



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/019

Judgment No.: UNDT/2012/208

Date: 31 December 2012

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

EGGLESFIELD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Bart Willemsen, OSLA

Brian Gorlick, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the Respondent's refusal to reinstate him to service following his separation from the United Nations Mission in Côte d'Ivoire ("UNOCI") and his re-appointment to the United Nations Assistance to the Khmer Rouge Tribunals ("UNAKRT"). Pursuant to staff rule 4.18 (Reinstatement), on reinstatement the staff member's services are considered as having been continuous, with appropriate adjustments to various entitlements and benefits (including payment or return thereof). The Applicant argues that the Respondent has erred in determining that staff rule 4.18 cannot be applied in his case. He requests rescission of the contested decision.

2. The Respondent submits that staff rule 4.18 does not confer on staff members a right to be reinstated but provides the Administration with discretion to determine whether reinstatement is in the interests of the Organization. The Respondent submits that this discretion was exercised properly in this case.

3. By Order No. 237 (NY/2012), the Dispute Tribunal directed both parties to file additional submissions, if any. The Respondent's additional submission was filed on 3 December 2012. The Applicant did not file any further submission. Neither party objected to having this case determined on the papers before the Tribunal.

Background

4. The Respondent agrees with the history of the Applicant's employment and of the proceedings detailed at paras. 4 to 10 of the application, a summary of which follows.

5. The Applicant joined the United Nations in 1996 as a Communications Technician at the FS-4 level. He served in several peacekeeping missions before joining UNOCI in or around 2003. Since 1 January 2008, the Applicant served as a Chief Communications Officer at the FS-6 level on a fixed-term contract. Since his

appointment at the FS-6 level with UNOCI, the Applicant was assigned twice to the United Nations Stabilization Mission in Haiti, including in the aftermath of the earthquake in January 2010.

6. On or around 19 August 2010, whilst under appointment with UNOCI, the Applicant applied for a position with UNAKRT (Phnom Penh, Cambodia), at the FS-5 level. On 8 June 2011, the Applicant received an offer of appointment from the United Nations Department of Economic and Social Affairs (“DESA”) for a position with UNAKRT at the FS-5 level. The Department of Economic and Social Affairs of the United Nations Secretariat provides administrative and human resources support to UNAKRT.

7. The Applicant accepted the offer on 10 June 2011, indicating that he would be able to travel to UNAKRT on 10 July 2011. His letter of appointment stated that it was for a fixed-term appointment of one year “in the Secretariat of the United Nations”. The letter was counter-signed by an official of the Office of Human Resources Management (“OHRM”) of the United Nations Secretariat “[o]n behalf of the Secretary-General”.

8. On 10 June 2011, the Applicant informed the Chief Civilian Personnel Officer (“CCPO”) of UNOCI of his acceptance of the offer from UNAKRT. He also advised him that he would therefore not seek a renewal of his appointment with UNOCI, which was due to expire on 30 June 2011. The Applicant requested the CCPO to arrange his repatriation to Brisbane, Australia. The Applicant pointed out that, since his arrival in Abidjan in 2003,

the workload has never relented. I knew I was selected for the position of CCO in 2003 because of my demonstrated experience in Mission start-ups and expansions in such places as UNLB [United Nations Logistics Base], UNAMET [United Nations Mission in East Timor], UNMIK [United Nations Interim Administration Mission in Kosovo], MONUC [United Nations Organization Mission in the Democratic Republic of the Congo], UNAMSIL [United Nations Mission in Sierra Leone] etc etc. I had no idea however that this mission would remain in start-up phase for 8 years! My recent ill health and the distance and

isolation from my family for what has now been 19 years, coupled with several personal tragedies, has prompted me to make this decision”.

9. On 29 June 2011, the Applicant completed all the required check-out procedures with UNOCI and, on 30 June 2011, left Côte d’Ivoire for Brisbane, Australia, to make the necessary arrangements for his and his family’s travel to UNAKRT, designated as a family duty station. Ten days later, on 10 July 2011, he was appointed with UNAKRT and departed Brisbane for Phnom Penh, Cambodia.

10. Based on the record, including the management evaluation’s response dated 16 January 2012, the Applicant has neither been reimbursed for the costs of his travel to Australia nor received a repatriation grant. However, in para. 8 of the reply, the Respondent states that the Applicant requested and received all of his repatriation entitlements.

11. On 3 October 2011, the Applicant requested that the Assistant Secretary-General, OHRM, reinstate him in accordance with staff rule 4.18 in view of the fact that he had been reappointed within twelve months of separation from service from UNOCI.

