UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2016/110
Judgment No.:	UNDT/2017/085
Date:	7 November 2017
Original:	English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

ASENSI MONZÓ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jérôme Blanchard, UNOG

Notice: This Judgment has been corrected in accordance with art.31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant, a Terminologist serving at the Division of Conference Management ("DCM"), United Nations Office at Geneva ("UNOG"), under a fixed-term appointment, contests the decision to find her ineligible for conversion of her fixed-term appointment into a continuing appointment due to a break in service ("contested decision"). She was notified of the contested decision on 11 July 2017 by email from the Human Resources Management Service ("HRMS"), UNOG.

2. The Applicant requests the rescission of the contested decision and for the matter to be remanded to the decision maker with directions to find that the purported break-in-service relied on by the Respondent did not actually break her continuity of service with the Organisation.

Facts

3. The Applicant joined the Organization, as a Spanish Terminologist, with the Spanish Translation Section, DCM, UNOG, in November 2002, and was reemployed on successive short-term contracts under the former 300-series of the Staff Rules.

4. On 15 April 2008, the Applicant's contract expired and she separated from the Organisation and was paid her balance of accrued annual leave. She was later re-employed as from 5 May to 31 October 2008 on another short-term appointment. Upon her separation, the Applicant was not paid her leave balance however, the annual leave days were carried forward to the next contract, this information was indicated in her separation Personnel Action ("PA").

5. On 10 November 2008, the Applicant received another short term appointment till 8 May 2009.

6. Meanwhile, the Applicant went through a competitive recruitment process and she was selected, consequently, her then short term appointment was converted into a fixed-term appointment as from 1 March 2009.

7. In 2013, the Organisation was conducting a review for consideration for granting of continuing appointments as at 1 July 2012 and the Applicant was contacted. She provided all the requisite documentation. In March 2014, the Applicant was informed that she did not meet the eligibility requirements to be considered for conversion to continuing appointment as at 1 July 2012.

8. On 23 October 2014, the Applicant's supervisor wrote to a Senior Human Resources Officer, ("SHRO") HRMS, UNOG, inquiring about the Applicant's "conversion status". By reply email on 31 October 2014, the SHRO, HRMS, UNOG, explained that the Applicant had been deemed ineligible for two reasons:

a. She did not have five years of continuous service, because she was separated from the Organisation on 15 April 2008 and was paid her balance of accrued annual leave consequently this broke her continuity of service. In this respect, she indicated that, on 30 June 2012, the Applicant "had served continuously for approximately 4 years and 2 months"; and

b. The Applicant did not have four satisfactory performance evaluation documents (e-PAS). She only had three because before 2009, she held 300 series short-term appointments which did not require staff members to have performance evaluations.

9. In December 2015, the Organisation was conducting another review exercise for consideration for granting of continuing appointments to staff members. The cut-off date taken into account for the fulfilment of the eligibility requirements was 30 June 2013. The Applicant was once again informed of this and she submitted her documentation.

10. On 18 May 2016, the continuing appointment team sent the Applicant an email informing her that the eligibility review stage had been completed and to be able to view the status of her application, she should log on to Inspira and that if she disagreed with the decision, she had 15 days in which to provide additional information for her application to be reconsidered.

11. On 1 June 2016, the Applicant wrote to the continuing appointment team informing them that she disagreed with the decision to find her ineligible for the continuing appointment and that she believed that she had met all the requirements. Consequently, she requested a reconsideration of the decision to find her ineligible.

12. Subsequently, staff at HRMS, UNOG, engaged in consultations with staff at the continuing appointment team in the Office of Human Resources Management ("OHRM"), regarding the Applicant's situation. From the various email exchanges on file, it is evident that HRMS, UNOG, was in support of the Applicant's conversion to continuing appointment while the continuing appointment team in OHRM was opposed to it.

13. Finally, on 11 July 2016, HRMS, UNOG, informed the Applicant that, after reviewing her file, the Administration had determined that she was not eligible to be considered for the continuing appointments review exercise of 2013. The reason given for her ineligibility was that her continuity of service with the Organisation was broken after the expiry of her contract on 31 October 2008.

