount; that UNOPS pay a lump sum to compensate him for compensatory and punitive damages for the total estimated amount of two years of salary, including salary (with staff assessment) and pension contribution (both contributions of the staff member and of the Organization).

44. The Respondent’s principal contentions are:

The decision not to change the Applicant’s nationality for UN purposes

a.

c. The Appeals Tribunal ruled in *Cremades* 2012-UNAT-271 that restatements of an earlier decision do not restart time limits; if the request

n. The Respondent is not claiming any overpayment from the UNJSPF, but only exercised his right under ST/AI/155/Rev.2 to not to provide the Fund with the relevant separation documentation to process the pension, as long as the Applicant's indebtedness is not settled;

o. Therefore, the decision "to use leave balance and separation entitlements to compensate for UNDP BES education grant reimbursement

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assessing the merits of the Applicant's claim (see *Servas* 2013-UNAT-349) in this respect.

Decisions to use leave balance and separation entitlements and not to provide separation documents to the UNJSPF to recover education grants

50. The Tribunal notes that the Applicant was informed that he would not be entitled to education grant for the first time through the offer of appointment dated 23 February 2009, which he signed on the same day, and which stated "Education grant ... not applicable since your home country is within commuting distance of

force—i.e. current staff rule 3.18(c)(ii)—stated “deductions from salaries and other emoluments may also be made for: indebtedness to the United Nations”. Upon its request, the Tribunal was informed by the Respondent that from the total amount of education grant payments to be recovered, that is USD60,743.27, USD20,291.36 were recovered by using 38 days of the Applicant’s commuted annual leave, plus USD84 by using life insurance contribution of the Applicant. It is the considered view of this Tribunal that such leave balance and separation entitlements clearly fall under the notion of “other emoluments” under the above-referenced rules; hence, it was legal to use these emoluments to partially settle the Applicant’s indebtedness to the Organization and the application in this respect has to be rejected on the merits.

54. Finally, the Tribunal has to consider the argument put forward by the Respondent that he can, on the basis of ST/AI/155/Rev.2 (Personnel Payroll Clearance Action), withhold the separation notification needed by the UNJSPF to process the Applicant’s pension benefits due under the UNJSPF Regulations and Rules.

55. Sections 10 to 12 of ST/AI/155/Rev. 2 provide as follows:

10. The Office of Programme Planning, Budget and Finance will be responsible for:

(a) Recording on form P.35 if there are any outstanding cash advances, travel advances, income tax reimburseAo618(S)12.4048(T)-7.20556(60221(i)4

Staff members

11. Staff members separating from service, in accordance with their contractual obligations to the United Nations are responsible for:

the Administration has no legal grounds for refusing to issue the separation notification to the UNJSPF to secure the payment of a debt the Applicant has vis-à-vis UNOPS.

58. The Tribunal stresses that while sec. 12 of ST/AI/155/Rev.2 constitutes the

notification to the UNJSPF, and to be awarded interest with respect to the fact that his pension entitlements were not paid on time.

61. The Tribunal recalls that art. 10.5 of its Statute provides that it may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision

62. The fundamental purpose of judicial remedy is to attempt, to the extent possible, to place the aggrieved party in the position she or he would have been in but for the breach (*Warren* 2010-UNAT-059). However, in some instances rescission as a remedy may be unavailable or the Tribunal may find that, although rescission is available, other types of relief, such as specific performance or compensation, may be more appropriate (*Klein* UNDT/2011/169).

63. In the case at hand, the Tribunal considers that th

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