12. On 4 November 2011, the Chief of Section III, Human Resources Section (“HRS”), Learning, Development and HR Services Division (“LDS”), OHRM, informed the Applicant that his request was denied, stating that, in OHRM’s view, UNOCI and UNAKRT were separate entities independent of each other. OHRM stated that, because the Applicant’s contracts with the two entities were “not linked, connected in any way administratively, budgetary or by mandate and are mission/project related, there is no basis in fact or rationale for a reinstatement when moving from one entity to another”. OHRM further stated that “[r]einstatement per staff rule 4.18 is subject to conditions set by the Secretary-General which include staff selection procedures enumerated under ST/AI/2010/3 [Staff selection system] requiring a competitive process via INSPIRA [UN’s job website] and review by the central review bodies prior to selection”.

13. On 28 November 2011, the Applicant requested a management evaluation of the decision not to reinstate him. On 16 January 2012, the Applicant was informed that the Under-Secretary-General, Department of Management, had decided to accept the recommendation of the Management Evaluation Unit to uphold the contested decision not to reinstate the Applicant under staff rule 4.18(a).

Consideration

Discretionary nature of decisions concerning reinstatement

14. Decisions on reinstatement of staff members under staff rule 4.18 are discretionary, and it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General in matters of managerial prerogative and discretion (*Abbassi* 2011-UNAT-110). However, the exercise of such discretion and managerial prerogative is not absolute and the Tribunal may examine whether the decision was based on proper considerations and whether any improper considerations have been taken into account, or whether the decision was manifestly unreasonable.

Proposed reasons for the contested decision

15. The Respondent concedes that, although staff rule 4.18 provides that staff members who hold fixed-term appointments and are re-employed within 12 months of separation from service “may be reinstated in accordance with conditions established by the Secretary-General”, no such conditions have been established. The Respondent acknowledges that there are no additional conditions placed on the exercise of the Secretary-General’s discretion other than the inherent requirement that the Secretary-General act rationally and lawfully in exercising his discretion.

16. The Respondent submits in the reply (in line with the reasoning in the rejection letter dated 4 November 2011) that, in exercising his discretion not to grant the Applicant’s request, the Administration took into account the following factors:

a. The Applicant's contracts with UNOCI and UNAKRT were not linked or connected in any way, either administratively, budgetary or by mandate. The Applicant expressly agreed to an appointment limited to UNAKRT and accepted his re-appointment to UNAKRT without requesting that he be reinstated. He also requested and received all of his repatriation entitlements. By requesting to be reinstated, the Applicant is seeking to artificially create a continuity of service where there is no basis for doing so. Further, if the Applicant were to be reinstated, UNAKRT would be required to absorb liabilities that were accrued under an independent funding and budget scheme (although the Tribunal notes that the Respondent has failed to identify or elaborate on any such alleged liabilities);

b. UNAKRT is not part of the Secretariat and the funding and liabilities of UNAKRT are separate from the Secretariat. The Applicant's appointment at UNAKRT was budgeted for on the basis that it was limited to UNAKRT and not referable to any former period of service; and

c. The Applicant's appointment has not been vetted by a Secretariat central review body. To protect the integrity of the Organization's staff selection process and maintain control over appointments to the Organization, appointments without limitations to a particular entity are only granted to staff selected following review of a selection exercise by a Secretariat review body.

17. The Applicant on the other hand submits that it is evident that he satisfies the conditions established under staff rule 4.18, which are the only relevant factors. Firstly, his appointments with UNOCI and UNAKRT were of a fixed-term nature. Secondly, he was separated for no more than 10 calendar days, well within the 12-month rule. The Applicant submits that he applied for and accepted the offer for the position with UNAKRT when he was still with UNOCI where his appointment would have been renewed had he not accepted the offer with UNAKRT. This has not been disputed by the Respondent.

Purpose of staff rule 4.18

18. The purpose of staff rule 4.18 is to confer continuity of employment on former staff members with fixed-term or continuing appointments who have been re-employed, and who may then be reinstated under staff rule 4.18, on the same type of contract within 12 months of their separation. Generally speaking, continuity of employment ensures that an employee is not disentitled of benefits that normally accrue through continuous service. Reinstatement through re-employment is subject to the following conditions under staff rule 4.18: (i) a staff member holding a fixed-term or a continuing appointment has to be re-employed under either a fixed-term or a continuing appointment; (ii) the staff member concerned may not be separated from service for more than 12 months; (iii) the reinstatement would be in accordance with conditions established by the Secretary-General.

