



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/004

Judgment No.: UNDT/2013/143

Date: 18 November 2013

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

CARRABREGU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Brian Gorlick, OSLA

Counsel for Respondent:

Fabrizio Mastrogirolamo, UNDP

Introduction

1. By application filed with the Geneva Registry of the United Nations Dispute Tribunal on 1 February 2013 under No. UNDT/GVA/2013/004, the Applicant, a G-6 staff member with the United Nations Volunteers programme (“UNV”), contests the decision taken on 23 August 2012 by the Director *a.i.*, Office of Human Resources, Bureau of Management, United Nations Development Programme (“UNDP”), to deem her ineligible for consideration for a permanent appointment.

Facts

2. The Applicant commenced her employment with UNDP on 1 October 2000 on a special service agreement —a non-staff modality— for the period up to 30 October 2000, as a UNV Administrative Assistant at the UNDP office in Pristina, Kosovo.

3. 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.

4. 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.

5. 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.

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

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

8. 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.

9. 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.

10. 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.

11. 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.

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

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. By Order No. 100 (GVA/2013) of 19 July 2013, this Tribunal ordered the Respondent to produce, by 9 August 2013, a complete set of documents relating to the Applicant's employment history within the United Nations, at both UNDP and UNV.

20. On 24 July 2013, Counsel for the Applicant filed a motion to introduce additional evidence consisting of a written statement by the Applicant, which was annexed to the motion in question. Counsel for the Applicant also indicated that his client was willing to testify before the Tribunal as a witness under oath.

21. On 6 August 2013, the Respondent submitted the documents requested by Order No. 100 (GVA/2013) and, at the same time, requested leave to submit

comments on the motion submitted by Counsel for the Applicant on 24 July 2013; those comments were already filed together with the Respondent's request for leave.

22. By Order No. 135 (GVA/2013) of 20 September 2013, the Tribunal granted the parties' requests and decided that the parties' motions and the annexes thereto would become part of the Tribunal's case file. The Tribunal also decided to hold a hearing, which took place on Wednesday, 9 October 2013.

23. By Order No. 154 (GVA/2013) of 14 October 2013, the Tribunal ordered the Respondent to indicate the circumstances in which the Applicant was granted special leave without pay from her fixed-term appointment with UNDP Kosovo before she concluded with UNV Bonn a 300-series appointment of limited duration followed by a fixed-term appointment, and the legal basis for those administrative actions.

24. On 23 October 2013, the Respondent submitted a reply, which was transmitted to the Applicant for comment in accordance with Order No. 166 (GVA/2013) of 25 October 2013.

25. On 5 November 2013, Counsel for the Applicant submitted comments.

Parties' submissions

26. The Applicant's contentions are:

- a. She meets the requirement of continuous service for the purposes of conversion to a permanent appointment in accordance with Secretary-General's bulletin ST/SGB/2009/10 of 23 June 2009 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009); the Respondent's interpretation of the term "continuous service" is without legal basis and runs counter to the spirit of the granting of permanent appointments on conversion;

b. Misleading advice from the Human Resources Unit of UNV Bonn prompted the Applicant to officially resign from her position with UNDP Kosovo in order to be re-employed with UNV Bonn. The Human Resources Unit failed to inform her that such a resignation would break the continuity of her service with the United Nations and negatively affect her future career prospects. Her situation is similar to that of the applicant in *Kulawat*, UNDT/2013/058;

c. The Human Resources Unit of UNV Bonn also failed to advise the Applicant that she was in fact eligible for reinstatement pursuant to former staff rule 104.3. Requiring her to resign or to effect a break in service prior to her appointment with UNV Bonn is contrary to the Tribunal's ruling in *Rockcliffe*, UNDT/2012/033;

d. Paragraph 6 of the one-time review policy, on which the Respondent's decision is based, derogates unlawfully from former staff rule 104.12 (b) (iii), former staff rule 104.13 (a) (iii) and section 1 of ST/SGB/2009/10, which do not state that any break in service will interrupt continuity;

