



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/002

Judgment No.: UNDT/2013/087

Date: 11 June 2013

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar:

Introduction

1. By application filed with the Registry of the United Nations Dispute Tribunal in New York on 10 January 2011, the Applicant contested the decision that he was ineligible for consideration for conversion to a permanent appointment due to his breaks in service. The Applicant submits that he was reappointed within less than a month of each of his two breaks in service, in accordance with a letter of appointment that was signed prior to each break, with the resulting breaks having been induced for administrative purposes and that he was therefore eligible for consideration for conversion to a permanent appointment.

2. The Respondent claims that the breaks in service in the Applicant's employment history, which resulted in his non-eligibility for consideration for conversion to a permanent appointment, are breaks that occurred in the natural course of his contracts expiring.

Facts

3. On 7 October 2002, the Applicant joined the United Nations Interim Administration Mission in Kosovo ("UNMIK") on an appointment of limited duration. His contract was extended until his separation from service on 30 June 2003.

4. On 13 July 2003, the Applicant reported for duty to the United Nations High Commissioner for Refugees ("UNHCR") on a fixed-term appointment ("FTA") under the then 100 series of the Staff Rules.

5. On 30 July 2004, the Applicant accepted an offer of appointment on a FTA under the 100-series of the Staff Rules with the then United Nations Mission in the Democratic Republic of the Congo ("MONUC"). The Applicant separated from service with UNHCR on 31 August 2004 and reported for duty with MONUC nine days later, on 9 September 2004.

6. On 3 September 2004, the Applicant signed a “Sworn Statement by Former

11.

Respondent's submissions

13. The Respondent's principal contentions may be summarized as follows:
- a. The term continuous is clear and does not suffer from any ambiguity, meaning without interruption. The requirements are clearly expressed in 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, which states at para. 5(a) that "[a] break in service of any duration prior to the date on which the staff member reached the five years of qualifying service will interrupt the continuity of service";
 - b. The Applicant's breaks in service were not for administrative purposes but rather occurred in the natural course of business. There is no evidence that the Applicant was instructed to take any of the contested breaks in service.

Consideration

Applicable law

14. ST/SGB/2009/7 (Staff Regulations of the United Nations and provisional Staff Rules) states:

Rule 4.17

Re-employment

(a) A former staff member who is re-employed shall be given a new appointment unless he or she is reinstated under staff rule 4.18 below.

(b) The terms of the new appointment shall be fully applicable without regard to any period of former service, except when a staff member receives a new appointment in the United Nations common system of salaries and allowances less than twelve months after separation. In such cases, 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.

Rule 4.18

Reinstatement

(a) A former staff member who held a fixed-term or continuing appointment and who is re-employed under a fixed-term or a continuing appointment within twelve months of separation from service may be reinstated in accordance with paragraph (b) below.

(b) On reinstatement the staff member's services shall be considered as having been continuous, and the staff member shall return any monies he or she received on account of separation, including termination indemnity under staff rule 9.8, repatriation grant under staff rule 3.18 and payment for accrued annual leave under staff rule 9.9. The interval between sepa

b. As special leave without pay for a period of up to two years for a staff member who is the mother or father of a newly born or adopted child, with a possibility of extension for up to an additional two year

Rule 9.2

Resignation

(a) A resignation, within the meaning of the Staff Regulations and Staff Rules, is a separation initiated by a staff member.

(b) Unless otherwise specified in their letters of appointment, three months' written notice of resignation shall be given by staff members holding continuing appointments, thirty calendar days' written notice by those holding fixed-term appointments and fifteen calendar days' written notice by those holding temporary appointments. The Secretary-General may, however, accept resignations on shorter notice.

(c) The Secretary-General may require the resignation to be submitted in person in order to be acceptable.

...

Rule 9.4

Expiration of appointments

A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

...

Rule 9.6

Termination

Definitions

(a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.

(b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

15. ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) states:

Section 1

Eligibility

To be eligible for consideration for conversion to a permanent appointment under the present bulletin, a staff member must by 30 June 2009:

(a) Have completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules; and

(b) Be under the age of 53 years on the date such staff member has completed or completes the five years of qualifying service

Section 2

Criteria for granting permanent appointments

In accordance with staff rules 104.12 (b) (iii) and 104.13, a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible staff members who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the highest standards of efficiency, competence and integrity established in the Charter.

Section 3

Procedure for making recommendations on permanent appointments

3.1 Every eligible staff member shall be reviewed by the department or office where he or she currently serves to ascertain whether the criteria specified in section 2 above are met. Recommendations regarding whether to grant a permanent appointment shall be submitted to the Assistant Secretary-General for Human Resources Management.

3.2 A similar review shall also be conducted by the Office of Human Resources Management or the local human resources office.

3.3 In order to facilitate the process of conversion to permanent appointment under the present bulletin, recommendations to grant a permanent appointment that have th

the Secretary-General for approval and decision in respect of D-2 staff, and to the Assistant Secretary-General for Human Resources Management for all other staff.

