



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/049

Judgment No.: UNDT/2011/193

Date: 11 November 2011

Original: English

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**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Anne Coutin, Officer-in-Charge

PAYMAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Serguei Agadjanov, UNOV

## **Introduction**

1. By an application filed on 2 September 2011, the Applicant contests the “incorrect classification of [her] status as a seconded staff member from the Australian Government and the subsequent administrative action not to correct [her] employment status to remove all references to a secondment *ab initio* from [her] personnel record”.

2. She requests that her employment status be rectified to reflect a normal fixed-term appointment under the 100 series of former Staff Rules, removing any reference to a secondment, and that the Human Resources Management Service (“HRMS”) at United Nations Office at Vienna (“UNOV”) proceed with the review of her suitability for conversion to permanent appointment.

## **Facts**

3. The Applicant joined the United Nations in Vienna on 9 January 2004 as a Legal Officer in the Office for Outer Space Affairs (“OOSA”) at the P-3 level and was given a two years’ fixed-term appointment. A special condition in her initial letter of appointment states *inter alia* that her appointment was on “secondment from the Government of Australia” and that “[t]he conditions governing [her] right to return to Government service [were] specified in the ‘Note Verbale’ dated 23 October 2003 from the Permanent Mission of Australia ...”. Her contract was extended several times, always with the same special condition. During the period from 2 January 2009 until 30 June 2011, the Applicant was assigned to the position of Senior Legal Liaison Officer at UNOV and received a special post allowance at the P-4 level. Effective 1 July 2011, she returned to her post in OOSA at the P-3 level and she currently holds a fixed-term appointment until 31 December 2012.

4. In February 2010, UNOV started the one-time review of staff members who were eligible for conversion to permanent appointment as at 30 June 2009.

5. By letter dated 12 July 2010, the Applicant was informed by the Chief of HRMS that the Office of Human Resources Management at Headquarters had confirmed her eligibility to be considered for conversion to a permanent appointment and that she would be included in the next stage of the process, which involved a further review of eligible staff for suitability to be conducted on the basis of the relevant provisions of Secretary-General's bulletin ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) and related guidelines.

6. In late September 2010, the Applicant inquired with HRMS on the status of the consideration of her case for conversion to a permanent appointment. She pointed out that at no point in time did she have a continuing contractual relationship with the Australian Government given that she had requested leave without pay as of 2004 upon taking up her appointment with the United Nations.

7. On 1 October 2010, the Applicant received a letter from the Attorney-General's Department of the Australian Government noting that she had been on leave without pay while working with the United Nations since 9 January 2004 and notifying her that her leave would be concluded as at 31 January 2011 since the Department was unable to provide a further extension. The letter also clarified that, for the Australian Government, she was on leave without pay and not on secondment to the United Nations.

8. On 5 October 2010, the Applicant submitted her resignation from the Government of Australia.

9. By email dated 28 April 2011, the Director, Division for Management, UNOV, conveyed to the Applicant the HRMS determination that her status at the time of recruitment and up to 31 January 2011 was on secondment from the Australian Government. He pointed out that it was not possible to modify her recruitment status *post facto* but that a correction would be made to reflect the end of her secondment as of 1 February 2011.

10. By email dated 27 May 2011, the Applicant requested a management evaluation of the decision dated 28 April 2011 from the Director, Division for Management, UNOV, concerning the determination of her status as on secondment at the time of recruitment.

11. By letter dated 11 July 2011, the Management Evaluation Unit at Headquarters informed the Applicant that her request for management evaluation was not receivable as no final administrative decision on the determination of her eligibility for conversion to a permanent appointment had been made at that time.

12. On 2 September 2011, the Applicant filed an application before the Tribunal.

13. On 5 October 2011, the Director, Division for Management, UNOV, informed the Applicant that she was not eligible to be considered for conversion to a permanent appointment. He highlighted that her tenure with UNOV had been on secondment basis since her initial appointment on 9 January 2004 until 31 January 2011 when her special leave without pay with the Australian Government expired, and that, as a result, her service with the United Nations during that period could not be counted towards the five years of qualifying service required for the consideration for conversion to a permanent appointment.

14. On 7 October 2011, the Respondent filed his reply to the application.

15. By Order No. 181 (GVA/2011) dated 24 October 2011, the Tribunal informed the parties that, in its view, there was no need for the filing of further pleadings, nor for an oral hearing to take place. The parties were invited to provide their comments on the Tribunal's position by 31 October 2011, but did not make any submission in this regard.