14. According to the Organisation, the Applicant's continuity of service for the purposes of consideration for continuing appointment started on 10 November 2008, consequently as of 30 June 2013 she did not meet the required five years of continuous service.

15. The Applicant requested management evaluation of the contested decision on 27 July 2016, and by letter dated 30 September 2016, the Management Evaluation Unit informed her that the contested decision was upheld.

16. On 23 December 2016, the Applicant filed her case with the Tribunal and on 27 January 2017, the Respondent filed his reply to the case.

17. By Order No. 67 (GVA/2017) of 10 March 2017, the Tribunal disclosed to the Applicant two annexes of the Respondent's reply that had been filed ex parte and also called the parties to a Case Management Discussion ("CMD"), which took place on 2 May 2017.

18. During the CMD, the parties, *inter alia*, agreed that the case could be determined based on the pleadings and that there was no need to hold an oral hearing.

Parties' submissions

19. The Applicant's principal contentions are that:

a. Her employment with the Organisation has been continuous since 5 May 2008, and that because she did not receive any payments as commutation of her accrued annual leave. The act of carrying forward, to the next contract, her annual leave days served the purpose not to break her service thereby, her separation from the Organisation did not extinguish the contractual relationship between her and the Organisation;

b. The fact that a contractual entitlement earned during one contract survived to the following contract is evidence of continuity of service between them, and shows that some form of contractual relationship existed during the period between appointments;

c. The email of 31 October 2014 plainly shows that upon the expiry of the Applicant's contract on 15 April 2008, it was the fact that annual leave was commuted that triggered a break in service then. Therefore, the fact that the Applicant's annual leave was not commuted after the expiry of her contract on 31 October 2008 indicates continuity of service. Consequently, the Administration should not be allowed to argue that the 31 October 2014 email was an error/oversight in reviewing the Applicant's history of employment;

d. Based on the email of 31 October 2014 from the SHRO, HRMS, UNOG, she had a legitimate expectation that she would be deemed to have five years of continuous service during the 2013 continuing appointment review exercise; and

e. In the event of any possible ambiguity in the applicable rules, such should be resolved in her favour based on the *contra proferentem* rule.

20. The Respondent's principal contentions are:

a. The principle is that a staff member must have completed five years of continuous service under fixed-term appointment(s) under the Staff Regulations and Rules of the United Nations;

b. Although the relevant Regulations and Rules cater for the possibility of counting the period when a staff member served under the former 100, 200 or 300 series short-time appointments towards the continuous five years required for conversion to continuing appointment, only continuous periods of employment can be counted;

c. The provisions relied upon by the Applicant to argue that her service has been continuous since 5 May 2008 given that she carried over her annual leave days, is intended to determine when continuity of service under fixed-term appointments shall be considered broken, and not to define continuity of service between two short-term appointments;

d. The fact that the Applicant carried over her annual leave between two short-term contracts is not an indication that her service was continuous. During the break between two contracts, the Applicant did not have a contractual relationship with the Organization;

e. The Frequently Asked Questions (FAQs) document on continuing appointments contemplate exceptions to the general requirement of continuous service, relating to staff members who served under the former 100, 200 and 300 series contract and none of the exceptions apply to the Applicant; and

f. The Applicant suffered no damage and her eligibility will be reassessed in the next annual review exercise.

Issue

21. The legal issues to be determined by the Tribunal, in this case, are the following:

a. Whether the Applicant's break between two short-term appointments, from 31 October to 9 November 2008, broke her continuity of service with the Organisation for the purpose of her eligibility for a continuous appointment;

b. Whether she had a legitimate expectation of being found eligible for a continuous appointment; and

c. Whether the doctrine of *contra proferentem* can be applicable in the present case.

