UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/065
Judgment No.: UNDT/2013/034
Date: 27 February 2013
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

DUNDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a current staff member of the Security and Safety Service ("SSS"), Department of Safety and Security ("DSS") in New York, contests the decision finding him ineligible for consideration for conversion to a permanent appointment due to a prior break in service in 2005 resulting in him not having acquired five years of continuous service on fixed-term appointments. The Applicant requests that he be considered for conversion to a permanent appointment or that his contract "be converted to a continuing contract".

2. The issues to be decided are whether there was a break in service between the Applicant's employment at the United Nations Economic Commission for Africa ("UNECA"), Addis Ababa, Ethiopia, and thereafter at SSS, New York, USA and whether such a break in service rendered the Applicant ineligible for consideration for conversion to a permanent appointment.

Facts

3. On 1 December 2001, the Applicant joined UNECA as a Security Officer on a Special Service Agreement, that is, on a short-term consultancy.

4. On 1 January 2003, the Applicant was appointed to UNECA on a three-month fixed-term 100 series contract as a Security Officer at the G-3/1 level. Following this initial appointment, the Applicant's contract was renewed by UNECA on several occasions until 31 July 2005.

5. On 14 May 2005, the Applicant, having applied for a post as a Security Officer with SSS at the United Nations Headquarters in New York, was invited to undertake pre-recruitment formalities in New York lasting approximately 7 to 10 days, including a written test, medical examination, interviews, psychological evaluation and substance abuse testing. The record indicates that the Applicant travelled to New York where the written test was taken on 9 June 2005.

6. On 6 July 2005, the Applicant was offered "a fixed-term appointment [at the S-1/1 level] for an initial period of six months as a Security Officer in [SSS] to commence on 8 August 2005". The Applicant accepted the terms and conditions of this offer of appointment on 8 July 2005.

7. On 27 July 2005, the Applicant informed UNECA that the "United Nations Headquarters has sent [him] an appointment offer letter for duty commencing August 2005. Accordingly, I have finalized the clearance process and arranged my travel to be on Friday, 29 July 2005 so that I can report for duty at the stated time. Therefore, it would be very much appreciated if the HRSS [Human Resources Safety and Security] could curtail my appointment to 31 July 2005". The Applicant then travelled to New York at his own expense.

8. On 8 August 2005, the Applicant, who contends that he was initially informed that he was to report for duty on 1 August 2005, signed his letter of appointment and commenced his initial six-month appointment on a fixed-term 100 series contract with SSS. The Applicant was afforded successive fixed-term appointments with the current one due to expire on 28 February 2013.

9. On 23 June 2009, the Secretary-General of the United Nations issued 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).

10. Around the time the Applicant was granted his most recent fixed-term appointment, on 1 March 2011, he enquired as to the status of his consideration for conversion to permanent appointment. On 4 March 2011, the Executive Office, DSS, informed the Applicant that as a result of a break in service, from 31 July 2005 to 8 August 2005, following the completion of his service at UNECA and his appointment to DSS/SSS, he was ineligible for consideration for conversion to a permanent appointment.

11. On 3 May 2011, the Applicant submitted a request for management evaluation of the decision finding him ineligible for consideration for conversion to permanent appointment.

12. On 12 July 2011, the Management Evaluation Unit determined that the decision that the Applicant was ineligible for conversion to permanent appointment had been taken in accordance with the applicable rules.

13. On 12 August 2011, the Applicant filed the present application against the contested decision and the Respondent duly filed his reply on 14 September 2011. Following the Tribunal's enquiry via an order, both parties confirmed that they had no objection to the matter being disposed of on the papers.

Applicant's submissions

14. The Applicant's principal contentions may be summarized as follows:

a. The contested decision was tainted by arbitrariness for several reasons. Firstly he claims that sometime in 2010 his name appeared on a circulated list of staff members who were eligible to be considered for permanent appointment, and that his name was subsequently removed. Secondly he claims that a colleague who separated from service at the United Nations Office in Nairobi on 5 August 2005 and was reappointed at the Secretariat in New York on 8 August 2005 was granted a permanent appointment although he in effect had a two-day break in service;

b. The uneven application of the criteria as to who may be considered for permanent appointment is further emphasized by the explanations the Applicant received from the Office of Human Resources Management ("OHRM") and DSS regarding the reasoning behind the decision, namely that he "had been randomly assigned a longer break in service" and that Management "had to cut if off somewhere";

c. The reliance on OHRM's Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 ("Guidelines") and, more specifically, sec. 5(a), to interpret the staff rules and the application of ST/SGB/2009/10, is misguided and misplaced as those Guidelines derogate from former staff rule 104.12(b)(iii) which is now staff rule 13.4;

d. It was never the intention of the General Assembly to deny staff members the right for consideration to permanent appointment as a result of short administrative breaks in service between successive appointments, when they had provided the Organization with "continuing good service", as referenced in General Assembly resolution 37/126 (1982);

e. The Respondent stated in *Villamoran* UNDT/2011/126 that short breaks in service may be discounted or ignored when they are required to occur between successive appointments. Similarly, the United Nations High Commissioner for Refugees' provisions regarding the criteria for continuous service states that a break in service of less than 30 days does not interrupt the continuity of service;

f. This application is not challenging "the 2005 decision creating the Break-in-Service, but the later decision not to consider [the Applicant] eligible for conversion to permanent appointment on the basis of that earlier decision".

Respondent's submissions

15. The Respondent's principal contentions may be summarized as follows:

a. The Applicant's candidature was fully considered on the basis of the applicable United Nations staff rules and policies and he did not meet the eligibility requirement of having completed five years of continuous service on an fixed-term appointment under the 100 series;

b. Additional details regarding the implementation of the requirements of ST/SGB/2009/10 can be found in the Guidelines. More specifically, sec. 5(a) states that a "break in service of any duration … prior to the staff member reach[ing] the five years of qualifying service will interrupt the continuity of service";

c. The terminology requiring that the service be "continuous" is very clear and is not contradicted by any of the applicable legal provisions. Namely, that "continuous", as defined by the Oxford dictionary, means "without interruption";

d. In the instant case, the break in service rendering the Applicant ineligible for conversion occurred in the natural course of business as a result of the Applicant's unilateral and willing decision to resign from UNECA for the purpose of joining the Secretariat in New York. Following his resignation, the Applicant had no contractual relationship with and did not perform any activities for the Organization from 1 August 2005 to 8 August 2005;

e. The Applicant cannot rely on the Respondent's submissions in *Villamoran* for the purpose of establishing that there was continuity of service as those submissions did not serve the purpose of establishing or creating any type of policy that could be relied upon by either the Organization or a staff member. Indeed, the service criteria in the present case is very clear and the Applicant does not meet it;

f. Under the staff rules, the Organization could not consider the Applicant's service as continuous seeing that starting 8 August 2005 he was re-employed rather then reinstated into service;

g. The Applicant was aware and bound by the terms of his appointment and he cannot try to re-characterize it as a reinstatement rather then a re-employment. Furthermore, the issue of whether his contract consisted of one

or the other is not properly before the Tribunal as the Applicant did not contest it within the statutory deadline. It should also be noted that the Applicant benefited substantially from his desire to resign, have a break in service and then be re-employed in a different duty station as a local hire in a different service category;

h. The Applicant cannot contest the decision not to consider him for permanent appointment without contesting the fact that the 2005 decision amounts to a break in service as one decision flows directly from the other;

i. The contested decision was not applied arbitrarily and any other situation such as the one identified by the Applicant whereby it appears that a staff member who did not meet the relevant criteria was nonetheless granted permanent appointment will be reviewed and, if there was any error, the contractual situation of the concerned staff member will be remedied;

j. There is no legal basis to grant the remedies requested by the application whether it be that his contract be converted to "continuing contract" or that he be considered for permanent appointment.

Consideration

Applicable law

16. ST/SGB/2009/10 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

17. OHRM Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 state:

> **Eligibility for consideration**
>
> **…**
>
> 5. With respect to the requirement of five years of continuous service, the following should be noted:
>
> > a. 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.
> >
> > …
> >
> > d. Staff who were in the Secretariat on 30 June 2009 on a 100 series appointment will be eligible for consideration for conversion to permanent appointment even though part of such service under the 100 series of the Staff Rules was performed outside the Secretariat in an another entity that was governed by the 100 series of the Staff Rules prior to 1 July 2009.

Break in service

18. In the context of the United Nations, a break in service consists of a certain period of time between two contracts, governed by the United Nations staff rules, during which a person is not employed by the Organization (*Villamoran* UNDT/2011/126, *Garcia* UNDT/2011/189, *Neskorozhana* UNDT/2011/196). A break in service also has the effect of interrupting a staff member's continuous appointment under the staff rules.

19. A number of cases have dealt with the issue of breaks in service. Below is a brief outline of the recent case law and legislative developments, as well as authorities upon which the Applicant has placed reliance.

20. On 13 November 2009, the Dispute Tribunal rendered *Castelli* UNDT/2009/075. In *Castelli*, the Tribunal found that the Administration's decision to impose a retroactive break in service was unlawful as it lacked proper legal basis and had the purpose of depriving the staff member of his accrued benefits. In *Castelli* 2010-UNAT-037, rendered on 1 July 2010, the United Nations Appeals Tribunal affirmed *Castelli* UNDT/2009/075, finding that "the administration may not subvert the entitlements of a staff member by abusing its powers, in violation of the provisions of the Staff Regulations and Staff Rules".

21. On 12 March 2010, the Dispute Tribunal rendered *Gomez* UNDT/2010/042. This case concerned a staff member who was required by the Administration to take a three-day break in service between two temporary assignments. The Tribunal found for the staff member, stating that the Respondent had failed to provide any evidence of a lawful policy on mandatory breaks in service or to demonstrate a consistent application of the alleged policy.

22. On 12 July 2011, the Dispute Tribunal issued *Villamoran* UNDT/2011/126. This case concerned a staff member whose fixed-term appointment had expired and who was expected to continue working on a temporary appointment. The Administration required her to take a break in service of 31 days after the expiration of her fixed-term appointment and prior to her employment on a temporary contract, and the staff member filed an application for suspension of action of that decision. The Tribunal found that the break in service requirement between fixed-term and temporary appointments was based on a memorandum issued by the Assistant Secretary-General for OHRM, which was not a properly promulgated administrative issuance. The Tribunal found that, in the absence of a properly promulgated administrative issuance, for staff "who [were] being re-appointed under temporary appointments following the expiration of their fixed-term appointments, there [was] no requirement, in law, to take a break in service—be it 1 day or 31 days—prior to the temporary appointment". The Tribunal found that the break in service requirement was a significant, material contractual

provision and that, to be considered part of the contract, it had to be introduced by properly promulgated administrative issuances.

23. On 7 August 2012, the Tribunal rendered *Rockliffe* UNDT/NY/2012/033 in which the Tribunal held that the Administration's representation to the staff member that the break in service was an administrative requirement was false. Furthermore, the Tribunal found that no actual break in service took place and the purported requirement of break in service was unlawful.

Applicant's Employment Status

24. The Tribunal must observe from the outset that the above cited cases are clearly distinguishable from the present case. The case of *Gomez* in particular upon which the Applicant relies, *inter alia*, did not concern a conversion case, predated ST/SGB/2009/10, had no legal basis for a break in service, involved a clear case of differential treatment which remained unrebutted by the Respondent, had evidence of arbitrary and high handed action by the Respondent, and was clearly stated by the Tribunal to have been decided "on its own particular facts in the context of [the Office for the Coordination of Humanitarian Affairs] customary practice."

25. In *Castelli* and *Rockliffe* the Tribunal found that, in reality, there was no break in service as the applicants continued in, and were compensated for, their duties, whereas in the present case there was clearly a period of seven days during which the Applicant did not provide any services to the Organization. Suffice to say, each case must of course be decided on its own merits and no two cases are often alike.

