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:

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

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 R

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

The parties

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,

> (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.

2.13

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

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

"[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 ion. The Rules provide for two types of

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

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.

> 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