Consideration

Whether the Applicant's break between two short-term appointments, from 31 October to 9 November 2008 broke her continuity of service with the Organisation for the purpose of her eligibility for a continuous appointment

22. The legal framework governing continuing appointments is ST/SGB/2011/9 (Continuing appointments) and ST/AI/2012/3 (Administration of continuing appointments). The Tribunal will analyse the key provisions of these instruments that are relevant to the Applicant's case.

23. Section 2 of ST/SGB/2011/9 provides for eligibility for the consideration of the granting of continuing appointments and the key interpretative element concerning the Applicant's case is the definition of "continuous service".

24. Section 2.1 (a) of the bulletin provides that:

> 2.1 In order to be eligible for consideration for the granting of a continuing appointment, staff members who have been selected for a position through a competitive process, which includes a review by a Secretariat review body in accordance with staff rule 4.15, and are serving with the United Nations Secretariat under a fixed-term appointment, must satisfy the following criteria:

> (a) They must have completed five years of continuous service under fixed-term appointment(s) under the Staff Regulations and Rules of the United Nations, notwithstanding the provisions of sec. 2.2 below;

25. Section 2.2 of the same bulletin provides that with regards to the requirement of five years of continuous service referenced in sec. 2.1 (a) above:

> (a) Time served under the former 100, 200 or 300 series of the Staff Rules[1] may be counted towards the qualifying service, provided that:
>
> (i) The service has been continuous;
>
> (ii) The staff member has been selected for a position through a competitive process which includes a review by a Secretariat review body in accordance with staff rule 4.15 at any time during the period of continuous service;
>
> (iii) The staff member holds a fixed-term appointment;
>
> …
>
> (d) Continuity of service shall be considered broken when the staff member has been separated and paid on account of termination indemnity, repatriation grant or commutation of accrued annual leave.

26. Provisions of ST/AI/2012/3 on administration of continuing appointments similarly provide that:

> *Qualifying service towards the required five years of continuous service*
>
> 2.9 In accordance with sec. 2.1 (a) of ST/SGB/2011/9, staff members must, on the eligibility date, have accrued at least five years of continuous service under fixed-term appointment(s) under the Staff Regulations and Rules of the United Nations.
>
> 2.10 Time served under the former 100, 200 and 300 series of the Staff Rules of the United Nations may be counted towards the qualifying service, as long as such service has been continuous until the eligibility date.
>
> …

[1] The 100 and 200 series of the Staff Rules were abolished on 30 June 2009. The 300 series of the Staff Rules were abolished on 31 December 2010.

> 2.13 Continuity of service shall be considered broken when the staff member has been separated and paid on account of termination indemnity, repatriation grant or commutation of accrued annual leave. When the continuity of service has been broken, service accrued before the break shall not count towards the five years' requirement and the count will begin anew upon re-employment, unless that staff member was reinstated under staff rule 4.18.

27. Staff rule 4.18 of ST/SGB/2017/1 (Staff Regulations and Rules of the United Nations) provides as follows:

> **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 12 months of separation from service may be reinstated if the Secretary-General considers that such reinstatement would be in the interest of the Organization.
>
> (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 3.19 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. The staff member's sick leave credit under staff rule 6.2 at the time of separation shall be re-established; the staff member's participation, if any, in the United Nations Joint Staff Pension Fund shall be governed by the Regulations of the Fund.
>
> (c) If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment.

28. In *Kulawat* 2014-UNAT-428, the Appeals Tribunal stressed that in reviewing an administrative decision regarding a staff member's eligibility for conversion, the right of a staff member is not to the granting of a permanent appointment but, rather, to be fairly, properly, and transparently considered for permanent appointment.

29. This Tribunal finds that the above standard of review, though it was applied in a case regarding conversion to a permanent appointment, can also be applicable *mutatis mutandis* to cases of continuing appointments. Indeed, in order to be

considered for either of the types of appointments staff members must fulfil certain eligibility requirements laid down in the bulletins and administrative instructions.

30. The breaking of continuity of service in the Organisation is mostly referred to as "break-in-service". In essence, it is the period following the ending of a contract during which a person cannot be employed by the Organisation especially within the United Nations Secretariat.

