



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

GUEDES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Jeffrey C. Dalh

Counsel for Respondent:

Stéphanie Cochard, HRMS/UNOG

Arne Treves, HRMS/UNOG

Introduction

1. The Applicant contests the decision denying his request to be considered for conversion to a permanent appointment. The decision was based on the fact that he did not complete five years of continuous service on a fixed-term appointment as a result of him taking six months special leave without pay (“SLWOP”). The Applicant contends that the Administration’s reliance on sec. 5(c) of the “Guidelines on Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered as at 30 June 2009” (“Guidelines”) imposes requirements that are not consistent with ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009). The Applicant also contends that such a reliance on the Guidelines results in a breach of staff rule 5.3(e) which specifically states that “[c]ontinuity of service shall not be considered broken by periods of special leave”. The Applicant seeks the rescission of the contested decision and an award of moral damages.

2. The Respondent submits that the decision that the Applicant did not meet the eligibility criteria set forth in ST/SGB/2009/10 is consistent with the Staff Rules and Regulations. The Respondent contends that the Guidelines do not contradict either staff rule 5.3(e) or sec. 1 of ST/SGB/2009/10 nor do they include any criteria additional to those identified in the existing administrative issuance. Furthermore, the Respondent submits that sec. 5(c) of the Guidelines indicates that the period of SLWOP shall not be counted towards the five years of continuous service, without affecting the continuity of service. The underlying rationale is that while on SWLOP “the staff member does not actively provide service to the Organisation”. The Respondent requests that the application be rejected.

Background

3. The Applicant began his service in December 1991 as a Privatization Specialist with the United Nations Volunteers (“UNV”) in Guyana. He held different posts over the years until March 2000 when he was appointed to a 300-series contract as a Programme and Operations Specialist.

4. On 1 May 2004, the Applicant’s 300-series contract was converted to a 100-series fixed-term appointment and, on 4 August 2004, the Applicant was reassigned to the United Nations Office on Drugs and Crime (“UNODC”). The Applicant is currently the Country Representative in Bolivia for UNODC.

5. From 1 July 2008 through 31 December 2008, the Applicant took SLWOP.

6. By memorandum dated 12 June 2012, the Applicant was notified that he was not eligible to be considered for conversion to a permanent appointment due to the fact that his six months SLWOP resulted in him having not acquired five years of continuous service on a fixed-term appointment under the 100-series of the Staff Rules by 30 June 2009.

7. On 10 August 2012, the Applicant requested management evaluation of the 12 June 2012 decision. On 24 September 2012, the Under-Secretary-General for Management, on behalf of the Secretary-General, affirmed the administrative decision. On 21 December 2012, the Applicant submitted his application to the Tribunal contesting the finding that he was not eligible for consideration to permanent appointment.

Consideration

Applicable law

8. ST/SGB/2009/10, dated 23 June 2009, states:

Section 1 - Eligibility

To be eligible for consideration for conversion to a permanent appointment under the present bulletin, a staff member must by 30 June 2009:

- (a) Have completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules; and
- (b) Be under the age of 53 years on the date such staff member has completed or completes the five years of qualifying service.

9. ST/SGB/2011/1 (Staff Rules and Staff Regulations on the United Nations), applicable at the time, states:

Rule 5.3

Special Leave

- (e) Staff members shall not accrue service credits towards sick, annual and home leave, salary increment, seniority, termination indemnity and repatriation grant during periods of special leave with partial pay or without pay exceeding one month. *Continuity of service shall not be considered broken by periods of special leave.* (emphasis added)

10. Office of Human Resources Management (“OHRM”) Guidelines on Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered as at 30 June 2009, dated 29 January 2010, states in part:

5. With respect to the requirement of five years of continuous service, the following should be noted:

- (c) Special leave with or without pay for any duration will not interrupt the continuity of service nor render the staff member ineligible for consideration for conversion to permanent appointment.

However, period of special leave without pay exceeding one month will not be counted towards the five years.

11. ST/SGB/1997/1 which was replaced by ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances), both state:

Section 1

Categories of administrative issuances

1.1 In accordance with the provisions of the present bulletin, the following administrative issuances may be promulgated:

- (a) Secretary-General's bulletins;
- (b) Administrative instructions.

1.2 *Rules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative instructions.* (emphasis added)

Continuous service

12. The only question before the Tribunal is whether the application of the Guidelines to ST/SGB/2009/10 is lawful or whether it either contradicts or restricts the rights afforded to staff members by a duly promulgated administrative issuance. It is noted that no other reason is given for denying the Applicant a permanent appointment.