3.4 In the absence of joint support for conversion to permanent appointment, including cases where the department or office concerned and the Office of Human Resources Management or local human resources office both agree that the staff member should not be granted a permanent appointment, the matter shall be submitted for review to the appropriate advisory body designated under section 3.5 below. The purpose of the review shall be to determine whether the staff member concerned has fully met the criteria set out in section 2 of the present bulletin. The advisory body may recommend conversion to permanent appointment or continuation on a fixed-term appointment.

3.5 For the purpose of this section, the appropriate advisory body shall be:

(a) For staff at the D-2 level, the Senior Review Group;

(b) For staff at the P-5 and D-1 levels administered by offices located in New York, Geneva, Vienna and Nairobi, the advisory body shall be the Central Review Board established at the location. Staff members serving at other locations shall normally be considered by the Central Review Board in New York but may be referred to another Board in order to expedite the process;

(c) For staff at the P-2 to P-4 levels administered by offices located in New York, Geneva, Vienna, Nairobi, Addis Ababa, Bangkok, Beirut and Santiago, the advisory body shall be the Central Review Committee established at the location. The Central Review

16. ST/AI/2010/4 (Administration of temporary appointments) states:

Section 14

Successive temporary appointments

14.1 Upon reaching the limit of service under one or under several successive temporary appointments within a period of 364 days as set out under section 2 above or, exceptionally, 729 days under section 15 below, the staff member shall be required to have a break in service of a minimum of three months before

an initial requirement for the process defined in ST/SGB/2009/10 to even be applicable, and as expressed by the title and also by secs. 3.4 and 3.7 of ST/SGB/2009/10, be currently appointed on an FTA with the United Nations Secretariat.

24. Therefore, for a staff member to be eligible for consideration for conversion to a permanent appointment he or she must:

- (1) Be on a fixed-term appointment at the time of consideration;
- (2) The fixed-term appointment is with the United Nations Secretariat;
- (3) Have completed at least five years of continuous service by 30 June 2009;
- (4) The continuous service was completed on fixed-term appointments under the 100 series of the Staff Rules;
- (5) On the date the staff member completed the five years of qualifying service he or she was under the age of 53.

25. These requirements are cumulative and it is only once all of them have been met that a staff member can actually be considered eligible for conversion to a permanent appointment.

26. In the present case, the Applicant, who was born on 1 July 1967, was 43 when he enquired about his eligibility for conversion to a permanent appointment. He was therefore under the age of 53 while he was employed on an FTA under the 100 series of the Staff Rules.

27. The Tribunal must therefore consider whether, by 30 June 2009, the Applicant had completed five years of continuous service on an FTA under the 100 series of the Staff Rules.

33. ST/AI/2010/4, which was implemented on 27 April 2010, introduced mandatory breaks in service between temporary appointments. Section 14.1 states:

Upon reaching the limit of service under one or under several successive temporary appointments within a period of 364 days as set out under section 2 above or, exceptionally, 729 days under section 15 below, the staff member shall be required to have a break in service of a minimum of three months before being eligible for

that “in the case of separation following a mutually agreed termination of appointment, unless otherwise specified in th

40. Staff rule 4.17(b) regarding re-employment must be read and interpreted in connection with staff rule 4.18 which focuses on reinstatement. These staff rules state:

Rule 4.17

Re-employment

...

(b) The terms of the new appointment shall be fully applicable without regard to any period of former service, except when a staff member receives a new appointment in the United Nations common system of salaries and allowances less than twelve month after separation. In such cases, 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.”

Rule 4.18

Reinstatement

(a) A former staff member who held a fixed term or continuing appointment and who is re-employed under a fixed-term or a continuing appointment within twelve months of separation from service may be reinstated in accordance with paragraph (b) below.

(b) On reinstatement the staff members services shall be considered as having been continuous, and the staff member shall return any monies he or she received on account of separation, including termination indemnity under staff rule 9.8, repatriation grant under staff rule 3.18 and payment for accrued annual leave under staff rule 9.9. The interval between between separation and reinstatement shall be charged, to the extent possible, to annual leave, with any further period charged to special leave without pay. The staff member’s sick leave credit under staff rule 6.2 at the time of separation shall be re-established; the staff member’s participation, if any, in the United Nations Joint Staff Pension Fund shall be governed by the Regulations of the Fund.

(c) If the former staff member is reinstated, it shall be so stipulated in his letter of appointment.

50. Therefore, the Applicant's 9 August 2012 statement that he was advised by human resources personnel from UNHCR in May 2003 and from MONUC in June 2006 to resign is not relevant to the case.

51. The Applicant was not eligible for consideration for conversion to permanent appointment, because one of the cumulative conditions of ST/SGB/2009/10, to have five years of continuous service before 30 June 2009, was not fulfilled. The contested decision is lawful.

Conclusion

52. **In the view of the foregoing, the Tribunal DECIDES:**

53. The application is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 11th day of June 2013

Entered in the Register on this 11th day of June 2013

(Signed)

Hafida Lahiouel, Registrar, New York