



UNITED NATIONS DISPUTE TRIBUNAL

## **Introduction**

1. The applicant was selected for a temporary P-4 administrative officer post in the Office for the Coordination of Humanitarian Affairs (OCHA). The applicant's assignment ended when the incumbent of the post returned from mission. The applicant secured another temporary appointment, but was required by the Administration to take a three-day break in service before taking up her new appointment. The main issue in this case is whether the applicant was lawfully required to take a break in service between her two temporary appointments.

2. The parties consented to a consideration of this case without an oral hearing. In the circumstances several orders were issued for the purpose of verifying the respective contentions of the parties and for providing them with a sufficient opportunity of testing the other side's contentions and of preparing final submissions.

3. The applicant provided detailed particulars identifying individuals in comparable circumstances who were treated more favourably than she was. These examples were provided for the purpose of supporting her contention that there was an inconsistency in the application of the respondent's practice requiring breaks in service between one temporary contract and another. In an attempt to preserve the anonymity of these individuals, who are not directly involved in this case, their details will be omitted.

## **Background**

4. The applicant was appointed on 12 March 2003 to the United Nations Secretariat on a three-month fixed-term appointment at the P-3 level as a human resources officer with the Department of Peacekeeping Operations (DPKO). She



Case No. UNDT/NY/2009/058/JAB/2009/002

Judgment No. UNDT/2010/042

- d. The applicant's continuity rights could not be preserved retroactively once she took up the Galaxy post on 15 August 2008. At the time she was required to take the break in service between one temporary contract and another in the period of 5 to 7 May 2008 the recruitment process for the Galaxy post was ongoing.

### **Applicable legal principles**

#### *Former staff rule 104.14*

9. The Secretary-General set up central review bodies to give advice on the appointment and promotion of staff at various levels. One such body was established to give advice on the appointment, promotion and review of staff in the professional category up to the P-4 level.

#### Rule 104.14

##### Central review bodies

...

##### (h) *Appointment and promotion*

- (i) The central review bodies shall advise the Secretary-General on all appointments of one year or longer and on the promotion of staff after such appointment except in the following cases:

- (a) Appointment of persons recruited specifically for service with a mission.

#### *ST/SGB/2008/5*

10. Bulletin ST/SGB/2008/5 deals with the policy on the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority.

In so far as it is material to this case the following extracts are relevant:

The Secretary-General, for the purpose of ensuring that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and responsibilities in maintaining a

workplace free of any form of discrimination, harassment . . . and abuse of authority, promulgates the following:

### **Section 1**

#### **Definitions**

. . .

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. . . .

. . .

1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. . . .

#### **Relevant factual findings**

11. The applicant's lengthy period of employment within the UN has been interspersed with periods of breaks in service. For the purpose of this judgment two such breaks of service are material:

- a. In May 2006, the applicant moved from a mission replacement with DPKO to another mission replacement with OCHA.
- b.

procedure requiring staff members to endure a break in service is predicated by

to other staff and senior management who eventually overruled the Chief. By this time the damage to the applicant had been done. Such arbitrary and high handed action motivated by personal animosity constitutes an abuse of power.

16. The applicant's retirement from service is imminent and her loss of continuity of employment rights will affect her post retirement benefits in addition to the detrimental effect she has already experienced in relation to pre-retirement benefits that she would otherwise have been entitled to.

### **Break in service in 2006**

17. The applicant referred to a break in service in May 2006. She was ordered to provide details on the relevance of this issue to the instant case. In responding to this order, the applicant stated that this break in service occurred when she moved from DPKO to OCHA. She did not wish to go through the appeal process at the time because she was hoping for "a mutually beneficial resolution" because other members of staff were not asked to take a three-day break in service. Her concern was not addressed by OHRM. Since the applicant made a decision not to pursue a formal remedy at the time it is not open to her to seek a remedy in relation to this matter but to advance it as relevant background evidence in support of her contention of inconsistency of treatment. It has been taken into account.

### **Assessment**

18. The respondent has failed to provide convincing explanations and evidence to rebut the extraordinarily detailed descriptions provided by the applicant in relation to the comparable examples which resulted in more favourable outcomes for other staff members. In the circumstances I find that the practice that was adopted by the respondent at the material time was inconsistent. This would suggest an element of discretion in following the practice. If the



practice was mandatory, on what basis was the discretion exercised in those cases? Why was discretion not exercised in the applicant's case?

19. I have been invited by the applicant to consider the observations of Adams J in *Castelli* UNDT/2009/075 on the policy of mandatory breaks in service. As I have indicated I have not found such a policy and certainly no document has been produced recording it. If there is a policy on mandatory breaks in service, why has it not been produced in spite of the applicant taking issue on the matter? It would appear to be a rule of practice adopted across the UN clearly in order to get round the requirements of former staff rule 104.14, particularly paragraph (h). In doing so, managers have effectively undermined the policy which was introduced for very good reasons of transparency and ensuring adherence to proper standards of recruitment and selection. The break in service forced upon staff serves as a device to avoid the application of former staff rule 104.14. I agree with Adams J that this practice has the effect of depriving the staff members of their rights and benefits accruing from continuity of employment. However, this case has been decided on its own particular facts in the context of OCHA's customary practice.

20. In this case the respondent has failed to demonstrate a consistent application of the practice of enforced breaks in service between temporary contracts. Furthermore, the respondent has failed to rebut the allegations about the attitude and actions of the then Chief of Human Resources Section at OCHA in delaying the Galaxy recruitment process. These allegations are well documented and additionally supported by a convincing witness statement. I conclude on the basis of such evidence that the then Chief of Human Resources Section behaved in a high-handed and arbitrary manner to frustrate the applicant's legitimate aspirations by delaying the Galaxy recruitment process.

### **Compensation**

21. The respondent is ordered to compensate the applicant for all losses incurred as a result of the enforced break in service. The applicant is to be placed in the position as if there had been no such break in service in May 2008.

22. The applicant has asked for compensation for the anxiety and distress caused to her. I have no hesitation in concluding that the manner in which the applicant was treated by OCHA, aggravated by the exercise of an abuse of power by the then Chief of Human Resources Section, caused the applicant considerable distress, anxiety and uncertainty regarding her benefits upon retirement. Whilst the applicant is entitled to compensation for such distress caused, any such award should be compensatory and not punitive. I am required first to assess the degree to which she suffered injury to her feelings aggravated by the high handed behaviour and abuse of power by the Chief of Human Resources Section. Having done so, I am required to place a monetary value on this to compensate the applicant. Although the distress was considerable, it was not at the extreme top end of the scale of awards that may be made in such cases. The respondent is ordered to pay to the applicant, on or before 22 March 2010, the equivalent of two months' net base pay as compensation for distress and emotional injury.

23. On the material available to me I am unable to make a precise quantification of the remainder of the compensatory award. The parties are invited to agree compensation and to file a joint submission with the Tribunal stating that the parties have reached agreement.

### **Judgment**

24. The applicant's claim succeeds.

25. The respondent is ordered to pay to the applicant, on or before 22 March 2010, the equivalent of two months' net base salary for distress and emotional injury.

26. The parties are ordered to attempt to agree a remedy which places the applicant in the position that she would have been had she not been required to take a break in service in May 2008. On or before 26 March 2010 the parties are to file a joint submission stating whether they have reached an agreement.

*(Signed)*

Judge Goolam Meeran

Dated this 12<sup>th</sup> day of March 2010

Entered in the Register on this 12<sup>th</sup> day of March 2010

*(Signed)*

Hafida Lahiouel, Registrar, New York