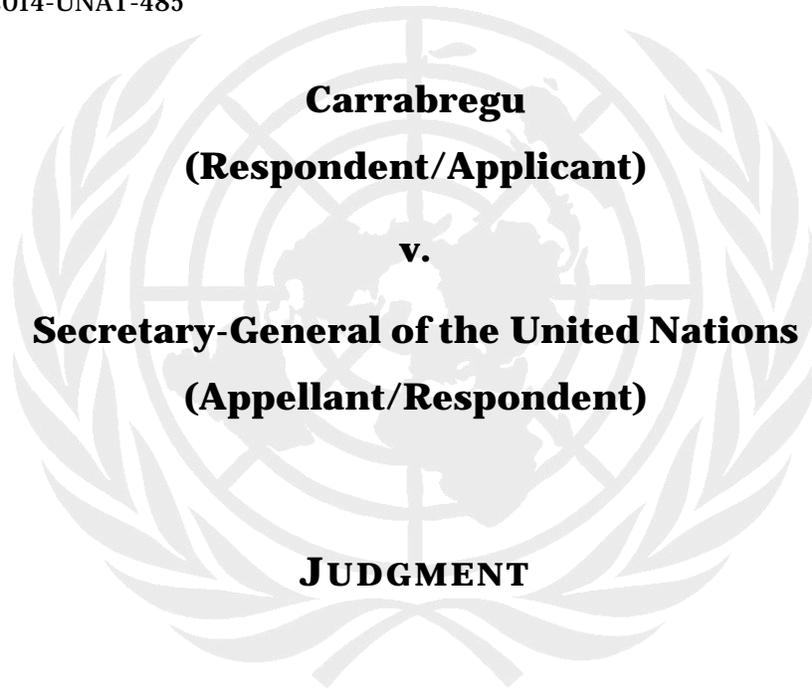




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-485



**Carrabregu
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Richard Lussick Judge Mary Faherty
Case No.:	2014-559
Date:	17 October 2014
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Brian Gorlick, Nicole Washienko/OSLA

Counsel for Appellant/Respondent: Rupa Mitra

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/143, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 18 November 2013. The Secretary-General appealed on 17 January 2014, and Ms. Anduena Carrabregu filed her answer on 21 March 2014. On 21 March 2014, Ms. Carrabregu filed a motion seeking leave to file additional evidence and the Secretary-General filed his comments on 29 August 2014.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant commenced her employment with [the United Nations Development Programme (UNDP)] on 1 October 2000 on a special service agreement—a non-staff modality—for the period up to 30 October 2000, as a [United Nations Volunteers Programme (UNV)]’s Administrative Assistant at the UNDP office in Pristina, Kosovo.

... On 1 November 2000, she took up an appointment for activities of limited duration with UNDP under the former 300 series of the Staff Regulations and Rules applicable to UNDP, also as a UNV Administrative Assistant at the UNDP office in Pristina, Kosovo.

... On 1 February 2001, her contract was converted to a fixed-term appointment for the period up to 31 December 2001 under the former 100 series of the Staff Regulations and Rules, again with the same functional title, at the G-5 level. Subsequently, that appointment was successively extended from year to year, and in December 2003 her functional title was changed to UNV Country Office Assistant.

... By a memorandum dated 27 December 2006 addressed to the UNDP Resident Representative in Kosovo, the Applicant requested special leave without pay for a one-year period starting in early February 2007. The reason given was that she had been offered an appointment for activities of limited duration as a Programme Associate with Special Operations at UNV headquarters in Bonn, Germany.

... On 28 December 2006, the UNDP Resident Representative approved the Applicant's leave request for a one-year period beginning on 7 February 2007.

... On 12 February 2007, the Applicant signed a letter of appointment with UNV concerning her appointment for activities of limited duration under the former

¹ Impugned Judgment, paras. 2-18.

300 series of the Staff Regulations and Rules for a one-year period beginning on 12 February 2007 as a Programme Associate, A-2, with UNV Special Operations in Bonn. The letter of appointment specified the category of appointment as “Local ALD-2”.