31. According to the Tribunal's jurisprudence (see *Rockcliffe* UNDT/2012/033), the decision to impose a break-in-service is intrinsically linked to the staff member's contract, as it commences immediately after the end of the contract and continues for some time prior to the staff member's becoming eligible and/or being granted a new appointment.

32. A break-in-service can be for a day or longer. However, whatever the duration, it has the effect of interrupting a staff member's continuous appointment with the Organisation see also *Dunda* UNDT/2013/034.

33. Both the Applicant and the HRMS, UNOG, were of the view that the break-in-service between the Applicant's two short-term contracts, that is, after the expiry of her 31 October 2008 contract and before her re-employment on 10 November 2008, was purely an "administrative break-in-service".

34. They argue that the Applicant's annual leave days were not commuted, instead, they were carried forward to her new contract that began on 10 November 2008. Also, the Applicant returned to carry out the exact same functions as she did before the expiry of her contract.

35. Nonetheless, the continuing appointment team in OHRM considered the break between the Applicant's two contracts as a break-in-service which interrupted her continuous employment with the Organisation.

36. In 2008, the Applicant was an employee of the Organisation on a 300 series contract. These types of contracts were meant to be short term and not to exceed six months. Consequently, staff members had to separate from the service of the Organisation, take a break-in-service, before they could possibly be re-employed.

During the existence of 300 series contracts, after a mandatory break-in-service, many staff members were re-employed to their exact same positions carrying out the same functions.

37. The foregoing notwithstanding, the Tribunal notes that the Applicant's Personnel Action on her separation, which was finalised on 23 October 2008 and approved a day before her contract expired, indicated that: "end of monthly short-term appointment at T.II local. 4 days' annual leave to be carried forward to next contract." This clearly indicates that the Applicant knew that, after that period of time, she was to receive another contract.

38. One of the Annexes filed by the Respondent[2] is a document from the Chief, HRMS, UNOG, to the continuing appointment team in OHRM, in which she detailed the Applicant's various short-term contracts and which includes an explanation as to why the Applicant's employment with the Organisation should be considered as continuous for purposes of consideration for eligibility of continuing appointment.

39. In that document, the Chief, HRMS, UNOG, stated that:

> Upon separation on 31 October 2008 her annual leave balance was carried over to the new contract. The break-in-service was for administrative purposes only and there was an expectancy that the staff member would be re-appointed. Therefore, the period of service on both short-term contracts shall be counted and considered as continuous for the purpose of consideration for continuing appointment.

40. The Chief, HRMS, UNOG, did not provide a legal basis for this conclusion and the Tribunal stresses that the existence of an "expectation of re-appointment" between two short-term contracts does not in itself create "a continuous service" in a staff member's employment.

41. Relevantly, the Tribunal recalls that the Applicant's Letter of Appointment for the 5 May to 31 October 2008 contract clearly indicated that:

[2] Annex 4

"[T]his appointment is subject to the terms and conditions specified below and to the provisions of the relevant Staff Regulations and to Staff Rules 301. to 312.6."

42. Former Staff Rules 301.1 to 312.6 governing appointments for service of a limited duration (ST/SGB/2003/3) provided as follows:

> **Scope and purpose of the 300 series of Staff Rules**
>
> The 300 series of the Staff Rules is applicable to staff members recruited specifically to meet special needs of the United Nations for services of a limited duration. The Rules provide for two types of non-career appointment:
>
> (a) Short-term (ST) appointments, for a period not exceeding six months. The purposes for which such appointments may be made are for assistance in dealing with peak workloads or meeting unforeseen demands; to cover essential work which, as a result of vacancies or absences for mission service, cannot be performed by regular staff; and to provide services for conferences and other short-term purposes;
>
> …
>
> **Rule 301.1**
>
> **Applicability**
>
> (a) Staff rules 301.1 to 312.6 are applicable to staff members:
>
> (i) Specifically engaged on short-term (ST) appointments for conference and other short-term service for a period not exceeding six consecutive months, at all duty stations where separate rules for such staff have not otherwise been established;
>
> (ii) …
>
> (b) The Secretary-General may establish special conditions of employment applicable to short-term language staff at the Professional level on specific assignments.

