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

6. On 6 July 2005, the Applicant was offered "a fixed-term appointment [at the S-1/1 level] for an initial period of si

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

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 for 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

(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:
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> a. A break in service of any duration prior to the date on which the staff member reached

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 1 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.

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 hire 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