19. Below is the text of the relevant provisions of the Staff Rules:

Rule 4.17

Re-employment

(a) A former staff member who is re-employed under conditions established by the Secretary-General shall be given a new appointment unless he or she is reinstated under staff rule 4.18.

(b) The 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.

(c) When a staff member receives a new appointment in the United Nations common system of salaries and allowances less than twelve months after separation, the amount of any payment on account of termination indemnity, repatriation grant or commutation of accrued annual leave shall be adjusted

...

Rule 4.18

Reinstatement

(a) 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 from service may be reinstated in accordance with conditions established by the Secretary-General.

(b) On reinstatement the staff member's services shall be considered as having been continuous, and the staff member shall return any monies he or she received on account of separation, including termination indemnity under staff rule 9.8, repatriation grant under staff rule 3.18 and payment for accrued annual leave under staff rule 9.9. The interval between separation and reinstatement shall be charged, to the extent possible, to annual leave, with any further period charged to special leave without pay. ...

(c) If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment.

Conditions for application of staff rule 4.18

20. Staff rule 4.18(a) is ambiguous and unclear as to what is meant by the "conditions" that are to be established by the Secretary-General and at what stage these conditions are to be applied. In other words, the question remains whether "the conditions established by the Secretary-General" are intended to be a list of additional objective and subjective pre-qualification requirements for consideration for reinstatement or whether they were intended as post-appointment terms of reinstatement.

21. A plain reading of staff rule 4.18 is that the only stipulated qualifying criteria for a staff member's reinstatement is that he should have held a fixed-term or continuing appointment, and that he was re-employed under a fixed-term or a continuing appointment within twelve months of his separation. The staff member may then "be reinstated in accordance with conditions established by the Secretary-General", indicating that these conditions would apply *post facto* to the reinstatement, and not to any prequalifying criteria. Alternatively, taking the purposive approach, the conditions could apply to circumstances such as the length of service of the staff member and any other criteria that, in the interests of fairness, reasonableness and justice, may facilitate the consideration of a reinstatement following separation in any particular individual case.

22. The Respondent's interpretation contained in the reply is that the conditions are not only prerequisite qualifying criteria, but that they also set out the circumstances, "in the interests of the Organization", under which they are applicable. The Respondent did not elaborate on the meaning or origin of the phrase "in the interests of the Organization" in the context of this case, although it is notably absent from staff rule 4.18.

23. If the construction of the rule is that there should be additional pre-conditions set for the consideration of reinstatement, surely such conditions would have had to be promulgated in an administrative issuance in accordance with established procedures. This would not only be the proper and lawful way of giving effect to staff rule 4.18, but it would guide managers in making sound reasoned decisions, and allow staff members to seriously take these considerations into account before making decisions affecting their careers.

Application of staff rule 4.18 to this case

24. Regardless of the interpretation placed on staff rule 4.18, it was conceded in his reply that the Secretary-General has not established any additional conditions under staff rule 4.18. Nor has it been averred that any conditions have been established by anyone with delegated authority. Therefore the reasoning in the contested letter of 4 November 2011—that the Applicant's reinstatement was denied because staff rule 4.18 was subject to conditions set by the Secretary-General "which include staff selection procedures enumerated under ST/AI/2010/3 requiring a competitive selection process via INSPIRA and review by the central review bodies prior to selection"—was erroneous and cannot be sustained.

25. The reasons for the decision, provided by the Respondent, have the effect of amending and unnecessarily restricting the clear language of staff rule 4.18. Staff rule 4.18 does not say, for instance, that to be reinstated the staff member concerned has to go back to the same office in which he or she was previously employed. Nor does it say that the staff member has to be vetted by a central review body for staff rule

4.18 to apply. The Respondent also argued that UNAKRT is separate from the United Nations Secretariat, but the Applicant's letter of appointment with UNAKRT was "for a fixed-term appointment in the Secretariat of the United Nations" and was signed by an official of OHRM "on behalf of the Secretary-General". Accordingly, the Tribunal finds that the explanation and reasons given to the Applicant at the time were based on restrictions that were non-existent in staff rule 4.18 and, as admitted in the reply, had not been "set by the Secretary-General".