43. Having analysed the above provisions regarding the 300 series contracts and in light of the scope and purpose of the 300 series appointments, the Tribunal finds the reasoning of the Chief, HRMS, UNOG, untenable. Indeed, if the Applicant's service were to be regarded as continuous then, by effect, it would violate the purpose of the 300 series appointments, which though now no longer existing, were aimed to be short term and not to exceed six months.

44. Furthermore, there is nothing on record that would permit the Tribunal to conclude that legally and/or *de facto*, UNOG considered the Applicant as a staff member, during the nine days that she was without an employment contract.

45. Having a continuous employment service with the Organisation results in protections, benefits and entitlements. Neither the Organization, nor the Applicant provided any elements which would allow the Tribunal to conclude that the rights and entitlements she would have had, had her service been continuous, were granted to the Applicant.

46. The Applicant separated from the Organisation on 31 October 2008 and was reappointed on 10 November 2008. When the Applicant's appointment expired on 31 October 2008, she seemingly had options regarding her annual leave balance: either get paid for the leave days (commutation), or have the leave days carried forward, or lose the annual leave days altogether. In the end, she was not paid her accrued annual leave before commencing her new appointment, but was allowed to carry them over to the new appointment.

47. The simple act of carrying forward of annual leave or other entitlements does not create a contractual relationship, but rather confirms the existence of an outstanding obligation owed to a staff member that is to be fulfilled by the Organisation within a certain period.

48. Carrying forward of annual leave days within the Organisation is not an uncommon practice, especially, if this is agreed upon by the parties and is documented. It does not lead to a legal fiction that the contract, which was interrupted through a break-in-service, was continuous. Therefore, since during the nine-day period, no contractual relationship existed, the Applicant's continuity of service was broken.

Reinstatement as an exception to continuous service

49. However, the Tribunal notes that exceptions to continuous service are provided for under sec. 2.13 of ST/AI/2012/3. The wording of section 2.13 of ST/AI/2012/3 is clear that when continuity of service is broken, service accrued

before the break shall not count towards the five years' requirement and that counting will begin anew with a new contract. The exception contained in this rule provides that service prior to breaking of continuity of service can count towards the five years if the staff member is reinstated pursuant to staff rule 4.18. This exception applies to former staff members who held fixed term appointments or continuing appointments at the time of separation from the Organisation but get re-employed under a fixed term appointment within 12 months of separation from service.

50. The reinstatement will occur if the Secretary-General considers it would be in the interest of the Organisation. If such reinstatement is granted, then the staff member will reimburse any amounts paid and the period he/she was separated is charged to his/her annual leave or treated as a special leave without pay. In these cases, the duration of employment is considered as continuous.

51. It should be noted that staff rule 4.18 on reinstatement did not come into existence until 1 July 2009, with the introduction of ST/SGB/2009/7, former Staff Rules, Staff Regulations of the United Nations and provisional Staff Rules. An almost similar provision existed prior to 2009[3]and despite having been modified over time the gist remains the same. Staff rule 4.18 addresses former staff members who held fixed term or continuing appointments who are re-employed under a fixed-term or continuing appointment within 12 months of separation.

52. The Applicant neither held a fixed-term nor a continuing appointment, but rather a 300 series short-term-appointment. The Applicant does not fall under this exception, because during her separation on 31 October 2008, she held a short term contract under the 300 series of appointment and, when she was re-appointed on 10 November 2008, she was reappointed to another 300 series short-term contract. She was thus not reinstated pursuant to sec. 2.13 of ST/AI/2012/3.

[3] ST/SGB/2002/1, former Staff Regulations of the United Nations and Staff Rules 100.1 to 112.8, staff rule 104.3, re-employment

Exception to continuous service pursuant to 2.2(d) (a contrario)

53. The Applicant further argues that sec. 2.2(d) of ST/SGB/2011/9 provides for circumstances under which continuity of service can be deemed broken. For the Applicant, the fact that her annual leave was not commuted but rather carried forward, entails a continuity of contracts, since the entitlements under one contract were utilised under another contract thus demonstrating continuity.