... On 19 September 2007, the Applicant was offered a fixed-term appointment for one year, effective 1 October 2007, as a G-6 Programme Associate with UNV Special Operations in Bonn, at the recommendation of the local appointment panel and with the approval of the Executive Coordinator. The offer of appointment included a reference to “locally recruited staff members of UNV”. The Applicant signed the offer of appointment on 20 September 2007.

... On 26 September 2007, she sent an e-mail to the UNDP Office of Human Resources in Kosovo giving notice of her selection for the position at UNV Bonn and asking what steps she should take to terminate her appointment with UNDP.

... By an e-mail reply of the same date, she was asked, *inter alia*, to confirm her intention to resign from UNDP Kosovo as of 30 September 2007.

... By an e-mail dated 28 September 2007, the Applicant replied that she confirmed her resignation from UNDP Kosovo and that she had been notified that she could not transfer her accrued annual leave balance from UNDP to UNV.

... By an e-mail dated 6 November 2007, the Applicant was informed that the process of separation from UNDP had been completed.

... The Applicant's appointment with UNV Bonn, which began on 1 October 2007, was successively extended and, on 1 July 2009, as a result of the promulgation of amended Staff Regulations and new provisional Staff Rules, which formalized major United Nations human resources reforms, the Applicant's contract was converted to a fixed-term appointment.

... On 9 December 2010, in light of the above-mentioned reform, UNDP issued the “UNDP policy on consideration for conversion to a permanent appointment of UNDP staff members eligible to be considered as at 30 June 2009”, also known as the “one-time review” policy [(Policy or UNDP Policy)].

... On 23 August 2012, the Director *a.i.*, Office of Human Resources, Bureau of Management, UNDP, decided that the Applicant was not eligible to be considered for a permanent appointment.

... By a letter dated 8 October 2012, the Applicant requested a management evaluation of the decision to deem her ineligible for consideration for a permanent appointment.

... By a memorandum dated 15 November 2012, which was e-mailed to the Applicant on 16 November 2012, the request to overturn the decision was rejected.

... On 1 February 2013, the Applicant filed an application with the Tribunal in the present case, and on 6 March 2013 the Respondent filed his reply.

3. The UNDT issued its Judgment on 18 November 2013. The UNDT held that UNDP had erred in allowing Ms. Carrabregu to be placed on special leave without pay so that she could take up a 300-series ALD appointment in Bonn. As a result, UNDP could not take her September 2009 resignation into account for the purpose of determining her eligibility for a permanent appointment. The UNDT concluded that Ms. Carrabregu must be considered to have met the requirement of continuous service and therefore ordered the rescission of the contested decision.

Submissions

The Secretary-General's Appeal

4. The Secretary-General contends that the UNDT erred in concluding that Ms. Carrabregu was eligible to be considered for a permanent appointment. Ms. Carrabregu's resignation and separation from UNDP Kosovo constituted a break in service. Her subsequent appointment to UNV Bonn could not be considered a reinstatement, as there was no stipulation to that effect in her letter of appointment. Moreover, Ms. Carrabregu was fully aware that her annual leave from her appointment in Kosovo was not carried over to her appointment in Bonn, which was also indicative of a break in service.

5. Ms. Carrabregu interrupted the continuity of her service voluntarily when she resigned in October 2007. She did not object to the requirement of her resignation. Accordingly, only the period of service of her appointment in Bonn could be counted towards the five-year requirement and it did not reach the five years as at 30 June 2009.

6. The Secretary-General contends that where this fundamental requirement for conversion was not fulfilled, the UNDT could not confer eligibility on Ms. Carrabregu because of the existence of a UNDP policy that she never challenged and that in any event had no impact on the contested decision.

7. The UNDT erred in law and fact in holding that Ms. Carrabregu's decision to resign resulted entirely from irregularities committed by UNDP. The UNDT based its conclusion on a determination that Ms. Carrabregu "in asking to go to Bonn, was simply availing herself of a policy in force at UNDP at the time", which the UNDT found unlawful.

8. Ms. Carrabregu's first ALD appointment was indeed governed by the UNDP Policy. The Policy was developed in order to facilitate the career development of national staff. One way in which this was done was to grant special leave for limited periods of time to enable national staff members to take advantage of short-term opportunities outside of the duty stations where they were locally recruited whilst providing them stability by allowing them to maintain a lien on their post for the purpose of returning to the country office after the limited appointment abroad had ended.