e. The Applicant had no way of knowing that her transfer from one 100 series contract to another would have the effect of a break in service. There was no break in her service, as she began work in her new position in Bonn the day after her previous contract ended;

f. Paragraph 10 (c) of the one-time review policy and footnote 5 thereto, read in conjunction with former staff rule 104.3, allow for a much wider and less formalistic interpretation than that of requiring five years of uninterrupted service, as they provide for the consideration of each case on an individual basis;

g. The Applicant's break in service was purely administrative in nature. The contested decision has the effect of discouraging staff members from actively seeking a transfer within the Organization. Such an interpretation cannot have been the intention of the Secretary-General or the General

Assembly in including the criterion of continuous service in former staff rule 104.12 (iii), in view of General Assembly resolution 59/266, which encourages mobility;

h. The whole situation has caused the Applicant to suffer from stress;

i. In the event that the Tribunal finds that the Applicant is indeed ineligible for conversion to a permanent appointment, the Applicant asks that her contract be converted to a continuing appointment.

27. The Respondent's contentions are:

a. Secretary-General's bulletin ST/SGB/2009/10, to which the Applicant refers, is applicable only to Secretariat staff members and not to UNDP staff members. The applicable UNDP text is its one-time review policy; moreover, staff rule 13.4 (b) clearly requires continuity of service with no breaks in the term of service as a condition for eligibility for conversion to a permanent appointment;

b. Separation from service is a break in service, and in the present case the Applicant herself resigned from her post at UNDP Kosovo. Unless a staff member is reinstated, a resignation will interrupt the continuity of service and therefore preclude consideration for a permanent appointment. The Applicant had no entitlement to reinstatement; she knew that accepting the position with UNV Bonn would entail a separation from service and that this separation would not result in the transfer of accrued benefits such as annual leave, as shown by her correspondence with the Human Resources Unit. In electing to take the higher-level position with UNV Bonn instead of remaining in Kosovo, the Applicant elected to separate from service and was aware that this separation would entail a new appointment with new entitlements;

c. Reinstatement is not an entitlement, but rather a discretionary action by the Organization, which has no obligation to reinstate a staff member who is offered a new appointment. Reinstating a General Service staff

member who takes up a new General Service appointment at another duty station would even circumvent the principle that General Service positions are subject to local recruitment only;

d. The Applicant's appointment with UNV starting on 1 October 2007 constituted a new appointment, and consequently her service prior to her resignation in 2007 is not relevant to the determination of her eligibility for a permanent appointment. Under paragraph 6 of the one-time review policy, only the period of service on the 100-series fixed-term appointment with UNV Bonn, from 1 October 2007 to 30 June 2009, is relevant for the calculation of the five-year period of continuous service. As a result, the Applicant did not qualify for consideration for a conversion of her appointment as at 30 June 2009;

e. With respect to the Applicant's claim that she was advised that she must resign in order to be re-employed with UNV Bonn, the case cited by the Applicant (*Kulawat*, UNDT/2013/058) differs from the present case in that it involved a staff member in the Professional category, not the General Service category;

f. Lastly, with respect to the Applicant's claim that the Administration is maintaining a narrow interpretation of continuous service that is contrary to the principle of mobility, it should be recalled that reinstatement is discretionary and that it is for the Administration to set the conditions further to which mobility is implemented within the regulatory framework of UNDP;

g. In view of the foregoing, the application must be rejected; in relation to the Applicant's request that her contract be converted to a continuing appointment in the event that the Tribunal finds her ineligible for conversion to permanent status, it is recalled that this contract modality has yet to be implemented and that the Respondent is therefore not in a position to grant the Applicant such an appointment.

