Introduction

1.

7. On 4 May 2007, the Applicant was seconded from ILO to the United Nations Secretariat under the terms of the IAMA and the Memorandum of Inter-Organization Exchange ("MIOE") for a two-year period during which she served as the Chief of Planning (at the P-5 level) in the Compliance and Monitoring Section of the Procurement Division in the Department of Management ("DM").

8. On 12 February 2009, per the terms of the IAMA and the MIOE, the ILO requested that the Applicant either return to ILO at the end of her secondment or accept a full-time transfer to the United Nations Secretariat. At the same time, the Procurement Division requested that the Applicant transfer to the United Nations Secretariat. On 4 May 2009, the Applicant's transfer from ILO to the UN was completed.

9. On 22 September 2009, following the June 2009 promulgation of ST/SGB/2009/10, the Applicant wrote to the Executive Office of DM requesting the conversion of her fixed-term appointment to a permanent appointment.

10. On 30 June 2010, the Applicant was notified by DM that she was not eligible for conversion to permanent appointment because her prior service with ILO was not "governed by UN Staff Rules and Regulations". The next day the Applicant requested that her request be reconsidered.

11. On 2 July 2010, the Applicant was informed that the Office of Human Resources Management ("OHRM") had stated "that while you may be on the 100 Series Staff Rules in the ILO, the 100 Series Staff in ILO is different from those in the UN Secretariat. As such, your conversion cannot be approved". In response to a request for the statutory basis on which this decision was based, the Applicant was informed that

> Several specialized agencies, including ILO, are not governed by the UN Staff Regulations and Rules. As a result, your prior ILO service cannot be considered for the purpose of eligibility to conversion to permanent appointment.

12. On 27 August 2010, the Applicant requested management evaluation of the decision that she was not eligible for consideration for conversion to permanent appointment. On 22 September 2010, the Management Evaluation Unit ("MEU") upheld the contested decision.

13. On 30 November 2010, the Applicant filed an application before the Dispute Tribunal and the Respondent filed his reply on 30 December 2010. In August 2012, both parties, in response to Case Management Order No. 148 (NY/2012) agreed to have the present case disposed of on the papers.

e. A review of the mandatory language contained in former staff rule 104.12(b)(iii) and sec. 3.1 of ST/SGB/2009/10 confirms that any staff member who meets the eligibility criteria will be considered for permanent appointment. Consequently, the only possible interpretation of such texts is that staff members who meet the eligibility requirements are entitled to consideration and, *ipso facto*, this is an entitlement;

f. To deny her the right to be considered for conversion to permanent appointment violates the terms of the IAMA and MIOE, the adoption of which was specifically made to favor the mobility of staff members between the Organization and related entities of the United Nations Common System;

g. Had she stayed with ILO, she would have been, under ILO Circular, Series 6, No. 407 of 8/12/1998, eligible for conversation to permanent appointment at ILO. Consequently, the Applicant contends that if there is any ambiguity with regard to the interpretation of the various rules and regulations then they should be construed in her favor as she would be "the party with the least bargaining power" and also expressly relied on the fact that her ILO service would be recognized by the United Nations;

h. Further, while several organizations, such as ILO, have express language that state that their organization preclude them from recognizing a staff member's service with another organization, the United Nations does not have any such clear express limitations on its books;

i. Based on her competencies and her exemplary track record, but for the denial of this right "the likelihood that [she] would have been granted such a conversion is extremely high". Therefore, the denial of her right of conversion results in her suffering injury.

Respondent's submissions

15. The Respondent's principal contentions may be summarized as follows:

a. The Applicant's candidature was fully considered in relation to the applicable staff rules and policies which required that staff members in active service have "completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules";

b. Section 5(d) of the "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009", which refers to the performance of service in an outside entity, states that such service must have been completed under the 100 series of the United Nations staff rules;

c. The Applicant's service at ILO was not performed under the 100 series of the United Nations Staff Rules but rather under the staff regulations and rules of ILO and cannot therefore be counted against the requirements set out by ST/SGB/2009/10;