9. However, the fixed-term appointment in Bonn that Ms. Carrabregu was subsequently offered was not a temporary or limited opportunity and did therefore not fall under the UNDP Policy. Her fixed-term appointment in Bonn was entirely unrelated to her first temporary ALD.

10. Furthermore, the requirement for a locally-recruited staff to resign from the duty station where he or she was recruited before accepting another locally-recruited General Service position in another duty station does not arise from the UNDP policy; rather, this requirement is applied throughout the Organization and is based on the Staff Rules which provide that General Service positions are subject to local recruitment. A transfer of a locally-recruited General Service staff member to another locally-recruited General Service position would entail the payment of benefits applicable to international recruitment.

11. The Secretary-General further submits that the UNDT erred in law in holding that the UNDP Policy was unlawful. The UNDT provides no reasoning and merely states that the Staff Rules did not authorize the placement of a UNDP Kosovo staff member on special leave without pay for the purpose of allowing him or her to take up another appointment with UNV on a local basis under the 300 series. Contrary to the UNDT's conclusion, paragraph 11(d) of the Policy specifically provides for special leave without pay for up to two years, which, the Secretary-General contends, is consistent with former Staff Rule 105.2(a)(i).

Ms. Carrabregu's Answer

12. Ms. Carrabregu contends that the Secretary-General has failed to demonstrate that the UNDT committed any reversible errors or provided other grounds for review in finding that she was eligible for consideration for a permanent appointment.

13. The Secretary-General has failed to address the UNDT finding that Ms. Carrabregu's resignation resulted "entirely from the irregularities previously committed by UNDP" and that therefore there were no grounds to take this resignation into account in determining her eligibility for consideration for a permanent appointment. Instead, the Secretary-General's first argument is that her resignation constituted a break-in-service and that therefore, she did not meet the requirement of five years of continuous service. This is the same argument that UNDP made at trial. Since it fails to address the finding which the holding of the UNDT turned on, the Secretary-General is essentially asking that this Tribunal retry the case, which is not the function of the Appeals Tribunal.

14. Ms. Carrabregu contends that the UNDT committed no reversible error in finding that her decision to resign arose entirely from irregularities committed by UNDP. While the Secretary-General argues that Ms. Carrabregu's acceptance of the fixed-term appointment in Bonn in no way arose from the system created by the UNDP policy, the UNDP was in fact the only reason why she went to UNV Bonn or why she was offered a position there.

15. Ms. Carrabregu contends that, based on the parties' written submissions as well as her oral testimony at trial, the UNDT found that she was availing herself of the UNDP Policy when she requested to work at UNV in Bonn; that her decision to resign arose from this UNDP Policy; and that UNDP's requirement that she resign was an attempt to regularize her administrative status. The Secretary-General has not pointed to any aspect of the testimony to demonstrate that the UNDT findings were not supported by the facts or that such findings were manifestly unreasonable. Accordingly, the Appeals Tribunal should defer to the factual findings of the UNDT.

16. Ms. Carrabregu submits that contrary to the Secretary-General's assertion, the UNDT did provide its rationale for finding the UNDP Policy unlawful by citing the specific staff rule that did not permit the placement of a UNDP locally-recruited staff member on special leave without pay in order to enable the staff member to accept a second UNDP contract in another

country. The UNDP Policy is not consistent with former Staff Rule 105.2(a)(i). The latter does not state that special leave may be granted to staff members to be placed on another post with the Organization, nor is there any act or promulgation that would sanction the granting of special leave for such purpose. Finally, the fact that UNDP issued an inter-office memorandum in May 2009 strictly prohibiting such practice is an implicit acknowledgment of its prior irregularity and unlawfulness.

17. Ms. Carrabregu requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

18. The requested oral hearing was not granted since the issues for decision were clearly defined in the parties' written submissions. The Appeals Tribunal also rejects Ms. Carrabregu's motion seeking leave to file additional evidence as she has not presented exceptional circumstances justifying her motion.