13. The language of ST/SGB/2009/10 requires that staff members have completed, or complete, five years of continuous service for them to be eligible for consideration to permanent appointment. The only other limitation inserted into the bulletin is that these five years of continuous service be performed on a 100-series contract and that the concerned staff member be under the age of 53.

14. The Respondent submits that for the purpose of determining the duration of the Applicant's continuous service with the Organization, he applied sec. 5 of the Guidelines which were approved by the Assistant Secretary-General, OHRM.

15. The purpose of a guideline is to clarify an administrative issuance and to provide the reader with an indication regarding the means to interpret a provision. It

may not do so in a way that results in the application of the provision becoming more restrictive than originally intended.

16. As stated by the Dispute Tribunal in *Eggesfield* UNDT/2012/208, “[i]f the construction of the rule is that there should be additional pre-conditions set ... surely such conditions would have had to be promulgated in an administrative issuance in accordance with established procedures”.

17. Staff rule 5.3 specifically defines the type of benefits and entitlements that may be affected by a staff member’s SLWOP. The rule further notes that SLWOP will not affect the continuity of a staff member’s employment and, as stated in *Eggesfield* “continuity of employment ensures that an employee is not disentitled [to] benefits that normally accrue through continuous service”.

18. While the bulletin had to go through a stringent process prior to its promulgation on 23 June 2009, the Guidelines established by OHRM are no more than a memorandum which was approved seven months after the bulletin came into force. It was never intended to restrict the rights of staff members but to explain in plain language what the bulletin meant and how it would be implemented.

19. If ST/SGB/2009/10 intended the effect stipulated by section 5(c) of the Guidelines it would have said so in explicit terms.

20. The Respondent submits that the Administration “lawfully exercised its discretionary power by defining how “continuous service” should be interpreted”. However, as stated in *Castelli* 2010-UNAT-037, “the administration may not subvert the entitlements of a staff member by abusing its powers, in violation, of the Staff Regulations and Staff Rules”. Further, the Tribunal also stated in *Korotina* UNDT/2012/178, that

31. ... at the top of the hierarchy of the Organization’s internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General’s bulletins, and administrative instructions.

Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

32. Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (Tolstopiatov UNDT/2010/147, Ibrahim UNDT/2011/115, Morsy UNDT/2012/043).

33. Just as a staff rule may not conflict with the staff regulation under which it is made, so a practice, or a statement of practice, must not conflict with the rule or other properly promulgated administrative issuance which it elaborates (Administrative Tribunal of the International Labour Organization, Judgment No. 486, *In re Léger* (486)). It is also important to highlight that a distinction must be made between matters that may be dealt with by way of guidelines, manuals, and other similar documents, and legal provisions that must be introduced by properly promulgated administrative issuances (Villamorán, Valimaki-Erk UNDT/2012/004).

21. The Tribunal concurs with the views expressed in *Villamorán* UNDT/2011/126, not disapproved of on appeal 2011-UNAT-160, that significant issues directly affecting staff members' contractual rights are being decided in a non-transparent and unilateral manner which is inconsistent with the requirements of good faith and fair dealing, and is detrimental to the basic rights of staff members.

22. When interpreting the requirements by which a staff member can be considered for permanent appointment, the Tribunal is obliged to rely on the plain letter of the law as promulgated. In this case, there are no provisions within ST/SGB/2009/10 or the Staff Rules that would enable the Tribunal to consider that the Applicant's SLWOP affected the continuous duration of his appointment. For the Tribunal to rule otherwise would be to give legitimacy to the misconception that OHRM Guidelines may overrule a duly promulgated administrative issuance.

23. The Respondent has not advanced any other ground for refusing the Applicant's request to be considered for permanent appointment. Accordingly, it

may legitimately be inferred that but for the refusal to include his period of SLWOP the Applicant would have met the criteria for eligibility for a permanent appointment.

Conclusion

24. It is the Judgment of the Tribunal that the decision to deny the Applicant conversion to a permanent appointment was unlawful.

25. The decision is rescinded.

26. The Tribunal will hold a hearing at **10.00 a.m. NY Time, Friday, 1 March 2013**, to determine any consequential relief to be afforded to the Applicant who will be required to give evidence in support of his claim for moral damages.

(Signed)

Judge Goolam Meeran

Dated this 25th day of February 2013

Entered in the Register on this 25th day of February 2013

(Signed)

Hafida Lahiouel, Registrar, New York