





4. On 22 July 2014, the Applicant filed a submission addressing the issues raised in the Respondent's reply and stating that she did not require a hearing on the merits or the legal issues. The Respondent also filed a submission consenting to the matter being determined on the papers, noting and denying some factual allegations for which it was contended the Applicant placed no evidence before the Dispute Tribunal. For the purposes of this judgment, the Tribunal places no reliance on these factual allegations.

### **Facts**

5. The primary facts of the case are not in contention. The following facts are from the written record.

6. The Applicant was appointed under a 100-series fixed-term appointment (“FTA”) as a Translator with the ICTY on 1 October 2006. The FTA was extended several times, up to 31 March 2010.

7. On 6 July 2009, the Applicant resigned from the ICTY, effective 8 August 2009, citing “personal reasons”. The Respondent produced several documents illustrating that the Applicant resigned, was repatriated and completed the full checkout process for her separation. The Applicant argued that these documents were unnecessarily produced as she did not deny the circumstances of her resignation effective 8 August 2009.

8. On 15 October 2009, the Applicant was appointed on a one year FTA with UNAKRT. The FTA was extended until her mandatory retirement from service at age 62, on 30 November 2013.

9. On 30 October 2013, the Applicant submitted a request for enrolment in the ASHI programme, which was received by the Health and Life Insurance Section (“Insurance Section”) of the United Nations Secretariat on 4 November 2013.

10. On 29 November 2013, the Applicant received an e-mail stating that she was ineligible for enrolment in the ASHI programme as her separation Personnel Action

form (“PA”) showed an entry on duty date (“EOD”) of 15 October 2009. The Applicant thereafter filed for management evaluation of the decision.

11. On 17 January 2014, the administration upheld the decision following management evaluation noting that: whilst the administration agreed that the Applicant had a total qualifying participation period of 86 months, or approximately 7.2 years, as a consequence of the application of staff rule 4.17(a), her 15 October 2009 EOD with UNAKRT was the applicable EOD for purposes of determining her eligibility to ASHI and the Applicant was therefore ineligible for ASHI as she did not meet the 10 year threshold.

### **Considerations**

12. The principal issue in this case is the determination of the applicable date of recruitment in the United Nations under sec. 2.1 of ST/AI/2007/3 on After-service health insurance in order to ascertain whether the Applicant qualifies for ASHI.

13. Pursuant to sec. 2.1 of ST/AI/2007/3, if the Applicant is deemed to have been recruited before 1 July 2007 she would only need to have been a participant in the contributory health insurance plan of the common system of the United Nations for a minimum of five years in order to qualify for ASHI, while if recruited on or after this date the requisite period of time would be a minimum of 10 years. In this regard, the Respondent concedes that the Applicant has a total qualifying participation period in the relevant health insurance plan of 86 months, or

15 October 2009, which is less than the 10 years of contributory participation required for ASHI.



...

16. However, ST/AI/2007/3 is silent on the situation where the staff member has been employed by the United Nations before 1 July 2007, and again subsequently after this date, with a voluntary break-in-service in between.

Sec. 5.1(c) of ST/AI/2007/3

17. The only provision of ST/AI/2007/3 that covers the issue of reemployment appears to be sec. 5.1(c) regarding cessation of coverage, which states that,

5.1 Eligibility for after-service health insurance coverage shall cease:

...

(c) When the former staff member re-enters the United Nations Joint Staff Pension Fund as a participant following re-employment. In this case, participation in after-service coverage will be suspended and the staff member will contribute to the health insurance plan as an active participant. After-service health insurance coverage will resume upon separation from service and reapplication within 31 days of such separation;

18. However, sec. 5.1(c) does not directly cover the issue of the Applicant's applicable recruitment date in relation to sec. 2.1(a) and (b), and it is not clear what importance is to be attached to sec. 5.1(c) in this context although it is instructive that ASHI is suspended, and not cancelled, on re-entry into the UNJSPF following re-employment. In any event, in light of the Respondent's admission that she had approximately 7.2 years of qualifying contributory participation, it cannot be said, and indeed it is not submitted, that the Applicant's eligibility or years of participation ceased or were irredeemably suspended, the only contention being whether she requires five or 10 years of service, depending on the applicable date of her recruitment.