19. The main issue to determine in the present appeal is whether or not Ms. Carrabregu was eligible to be considered for a permanent appointment. The UNDT concluded in the affirmative and granted the staff member's application, an outcome contested by the Administration.

20. This Tribunal holds that the UNDT erred in concluding that Ms. Carrabregu fulfilled all the requirements to be eligible for conversion to permanent appointment, because there was indeed a break in her service which prevented her from reaching five years of continuous service as required under the UNDP Policy.²

² Paragraph 10(b) and (c) of the Policy reads as follows (internal footnotes omitted):

b) A break in service of any duration prior to the date on which the staff member reached the five years of qualifying service will interrupt the continuity of service. This principle also applies to the case where a UNDP staff member has resigned from his/her UNDP 100-series appointment to take up another 100-series appointment with UNDP and has been administratively separated from the former appointment;

c) Breaks in service after the date on which the staff member reached five years of qualifying service will not automatically disqualify staff members from being considered for a PA. Their situation will be reviewed taking into account the specific facts of each case[.]

21. It is uncontested that in December 2006, Ms. Carrabregu obtained special leave without pay from her position in Kosovo, for the period of one year effective 7 February 2007 in order to take up an ALD in Bonn, under the former 300 Series of the Staff Regulations and Rules, starting 12 February 2007. Both positions were within the UNDP.

22. If Ms. Carrabregu had returned to her post in Kosovo, after the expiry of her one-year leave, no interruption of service would have taken place. But while in Bonn, she found a job opportunity within UNV and took it, signing a new (fixed-term) appointment on 20 September 2007.

23. It was only after that acceptance that she communicated with the UNDP Office of Human Resources making inquiries about how to terminate her appointment with that entity. Specifically consulted if her intention was to resign, she so confirmed and acknowledged that she was not able to transfer her accrued annual leave balance from UNDP to UNV. As a result of the exchange of correspondence, on 6 November 2007, Ms. Carrabregu was informed that the process of separation had been completed.

24. This factual sequence shows clearly that Ms. Carrabregu freely and willingly resigned from her service with UNDP to take up an appointment with a different entity (UNV), thereby causing a break in her service. Thus, this break in service should have led the Dispute Tribunal to uphold the administrative decision that Ms. Carrabregu was not eligible for conversion to a permanent appointment.

25. Instead, the UNDT undertook an unnecessary examination of the legality of the UNDP Policy of granting a staff member special leave without pay to enable him or her to take up an ALD, and assessing it as irregular, decided that Ms. Carrabregu's actions following the request of special leave should not be considered for the purpose of determining if there had been a break in service or not. Consequently, it rescinded the impugned administrative decision.

26. We do not share this view. The legality or illegality of the special leave without pay and appointment policy under the former 300 series of the Staff Regulations and Rules which Ms. Carrabregu availed herself of becomes immaterial in the context of the consideration of her eligibility for conversion to a permanent appointment and the fulfillment of the requirement of continuous service of at least five years.

27. Irrespective of the lawfulness or otherwise of the Policy, which, by the way, the staff member sought and benefited from, the subsequent resignation and separation from UNDP Kosovo constituted a break in service which independently rendered Ms. Carrabregu ineligible for conversion to a permanent appointment.

28. Moreover, her service to UNV Bonn could not be considered a reinstatement, as the terms of it reflect that it consisted of a fully new appointment, to the extent that Ms. Carrabregu's annual leave from her appointment in Kosovo was not carried over to her appointment in Bonn, another indicator of a break in service that she expressly acknowledged.

29. Therefore, the Judgment under appeal erred in law and fact in linking the resignation and break in service to the Dispute Tribunal's determination of irregularities in the Policy that allowed the staff member to take special leave without pay to take up the ALD in Bonn. Even if the alleged irregularities had taken place, the resignation and the acceptance of the fixed-term appointment with UNV resulted in the break in service which in turn rendered Ms. Carrabregu's claim for a right to be considered for conversion unfounded.

Judgment

30. The appeal is allowed, the UNDT Judgment is vacated. The administrative decision about Ms. Carrabregu's ineligibility for conversion to a permanent appointment is affirmed.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Faherty

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar