



JUDGE ROSALYN CHAPMAN , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it the appeal by the Secretary-General of the United Nations of Judgment No. UNDT/2013/058, issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 22 March 2013 in the case of *Kulawat v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 16 May 2013, and Ms. Suchada Kulawat answered on 19 July 2013.

#### Facts and Procedure

2. Ms. Kulawat joined the Organization on 25 May 1995 at the P-3 level, serving with United Nations Protection Force. On 1 July 1996, she was reassigned to the United Nations Mission in Bosnia and Herzegovina (UNMIBH), and on 1 December 1996 she separated from service with the Organization. On 7 September 1998, she was reappointed to UNMIBH, where she served until 30 September 2002. On 1 October 2002, she was again reappointed with UNMIBH, and on 30 November 2002 she separated from service with the Organization.

3. On 28 January 2003, Ms. Kulawat was reappointed to serve with the United Nations Mission of Support in East Timor. On 15 May 2004, she was reassigned to serve with the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) on a fixed-term appointment.

4. While serving with MONUC, Ms. Kulawat was advised that she had been selected for the post of Security Coordination Officer, at the P-4 level (Post), with the United Nations Department of Safety and Security (DSS) in New York. On 13 March 2006, she accepted and signed the offer for the Post, accepting a two-year fixed-term appointment under the 100-series Staff Rules. Under the terms of the offer, the appointment to the Post was to be “effective on the day [Ms. Kulawat] report[ed] for duty”.

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6. On 2 August 2006, Ms. Kulawat advised MONUC's Chief Civilian Personnel Officer (CCPO): "I wish to end the assignment with MONUC by 1 September following my acceptance of an Offer for Employment with the UN Secretariat (New York). I would appreciate your kind consideration for appropriate acts in facilitating my repatriation by 31 August 2006."

7. On 10 August 2006, a MONUC Human Resources Assistant (HRA) requested that Ms. Kulawat advise him if her "departure from MONUC is separation or reassignment to UNHQ". That same day, Ms. Kulawat confirmed "after consultations with [her] new duty station in UN Secretariat, that [her] departure from MONUC is the separation". She attached a memorandum to her response requesting repatriation.

8. On 10 August 2006, MONUC's CCPO sent Ms. Kulawat a memorandum regarding her separation from service, detailing the procedures and setting forth her repatriation and other entitlements, and attaching pertinent forms.

9. On 12 August 2006, Ms. Kulawat advised OHRM that her "separation date" from MONUC would be 31 August 2006, that she planned to travel to New York on 10 September 2006, and that she would report to duty on 11 September 2006.

10. On 11 September 2006, Ms. Kulawat signed a letter of appointment with OHRM for the Post, agreeing to a fixed-term of two years.

11. Almost four years later, on 14 July 2010, Ms. Kulawat inquired of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), the successor agency to MONUC, about amending her personnel records to reflect that she did not separate from service when she left MONUC to take the Post with DSS. However, she was advised that "it [wa]s too late to challenge the decision" and her "record cannot be amended as requested".

12. On 4 August 2011, the Executive Officer, DSS, advised Ms. Kulawat that she was ineligible to be considered for conversion of her fixed-term appointment to a permanent appointment because she did not meet the requirement of five years of continuous service set forth in ST/SGB/2009/10, due to a break in service from 31 August to 9 September 2006.

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24. Ms. Kulawat requests the Appeals Tribunal to dismiss the appeal.

Considerations

25. On 23 June 2009, the Secretary-General promulgated ST/SGB/2009/10 (Bulletin) to implement the provisions of former Staff Rules 104.12(b)(iii) and 104.13 for “staff members ... who have become or will become eligible for such consideration by 30 June 2009”.<sup>1</sup>

26. Section 1 of the Bulletin sets forth the requirements for a staff member to be eligible for consideration for a permanent appointment and Section 2 sets forth the criteria for granting a permanent appointment. Section 1 requires, in part, that to be eligible for consideration for conversion to a permanent appointment, a staff member must, by 30 June 2009, “[h]ave completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules”.

27. On 29 January 2010, the Assistant Secretary-General for the Office of Human Resources Management issued “Guidelines on Consideration for Conversion to Permanent Appointment of Staff Members of the Secretar

requirement of continuous service does not preclude staff members from consideration for conversion “who underwent a break in service for administrative or technical purposes [...] alone, in particular in conjunction with an intentional omission on the part of the Secretary-General not to utilize his power to transfer, reassign or reinstate such staff member”. And she claims that her break in service was not voluntary in that she was required to resign to start her new appointment with DSS.

29. The Dispute Tribunal agreed with Ms. Kulawat and found that “[i]n taking the decision to separate [she] was not acting on her own free will but was following what she had been told to do if she wished to take up the appointment at the United Nations Headquarters”; the “break in service occurred at the insistence of the Organization”. Based on these findings, the UNDT concluded that it was not lawful for the Administration to consider the break in service when evaluating Ms. Kulawat’s eligibility for conversion. Consequently, the UNDT rescinded the impugned decision, ordered the Administration to give Ms. Kulawat “full and fair consideration for conversion” and awarded her USD 7,000 as moral damages.

30. Judicial review of an administrative decision requires the Tribunal to examine whether the Administration reached its decision in a “reasonable and fair, legally and procedurally correct” manner.<sup>2</sup> In reviewing an administrative decision regarding a staff member’s eligibility for conversion, we have stated that 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”.<sup>3</sup>

31. The Appeals Tribunal finds that the UNDT did not properly review the impugned administrative decision to determine whether the Administration gave full and fair consideration to Ms. Kulawat’s suitability for conversion. We find that the Administration fully complied with Section 1 of ST/SGB/2009/10 and paragraph 5 of the Guidelines, as it must in considering whether a staff member is eligible for conversion. Thus, the UNDT made a significant error of law in concluding that the impugned decision was unlawful.

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<sup>2</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

<sup>3</sup> *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, para. 70 (emphasis in original).

32. The UNDT also erred in law when it refused to apply the Guidelines, which Ms. Kulawat had not challenged before the UNDT. In disregarding the Guidelines, the UNDT stated: “Even if the Tribunal were to accept that the Guidelines can be relied on for the



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Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2014 in Vienna, Austria.