Sec. 2.2(b) of ST/AI/2007/3

19. The Respondent submits that as the Applicant's continuous employment was interrupted when she was reemployed with UNAKRT on 15 October 2009, two



is re-employed under the present rule, the service shall not be considered as continuous between the prior and new appointments.

(c) When a staff member receives a new appointment in the United Nations common system of salaries and allowances less than 12 months after separation, *the amount of any payment on account of termination indemnity, repatriation grant or commutation of accrued annual leave* shall be adjusted so that the number of months, weeks or days of salary to be paid at the time of the separation after the new appointment, when added to the number of months, weeks or days paid for prior periods of service, does not exceed the total of months, weeks or days that would have been paid had the service been continuous.

21. In her response to the reply, the Applicant submits that the Respondent is being unduly selective in citing an extremely truncated portion of the modified staff



only certain allowances exhaustively listed such as termination indemnity, repatriation grant, or commutation of accrued annual leave, for staff members receiving a new appointment less than 12 months after separation. In essence, the Applicant is relying on the doctrine of *expressio unius est exclusio alterius*, which in common parlance means that the express mention of one thing excludes all others—when one or more things of a class are expressly mentioned others of the same class which are not mentioned are excluded. In this instance, the primary purpose of staff rule 4.17 is to regulate the entitlements listed therein, to the exclusion of others.

23. Furthermore, the Applicant also pleads the doctrine of *lex specialis*: that a law governing a specific subject matter overrides a law which only governs general

date of her eligibility for participation in the staff pension fund. Therefore she has been a United Nations staff member with the requisite type of contract and enrolled in the requisite United Nations contributory health insurance plan starting from 1 October 2006, and the Respondent is improperly imposing a requirement of continuity between contracts, not stipulated in ST/AI/2007/3, which expressly provides for contributory participation during *all* periods of service “*continuous or otherwise*”.

*Interpreting the relevant provisions of ST/AI/2007/3*

25. The literal theory of interpretation holds that, where the language is plain, courts should not invoke external aids to construction. In *Scott* 2012-UNAT-225, the Appeals Tribunal said at para. 28:

The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

26. This case is best resolved by the literal or plain meaning rule of construction, i.e., by “establishing the plain meaning of the words in the context of the document as a whole. Only if the wording is ambiguous should the Tribunal have recourse to other documents or external sources to aid in the interpretation” (*Scott* UNDT/2011/108).

27. The intended consequence of ST/AI/2007/3 is so apparent from the face of it that there can be no question as to its meaning. Section 2.1 of ST/AI/2007/3 describes the two categories of individuals eligible to *enroll* in the ASHI programme (recruited pre or post-1 July 2007); whilst sec. 2.2 applies for the *purpose of determining eligibility* in accordance with sec. 2.1. For purposes of determining eligibility, a staff

member requires *cumulative* contributory participation *during all periods of service*



cover, the latter of which is not in dispute. The Tribunal finds that to give any other construction would give rise to disparity and absurdity. It must also be borne in mind that there is no apparent prejudice that is suffered by the Respondent in finding the Applicant eligible for ASHI as she alone will bear the burden of the insurance contributions pursuant to sec. 3.2(b) and (c) because she has not reached “a total period of contributory participation of at least 10 years”.

33. The application therefore succeeds. Consequently, it is not necessary for the Tribunal to consider the Applicant’s submissions regarding legitimate expectations.

**Conclusion**

34. The administrative decision declaring the Applicant ineligible for ASHI is rescinded.

35. The Administration is to enroll the Applicant in the ASHI retroactively from 1 December 2013.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 20<sup>th</sup> day of August 2014

Entered in the Register on this 20<sup>th</sup> day of August 2014

*(Signed)*

Hafida Lahiouel, Registrar, New York