d. Unlike the United Nations, ILO is not governed by the United Nations staff rules and is not a subsidiary organ as understood by art. 7 of the Charter. Indeed, ILO has its own separate constitution, staff regulations and rules and its staff members are not appointed by the Secretary-General of the United Nations;

e. As of 30 June 2009, the Applicant had only served approximately two years and two months as a staff member under the United Nations staff rules;

f. The Applicant's interpretation and reliance on the provisions of the MIOE is mistaken. Upon being transferred to the United Nations in May 2007, the Applicant was notified that her secondment "would be governed by the Regulations and Rules of the UN" which includes the

eligibility for consideration to a conversion to a permanent position. However, para. 5 of the MIOE, which refers to benefits and entitlements, states that

> Service in the ILO shall be counted for all purposes, including credit towards within-grade increments, as if it had been made in the UN at the duty station where [the Applicant] actually served. Upon return of [the Applicant], the recognition of any changes in [the Applicant's] status (such as promotions, contract type, etc.) while at the UN shall be at the discretion of the ILO. Service in the UN shall be counted as service in the ILO.

This provision does not govern the issue of determining a staff member's years of service within the contractual relationship between the Applicant and the United Nations. The MIOE is purely limited to the question of benefits and entitlements which is an umbrella under which a staff member's contractual status does not fall;

g. Upon returning to ILO any change in a staff member's contractual status, such as promotion, would be at the discretion of ILO which further supports the fact that it is not a benefit or entitlement;

h. More importantly, even if one was to consider titlersion t was tp51 Tw9c0 Twu8.96.

> 5.15 - With respect to an exchange governed by the Regulations and Rules of the Receiving Organization, service in the Releasing Organization shall be counted for all purposes, including credit towards within-grade increments, as if it had been made in the Receiving Organization at the duty station where he/she actually served. Upon return of the staff member, the recognition of any changes in his/her status (such as promotions, contract type, etc.) while at the Receiving Organization shall be at the discretion of the Releasing Organization.
>
> 5.16 - With respect to an exchange governed by the Regulations and Rules of the Releasing Organization, service in the Receiving Organization shall be counted as service in the Releasing Organization.

18. ST/SGB/2009/6 (Staff Regulations of the United Nations) states:

> Scope and purpose
>
> … For the purposes of these Regulations, the expressions "United Nations Secretariat", "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter. The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary.

Receivability

19. The present case meets all the receivability requirements identified by art. 8 of the Tribunal's Statute.

Contractual relationship

20. Article 1.1 of ILO staff rules states that staff members appointed within that organization are "subject to the authority of the Director-General". Consequently, during the relevant time period prior to being seconded to the United Nations,

with the Receiving Organization" as "from the date of transfer" applied, resulting in the conditions of her employment being governed by the United Nations Staff Rules.

21. The Applicant maintains that as a former staff member of ILO who moved to the United Nations under the terms of the IAMA, she met the eligibility requirements of the conditions provided for under section 1 of ST/SGB/2009/10.

22. ST/SGB/2009/10 states that only staff members appointed on fixed-term contracts under the 100 series of the United Nations Staff Rules are considered eligible for the purpose of conversion to a permanent appointment. As such, while both organizations issue 100 series types contracts, the ones available to staff members of ILO do not fall in the category of contracts that are considered as applicable for consideration for a fixed-term appointment as they are not governed by the United Nations Staff Rules nor are they provided to the staff member by the Secretary-General of the United Nations.

23. The question posed by this case is therefore whether the application of art. 5.1 of the IAMA which states that "Service in the Releasing Organization shall be counted *for all purposes*, including credit towards within-grade increments, as if it had been made in the Receiving Organization" (emphasis added) means that the United Nations, the receiving organization, should recognize the Applicant's prior service on a 100 series contract governed by the ILO staff rules, as if it had been performed under a 100 series contract governed by the staff rules of the United Nations, thereby resulting in the Applicant fulfilling the eligibility requirements for consideration for conversion to permanent appointment.

24. A review of art. 5 of the IAMA cannot be conducted in a vacuum without taking into consideration the remainder of the mobility agreement whose purpose is to, among other, "open […] up a wider scope of opportunity for personal and professional growth and career development".