26. The Respondent contends that the Applicant freely entered into his terms of appointment with the Organization and is bound by these terms. Although the Respondent did not elaborate further on this point, it could be argued that because the offer for UNAKRT and the Applicant's acceptance of the offer, as well as the letter of appointment, did not include a provision on reinstatement, the Applicant should be precluded from raising the point. The Tribunal notes, in this regard, that staff rule 4.18(c) states that "[i]f the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment". In its 4 November 2011 letter, in response to the Applicant's initial request for reinstatement on 3 October 2011, OHRM reviewed the issue substantively and did not claim that it was too late for the Applicant to make the request. It follows from the conduct of the parties and the circumstances of this case, including the exchanges of October and November 2011, that neither party viewed the issue of reinstatement as an essential or conditional term of the contract that had to be agreed upon for the new appointment to go into effect (*Fagundes* UNDT/2012/056). It is clear that, had the Applicant's October 2011 request been granted, appropriate administrative arrangements could have been and would have been made to record the reinstatement in service, and to address the return of any monies received on separation, including repatriation grant and payment for accrued annual leave, and for adjusting and charging the interval between separation and reinstatement to annual leave or to special leave without pay. As stated above, the Respondent at the time of the events did not claim that the Applicant was too late with his request for reinstatement, nor that the issue of

reinstatement had to be agreed upon before his appointment with UNAKRT (see the letter of 4 November 2011).

Manifest unreasonableness of the contested decision

27. The findings above are sufficient to declare the contested decision unlawful.

28. The Tribunal further finds that the contested decision was arbitrary and manifestly unreasonable, which, in itself, is a separate basis for the finding of unlawfulness. Having served the Organization since 1986, including in some of the most challenging places, and having accepted an offer of appointment with the same Organization while still in service and having arrived at the new duty station only 10 days later, the Applicant had to resort to litigation in order to be reinstated despite satisfying the criteria stipulated and established in staff rule 4.18 and the lack of any additional criteria promulgated by the Secretary-General.

29. It is to be remembered that clarity in the promulgation and application of Staff Rules and other issuances facilitates proper managerial discretion and proper legal analysis, and avoids costly litigation.

Delegation of authority

30. Although this was not raised by the parties, it is unclear whether the author of the letter of 4 November 2011 had the proper delegated authority to make the contested decision. Specifically, ST/AI/234/Rev.1 (Administration of the staff regulations and rules) provides that the decision on whether to reinstate a staff member is delegated by the Secretary-General to the Assistant Secretary-General, OHRM. The letter of 4 November 2011 was authored by the Chief of Section III, HRS, LDS, OHRM. There are no records in this case demonstrating that, at the time, the Chief of Section III had the proper authority to make the contested decision. However, in view of the findings above, the Tribunal did not deem it

necessary to seek further submissions from the parties on this point to reach a determinative conclusion.

Arguments at the management evaluation

31. For the sake of completeness, the Tribunal will deal with other matters which, although not pleaded in the Respondent's reply, arise from the record before it. In particular, at the management evaluation stage the Administration endorsed the findings and recommendations of the Management Evaluation Unit that reinstatement can only be granted where a staff member is re-employed in the same office on the same conditions of service, in line with the established practice, which consists of three cases in which reinstatement had been granted on these terms. In his application the Applicant contended in rebuttal that, not having set any special conditions for granting reinstatement, the Respondent cannot rely on *ad hoc* criteria generated from an allegedly existing practice. Indeed, an established practice can hardly be derived from three cases, particularly if their application was not in line with staff rule 4.18. In any case, the Respondent has not argued the point of the established practice in his reply and has acknowledged that there were no additional conditions established by the Secretary-General under staff rule 4.18.

Note on repatriation entitlements

32. In his reply, the Respondent stated that the Applicant did not request reinstatement when he "accepted his re-appointment to UNAKRT" and received all repatriation entitlements. The submission is at odds with the Applicant's assertion that he received no repatriation entitlements. It is therefore unclear whether these were paid to him. If he was not paid at the time, this may be an indication that his employment was considered to be continuous. In any event, staff rule 4.18 contemplates that necessary adjustments to entitlements would be made upon reinstatement.

Conclusion

33. The Tribunal finds that, in view of the circumstances of this case, the contested decision was based on improperly imposed conditions not stipulated under staff rule 4.18 and thus lacked proper legal basis. Further, it was arbitrary, capricious, and manifestly unreasonable. Therefore, the contested decision was unlawful and stands to be rescinded.

34. In view of the rescission of the decision, and on the particular facts of this case, the Tribunal finds that, had the discretion been properly exercised on the stipulated conditions, the Applicant would have been reinstated in service and shall be treated as such.

Order

35. The contested decision is rescinded. The Applicant shall be deemed as reinstated in service. Proper adjustments shall be made to the Applicant's entitlements and benefits in line with this Judgment and staff rule 4.18.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of December 2012

Entered in the Register on this 31st day of December 2012

(Signed)

Hafida Lahiouel, Registrar, New York