### **Parties' submissions**

16. The Applicant's principal contentions are:

- a. The decision to classify her status as on secondment is an error and reflects a relationship with the Australian Government that does not exist.

As a result of this determination, HRMS did not proceed with the review of her suitability for conversion to permanent appointment despite the information given to her on 12 July 2010;

b. She did not seek to have this error in her employment status corrected prior to the one-time review as up until that time it had no impact on her terms of appointment.

17. The Respondent's principal contentions are:

a. Since the Applicant joined the United Nations in January 2004, she agreed to the secondment status which was recorded in all her letters of appointment. It was only during the one-time review for conversion to permanent appointment that she attempted to change her status. In this regard, her status has been modified effective 1 February 2011 to reflect the end of her secondment.

b. Had the Applicant wished to contest the decision to record her status as on secondment from the Australian Government effective 9 January 2004, she should have done so within two months of the notification of this decision in writing. As the Applicant did not do so, her application in this regard is not receivable.

### **Consideration**

18. The Applicant contests the decision of 28 April 2011 determining that her status at the time of recruitment in 2004 and up to 31 January 2011 was on secondment from the Australian Government.

19. The first issue is whether the contested decision can be regarded as an administrative decision. The scope of the Tribunal's material jurisdiction is strictly limited to reviewing administrative decisions, in accordance with article 2.1 of its Statute which provides that:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ... to appeal an

administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment ...

20. According to the relevant case law, an administrative decision is defined as follows (see United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003), endorsed *inter alia* in *Schook* 2010-UNAT-013 and *Tabari* 2010-UNAT-030):

[A] unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order.

21. In the present case, the Applicant contests the incorrect classification of her status as on secondment from the Australian Government at the time of recruitment in 2004 and up to 31 January 2011. While the classification of her status may have an impact on her eligibility for conversion to a permanent appointment, the classification in itself does not produce direct legal consequences as required by the definition quoted above. The Applicant thus does not contest an administrative decision.

22. The one-time review for conversion to permanent appointment involves a series of interlocutory findings which lead to an administrative decision. These findings may be challenged only in the context of an appeal against the outcome of the consideration for conversion to permanent appointment but cannot be, alone, the subject of an appeal to the Tribunal. Only if the Applicant contested the outcome of the one-time review in her case would the Tribunal be competent to hear and pass judgment on her application as per article 2 of its Statute. In this respect, such outcome was communicated to the Applicant on 5 October 2011, when she was informed that she was not eligible for consideration for conversion. This decision, however, has not been the subject of a request for management evaluation and the Tribunal is thus not competent to examine its legality, in accordance with article 8.1(c) of its Statute and staff rule 11.2(a).

23. Even assuming that the classification of the Applicant's employment status as on secondment may be construed as an administrative decision subject to appeal, for the application to be receivable the applicable time limits must have

been complied with. Former staff rule 111.2(a), which was in force at the time of the classification, provides as follows:

A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

24. It is an uncontested fact that the Applicant did not send until 27 May 2011 a request for management evaluation concerning the classification of her status as on secondment at the time of her recruitment in 2004. Although the Applicant received on 28 April 2011 the HRMS determination that her status at the time of recruitment and up to 31 January 2011 was on secondment, it remains that all her letters of appointment included a special condition according to which her appointment was on “secondment from the Government of Australia”. The decision of 28 April 2011 is thus a confirmative decision and as such it did not reopen the time limits for appeal (see *Rahman* UNDT/2011/183 quoting *Sethia* 2010-UNAT-079). The Applicant signed the initial letter of appointment on 22 January 2004 and, as she did not contest the classification of her status within the mandatory time limit prescribed by former staff rule 111.2(a), it can no longer be contested. The Applicant herself recognized that she did not seek to have her employment status corrected prior to the one-time review because up until that time it had no impact on her terms of appointment.

25. The Appeals Tribunal has affirmed in its jurisprudence that, pursuant to article 8.3 of the Dispute Tribunal’s Statute, the Tribunal may not suspend or waive the deadlines for administrative review or management evaluation (*Costa* 2010-UNAT-036, *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Ajdini et al.* 2011-UNAT-108).

26. In light of the above, even if the contested decision could be deemed to be an appealable administrative decision, the present application has to be declared irreceivable as time-barred.

**Conclusion**

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

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 11<sup>th</sup> day of November 2011

Entered in the Register on this 11<sup>th</sup> day of November 2011

*(Signed)*

Anne Coutin, Officer-in-Charge, Geneva Registry