25. Within the IAMA, the heading for art. V is "Benefits and Entitlements" which has to be read in conjunction with, yet also distinguished from, art. IV titled "Terms Governing the Relationship between the Staff Member and the Organizations".

26. The purpose of the IAMA was to govern the Applicant's employment during the period she was seconded to the United Nations starting on 4 May 2007. Upon being seconded, the Applicant was provided with a 100 series contract under the United Nations staff rules and, as part of the process of establishing their contractual relationship during that period, as well as based on the terms of the IAMA, the Applicant was provided with certain guidelines, namely that for items such as benefits and entitlements the receiving organization shall recognize the employee's service at the releasing organization.

27. The rationale behind art. V appears to be that staff members being seconded to another organization should not lose the rights to the benefits and entitlements that they accrued through service in either the releasing or the receiving organization.

28. In addition to being listed under the heading of benefits and entitlements, art. 5.1 is also listed under the sub-heading titled "Service Credits". A service credit serves the purpose of acknowledging, providing credit for, recognizing the performance of, work that was previously performed, in this case in another organization.

29. Similarly, art 5.15 and 5.16 of the IAMA provide for service credits during inter-organization exchange.

30. The language of art 5.15 is of particular relevance as, in addition to also stating that "service in the Releasing Organization shall be counted *for all purposes*, including credit towards within-grade increments, *as if* it had been made in the Receiving Organization at the duty station where he/she actually served" (emphasis added), it actually also adds that the recognition of "any changes in his/her status (such as promotions, contract type, etc.) while at the Receiving Organization shall be at the discretion of the Releasing Organization".

31. The IAMA therefore clearly distinguishes benefits and entitlements that a staff member may receive through the performance of the contract when with the other organization from a change in contractual status that may occur during that same period.

32. Recognizing that the performance of a contract has been performed “as if”, that is to say "equivalent to”, having been performed within another organization for purposes of obtaining service credits is not akin to saying that the terms governing the relationship between the staff member and the loaning organization shall be recognized as being the same as the ones between the staff member and the receiving organization.

33. Consequently, while the IAMA requires the receiving organization to recognize a staff member’s service in the releasing organization for “credit” purposes, it does not require it to consider that the performance of the contract in the releasing organization was undertaken in a setting other than in its original one as it provides each organization with the opportunity of rejecting any contractual changes not related to benefits and entitlements.

34. Even if one was to interpret the IAMA and the terms “as if” as applying to the contract, in and of itself the concept of equivalency that attaches to that terminology does not indicate that the authority that previously applied to that contract, namely the staff rules, would also be replaced.

35. A similar analysis can be put forward with regard to the terminology “for all purposes”. Indeed, stating otherwise would potentially open the receiving organization to becoming the ruling authority for administrative decisions that were taken by a different authority under different staff rules. While it is fully understandable that under the goals of the IAMA the participating organizations would not want their staff members to lose the “benefits and entitlements” they accrued in one setting when moving to another, whether related to salary or pension benefits, they surely did not intend to become the authority responsible for decisions

that were taken in a setting out of their control, whether they be administrative decisions relating to appointments or disciplinary sanctions.

36. Consequently, with regard to a contractual relationship that was previously set under a different set of staff rules, the new authority or receiving organization does not have the power or the responsibility of considering that the type of contract or any related administrative decisions taken in relation to it occurred under its own staff rules.

37. It is therefore apparent that, even if applying the principle of equivalency raised by the IAMA as well as the concept that the Applicant was considered, for all purposes, to have been employed for over five years at the United Nations, her contract was neither under the control of the Secretary-General of the United Nations nor did the staff member have to answer to the United Nations staff rules prior to actually joining the United Nations. Such an interpretation would be in line with art. 4.3 of the IAMA which clearly defines the point at which the contractual relationship with the other organization starts, namely "[a]s from the date of transfer".

38. The Tribunal can only conclude that the Applicant, who by 30 June 3009 had

Conclusion

39. The application is dismissed.

(*Signed*)

Judge Alessandra Greceanu

Dated this 7th day of November 2012

Entered in the Register on this 7th day of November 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York