54. As referenced above, sec. 2.2(d) provides that:

> Continuity of service shall be considered broken when the staff member has been separated and paid on account of termination indemnity, repatriation grant or commutation of accrued annual leave.

55. One could thus argue, *a contrario*, that since the Applicant's annual leave was not commuted, her service continuity was not broken. However, it is the Tribunal's considered view, as expressed above, that the mere fact that leave days were carried forward does not create a legal fiction of a continuity in service where otherwise, the staff member's contract was clearly interrupted, by a break-in-service. The Applicant's reliance on sec. 2.2(d) to find that in light of the fact that she carried forward her annual leave days' entitlements, her service was continuous, must thus fail.

Whether the Applicant had a legitimate expectation of being found eligible for a continuous appointment.

56. The Applicant argues she had a legitimate expectation that she would be deemed to have met the eligibility requirement of five years' continuous service during the 2014 continuing appointment review exercise.

57. As a result of this expectation she argues that she "continued to work under the contractual uncertainty created by fixed term appointment in reliance on the Administration's clear indication that she would have the required continuous service by the next review. That continued work represents detrimental reliance on the representation that she would meet the continuous service requirements at the

next review." The Applicant relies on the email of 31 October 2014 from the SHRO, HRMS, UNOG, as the source of her legitimate expectation.

58. The Tribunal notes that the process of consideration and granting of continuing appointments is an exercise that is monitored and implemented by the continuing appointment team in OHRM. This process is not decentralised to the extent that the SHRO, HRMS, UNOG, could bind the Organisation with her interpretation of the provisions regarding continuing appointments.

59. In light of the above, the Tribunal does not find that the email of 31 October 2014 could or did create any legitimate expectation of eligibility for the Applicant.

60. Further, the Tribunal sees no detriment occasioned to the Applicant by her reliance on the email 31 October 2014 from the SHRO, HRMS, UNOG, because her contractual relationship with the Organisation remained the same—she continued under her fixed term appointment. Finally, the review exercise for the granting of continuing appointments is an ongoing exercise, therefore, the Applicant still has the opportunity to have her candidature considered for eligibility.

Whether the doctrine of contra proferentem can be applicable in the present case.

61. The Applicant reiterates that the interpretation made by the Chief, HRMS, UNOG, is identical to her own, while the Respondent has a different interpretation. Therefore, if there is some discretion regarding the application of sec. 2.2 (d) of ST/SGB/2011/9 and sec. 2.13 of ST/AI/2012/3, this should be resolved in her favour, thereby finding that her service be considered as continuous.

62. The Applicant raises this argument and illustrates it with the Tribunal's former jurisprudence developed in *Simmons* UNDT/2012/167, para. 15, in which the Tribunal stated that:

> The Tribunal does not consider that there is any ambiguity in the wording of art. 17 of Appendix D. However, it would appear from the different interpretation given by the Respondent that it may well be of assistance to the parties for the Tribunal to deal with this submission. The Tribunal would rule in favour of adopting the interpretation that gives rise to least injustice by applying the

> internationally recognized principle of interpretation that an ambiguous term of a contract is to be construed against the interests of the party which proposed or drafted the contract or clause, particularly when dealing with a provision such as art. 17 that has been unilaterally imposed by the Respondent. This principle, also known as contra proferentem, was affirmed by the Dispute Tribunal in *Tolstopiatov* UNDT/2010/147, para. 66.

63. However, this Tribunal finds the doctrine of *contra proferentem* is not applicable in this case since the legal framework, as analysed above, clearly states the requisite of continuous appointments and leaves no room for interpretation on account of ambiguity. Her argument must thus fail.

Conclusion

64. The application is dismissed.

(*Signed*)

Judge Teresa Bravo

Dated this 7th day of November 2017

Entered in the Register on this 7th day of November 2017

(*Signed*)

René M. Vargas M., Registrar, Geneva