26. Furthermore, in the above cited cases, the staff members therein at the time took issue with the break in service which was imposed at the behest of the employer. In this instance, on the facts before the Tribunal, the separation was made at the initiative of the Applicant, who concedes that he is not challenging the decision creating the break in service.

27. It is not disputed by either party that the Applicant was employed by UNECA on a 100 series contract from 1 January 2003 to 31 July 2005 prior to becoming a Security Officer, also on a 100 series contract, with SSS on 8 August 2005 to date.

28. Consequently, but for the break in service between 31 July 2005 and 8 August 2005, the Applicant would have met the eligibility requirements of ST/SGB/2009/10 for consideration of conversion to a permanent appointment seeing that, by 30 June 2009, he would have completed five years of continuous service on fixed-term appointments on a 100 series contract under the Staff Rules. The Tribunal notes that while the Applicant submitted that he was informed that the date on which he was supposed to report for duty was 1 August 2005, the offer of appointment dated 6 July 2005, which the Applicant signed two days later, clearly stated that his appointment was "to commence on 8 August 2005". Also, the letter of appointment was signed by the both parties on 8 August 2005.

29. It is notable also that the Applicant "does not seek to challenge the 2005 decision creating the break in service, but, [in light of the Tribunal's decision in *Gomez*], the later decision not to consider him eligible for conversion to permanent appointment on the basis of that earlier decision".

30. The sole question that remains to be answered is whether, even if one accepts the fact that a break in service took place, the break in service precludes the Applicant from claiming that he had five years of continuous service with the Organization.

Contractual relationship

31. It is common cause that the sole purpose for the Applicant's request of 27 July 2005 that his employment at UNECA be curtailed, was to join DSS in his new position pursuant to "an appointment offer letter for duty commencing August 2005", which letter clearly stipulates the commencement date as 8 August 2005 and which the Applicant signed on 8 July 2005. As a result of this

action, the Respondent submits that during the period of 1 August 2005 to 8 August 2005 there was no contractual relationship between the parties as the Applicant "did not perform any services for the Organization during this period … did not contribute towards the United Nations Joint Staff Pension Fund and was not under the authority of the Secretary-General", thereby rendering him ineligible for consideration for conversion to a permanent appointment.

32. It is also common cause that the Human Resources Officer, UNECA, wrote a letter to the Applicant on 26 July 2005, stating:

> Upon your request to separate from the Commission effective 31 July 2005 to join UNHQ, New York, I wish to advise you that your request has been accepted with regret. To assist you in making preparation for final clearance, we are providing hereunder some information for your guidance as they affect your emoluments and entitlements
>
> > Your final Emoluments and entitlements will consist of the following:
> >
> > Payment of 100 per cent in commutation of your balance of unused annual leave to a maximum of 60 days,
> >
> > Salary up to 31 July 2005
> >
> > Additionally, and as relevant to your circumstances, we have attached the following forms for information and/or completion as necessary.
> >
> > Pension Fund Payment Instructions Form PENS/E/7.
> >
> > ECA Clearance Form, Part I of which is to be completed by you, after which Sections I through 10 are to be signed by the Sections/Units indicated. Please return the form to the Human Resources Services Section only upon total completion by the relevant offices.
>
> Once again, I wish to thank you for the dedicated service you have rendered to the Commission and wish you success in future career.

33. In response, the Applicant wrote to the Human Resources Officer, UNECA, on 27 July 2005 (copying two other officers). He requested that his appointment with the mission be curtailed to 31 July 2005, and also advised them that he had

finalized the clearance process. Therefore, the Applicant made an informed decision to separate from service on 31 July 2005.

34. In the circumstances, the Tribunal finds on these particular facts that the Applicant separated from service with UNECA and, following a break in service, was reemployed as a local hiree with DSS in New York. Consequently, the Applicant was ineligible for consideration for conversion to permanent appointment as the break in service resulted in him not having acquired five years of continuous service on a fixed-term appointment.

Conclusion

35. The application is dismissed.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 27th day of February 2013

Entered in the Register on this 27th day of February 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York