Consideration

28. The Tribunal will begin by describing the procedure followed for the parties' participation at the hearing. Counsel for the Applicant requested that his client should be allowed to testify at the hearing as a witness under oath, pursuant to art. 17 of the Tribunal's Rules of Procedure. The Tribunal rejected this request, however, holding that there is no need for an applicant to testify as a witness in cases where the facts are not in dispute, as such sworn testimony is of no added value to the Tribunal. Nonetheless, it did specify that Counsel for the Applicant could invite her to make statements at the hearing and that the Tribunal would, if applicable, ask her questions if her Counsel so agreed; this was in fact done at the hearing.

29. The Applicant submits that the decision to deem her ineligible for a permanent appointment is unlawful because, as at 30 June 2009, she met the requirement of five years of continuous service, which she performed on a fixed-term appointment under the 100 series of the Staff Regulations and Rules then in force, and that UNDP erred in considering that her transfer from the UNDP office in Kosovo to UNV Bonn in 2007 constituted a break in service.

30. It is not disputed that, in refusing to consider the Applicant eligible for a permanent appointment, UNDP based its decision solely on the fact that she had resigned from UNDP Kosovo as at 30 September 2007 and was thus ineligible under paragraph 10 of the one-time review policy of UNDP, which provides as follows:

(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 P[ermanent] A[ppointment]. Their situation will be reviewed taking into account the specific facts of each case.⁵

31. Footnote 5 to the above-cited para. 10 (c) provides as follows:

As is the case for paragraph 10 b) above, the eligibility for consideration will depend on whether the rehiring of a UNDP staff member who separated from UNDP after having reached five years of qualifying service can be considered as a reinstatement. This would be the case if the hiring unit explicitly agreed to reinstate the staff member pursuant to former Staff Rule 104.3 (new Staff Rule 4.18) or agreed to recognize the staff member's seniority for the purpose of entitlements, the calculation of which is based on the length of service (e.g. repatriation grant, termination indemnity, sick leave) or to carry over the annual leave accrued under the previous 100-series appointment. If there is no such indication that the hiring unit intended to reinstate the formerly separated UNDP staff member, the rehiring will be considered as a reemployment pursuant to Staff Rule 104.3 (new Staff Rule 4.17). As a result, even if the new appointment started immediately after the separation, only the period of service on the new 100-series appointment which has been completed by 30 June 2009 will be counted towards the five years of continuous service.

32. Taken together, these texts imply that a UNDP staff member with five years of continuous service cannot avail himself or herself of that status if he or she has resigned from UNDP and then received a new 100-series appointment with UNDP, even if the new appointment immediately follows the previous one. The five years may be taken into account only if the staff member's new appointment is considered a reinstatement, and not merely a re-employment.

33. It is not disputed that by the time the Applicant went to Bonn in 2007 she had already accumulated more than five years of continuous service during her UNDP career, as she held a 100-series fixed-term appointment that had been successively extended since February 2001. Nor is it disputed that UNDP took the contested decision because the Applicant resigned from UNDP Kosovo as at 30 September 2007 and could not be considered as having been reinstated as at 1 October 2007 within the meaning of staff rule 104.3 (Re-employment) as set out in the Secretary-General's bulletin of 1 January 2004 amending the 100 series of the Staff Rules (ST/SGB/2004/1), which provided as follows:

(a) A former staff member who is re-employed shall be given a new appointment or, if re-employed within twelve months of separation from service or a longer period following retirement or

disability under the Joint Staff Pension Fund Regulations, he or she may be reinstated in accordance with paragraph (c) below.

(b) If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment. If he or she is given a new appointment, its terms shall be fully applicable without regard to any period of former service, except as provided below

34. It is acknowledged that the offer extended to the Applicant of an appointment starting 1 October 2007 at UNV, an entity administered by and even forming an integral part of UNDP, does not stipulate that the appointment is a reinstatement. The Applicant's resignation thus appears to be an impediment to her eligibility for consideration for a permanent appointment.

35. Nonetheless, the Applicant maintains that her resignation of 30 September 2007 should not be taken into account because it was unlawfully imposed on her by UNDP.

36. At the hearing, the Tribunal expressed surprise at the administrative status of the Applicant, who, having started as a locally recruited staff member of UNDP Kosovo as from 2001, with a G-5 fixed-term appointment under the 100 series of the former Staff Rules, was granted special leave without pay for one year as from 7 February 2007 for the sole purpose of taking up an appointment for activities of limited duration under the 300 series, as a Programme Associate at the A-2 local level, at UNV headquarters in Bonn.

37. The Administration thus placed the Applicant in a situation in which she had two concurrent full-time contractual relationships with the same organization: that is, she was on special leave, and was thus still in a contractual relationship with UNDP Kosovo, while at the same time she held a 300-series G-6 appointment with UNV Bonn, as the Respondent has acknowledged. This situation is even reflected in the personnel action forms documenting the Applicant's administrative status, which show that she held a "primary" appointment, meaning the 100-series appointment under which she was granted special leave without pay from the UNDP office in Kosovo, and a "secondary" appointment, meaning the 300-series appointment with UNV Bonn. The Applicant was subsequently offered a one-year fixed-term appointment as a G-6

Programme Associate with Special Operations, UNV Bonn, as from 1 October 2007. This time, to enable her to take up that new appointment, UNDP asked her to resign from her former position with UNDP Kosovo, i.e. from her 100-series appointment with UNDP Kosovo.

38. After the hearing, in reply to a request from the Tribunal, the Respondent explained that the Applicant had been granted special leave without pay in accordance with the UNDP National staff career management policy in force at the time, one objective of which was to encourage locally recruited staff members to change duty stations in order to broaden their skills. Although the Respondent contends that former staff rule 105.2 (a), which was in force at the time, and the aforementioned policy authorized UNDP to grant the Applicant's request to be placed on special leave without pay, the Tribunal finds that these texts in no way authorized the placement of a UNDP Kosovo staff member on special leave without pay, thus maintaining the staff member's contractual relationship with UNDP, for the sole purpose of allowing him or her to take up another appointment in Bonn, on a local basis under the 300 series, with the UNDP-administered UNV Programme.

39. In addition, following the Tribunal's request, the Respondent produced a UNDP interoffice memorandum dated 14 May 2009 which strictly prohibits, for the future, the practice of placing a staff member on special leave without pay while offering him or her another appointment.

40. It follows that the Applicant, in asking to go to UNV Bonn, was simply availing herself of a policy in force at UNDP at the time which appears to the Tribunal to be completely at odds with the Staff Rules; she cannot be blamed for taking advantage of this policy, notwithstanding its unlawfulness. Even if UNDP, in asking the Applicant to resign on 30 September 2007, had intended to regularize her administrative status, her resignation arose entirely from the irregularities previously committed by UNDP, and the Tribunal therefore finds that there are no grounds for taking this resignation into account in determining eligibility for a permanent appointment.

41. The Applicant must accordingly be considered to have met the requirement of continuous service, as set out in the UNDP one-time review policy, and the decision of 23 August 2012 whereby the Director *a.i.*, Office of Human Resources decided that she was not eligible for a permanent appointment must be rescinded.

42. The Tribunal cannot but express surprise that the documents that were added to the case file only after the Tribunal requested them were not provided prior to the hearing at the Respondent's own initiative. These documents, in particular the interoffice memorandum of 14 May 2009, were essential to its understanding of the dispute and therefore necessary for the proper administration of justice.

Conclusion

43. In view of the foregoing, the Tribunal DECIDES:

The decision of 23 August 2012 whereby the Director *a.i.*, Office of Human Resources, Bureau of Management, UNDP, deemed the Applicant ineligible for consideration for a permanent appointment is hereby rescinded. This means that UNDP must reconsider the Applicant's situation in light of this ruling.

(Signed)

Judge Jean-François Cousin

Dated this 18th day of November 2013

Entered in the Register on this 18th day of November 2013

(Signed)

René M. Vargas M., Registrar, Geneva