
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/067

Judgment No.: UNDT/2014/108

Date: 31 July 2014

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

HAJDARI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Introduction

1. The Applicant contests and seeks the rescission of the decision that he was ineligible for consideration for conversion to a permanent appointment due to him having taken a break in service in 2005 resulting in his service with the Organization not being continuous.

Procedural history

2. By email dated 4 March 2011 and received on 7 March 2011, the Applicant was notified that as a result of a 10-day break in service between 3 and 13 June 2005, he was not eligible for consideration for conversion to permanent appointment.

3. On 6 May 2011, the Applicant requested management evaluation of the contested decision and, by letter dated 12 July 2011, he was informed that the Secretary-General had decided to uphold the decision.

4. The Applicant appealed the decision to the Dispute Tribunal on 17 August 2011 and the Respondent filed his reply on 19 September 2011.

5. By Order No. 344 (NY/2013), dated 17 December 2013, the Tribunal requested that the parties submit a joint statement identifying the agreed and disagreed facts and legal issues in this case. The Tribunal further requested that the parties inform it as to whether they required the production of additional documents, an oral hearing, whether the case would benefit from being suspended for the purpose of pursuing informal proceedings and if there were any other issues that needed to be brought to the Tribunal's attention.

6. On 4 February 2014, the Respondent submitted a request for leave to file additional documents and the parties' joint submission was filed on 7 February 2014.

day. [The Applicant]'s entry level status was soon thereafter corrected to S-2/1. He has since served on consecutive fixed-term appointments.

8. In an email dated 4 March 2011- received on 7 March 2011, [an] Administrative Assistant, Executive Office, [United Nations Department of Safety and Security], notified [the Applicant] that as a result of the break-in-service between 3 June and 13 June 2005, he was not eligible to be considered for conversion to a permanent appointment under ST/SGB/2009/10.

9. On 9 March 2011, [the Applicant] emailed [...] Human Resources, Section C, [Office of

the post, should be duly taken into account;

11. 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 el

weeks or days paid for prior periods of service, does not exceed the total of months,

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 conditions established by the Secretary-General.

(b) On reinstatement the staff member's services shall be considered 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 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 or her letter of appointment.

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

16. Section 1 of ST/SGB/2009/10 defines the eligibility requirements that have to be met by a staff member wishing to be considered for conversion to a permanent appointment. Namely, a staff member must, as of 30 June 2009, have completed or complete five years of continuous service on fixed-term appointments under 100 series of the Staff Rules and be under the age of 53 years.

17. Sections 2 and 3 of ST/SGB/2009/10 establish the procedure that has to be

24. As results from the evidence, the Applicant, by letter dated 1 June 2011, resigned from his post with UNMIK due to him having been recruited at UNHQ New York as Security Officer, a position which is considered to be 'locally recruited'. The Applicant's letter stated that his resignation would be effective as of 3 June 2005.

25. The Applicant, due to being considered a locally recruited staff at UNHQ in New York, had to organize his own travel arrangements from UNMIK to New York. Taking into consideration that the Applicant sent his resignation letter on 1 June 2005 (Wednesday), effective from 3 June 2005 (Friday), that 4-5 June were a weekend, that he obtained his visa to travel to New York on 10 June 2005 (Friday), and that he travelled from Kosovo to New York on 12 June 2005 (Sunday), the Tribunal considers that he acted in good-faith and as a diligent person.

26. It was not until the Applicant was informed by the Organization on 4 March 2011 that he was not eligible for consideration for permanent appointment that he became aware that the aforementioned period of 10 days would be considered a break in service.

27. As part of his 9 March 2011 request for reconsideration of his non-eligibility, the Applicant expressed that the purpose of this break in service was to enable him to "come a week before [his] new assignment in order to set up a new life. [The Applicant] never left UN per se, and believe that [he] should be considered for this conversion".

28. The Tribunal finds that the Applicant truly believed that in order to be able to report for duty on 13 June 2005, as required by his new terms of appointment, he had to resign from UNMIK prior to the expiration of his FTA. The date of expiration of the Applicant's contract with UNMIK, 30 June 2005 was known to the Organization prior to them providing him with a new offer of appointment. It is clear that as the Applicant's employer, the United Nations was aware that an acceptance of the new FTA with UNHQ was only possible if the appointment with UNMIK was to end prior to its expiration date of 30 June 2005. The Applicant accepted the terms of his new

appointment, including the 15 June 2005 start date, of his functions at the UNHQ and it appears that the sole purpose of his resignation was as a result of his acceptance of the new offer. Due to the Applicant being considered as a local hire for the purpose of this new appointment, the Applicant was required to make his own travel arrangements between his home country and UNHQ.

29. Both contractual parties were aware once the letter of 28 May 2005 from the Chief, General Service and Related Categories Staffing Unit, OSD /OHRM was accepted and signed on 31 May 2005 that the Applicant will be re-employed under a fixed term appointment within twelve months from his separation.

30. According with the legal provisions, any former staff member who is re-employed within twelve months from his/her separation from service may be reinstated. Consequently, a staff member re-employed within twelve months has the right to be considered for reinstatement and the Organization has the correlative obligation to analyze and determine if the staff member is to be reinstated. The Tribunal underlines that while a staff member does not having a legal right to be reinstated, because the legal provision is expressly indicating that the Organization has the discretion to decide on individual base if a staff member is to be reinstated, as indicated in the Tribunal's jurisprudence such a discretion must be exercised in a reasonable manner and with good faith. Also, a staff member has the right to be informed of what are the reasons for denying the reinstatement.

31. The Tribunal considers, taking into consideration the Applicant's resignation letter, his request for reconsideration of the decision that he was not eligible for consideration to permanent appointment and the content of his request for management evaluation, that the Applicant truly believed that the acceptance of his new FTA with the same employer prior to his resignation would not affect the continuity of his service and that his resignation was only a procedural formality required to enable him to relocate from UNMIK to UNHQ in New York.

32. The Tribunal considers that the contractual parties in a labour contract must respect their rights and obligations imposed by the general legal principles of law: the

25. Past practices cannot and do not substitute for an administrative issuance establishing conditions for reinstatement within the requirement of Staff Rule 4.18(a).[footnote omitted] Similarly, “conditions” set by managers that are not part of a published promulgation can prejudice a staff member and subject him or her to the personal opinions of the manager making the decision.

26. The Secretary-General’s failure to implement an administrative issuance establishing “conditions” for reinstatement, as required by Staff Rule 4.18(a), resulted in the Administration’s decision being an unlawful decision which was inconsistent with Staff Rule 4.18(a). Accordingly, the UNDT did not make an error of law when it found that the Administration’s decision not to reinstate Mr. Eggesfield was unlawful and should be rescinded.

27. Generally, when the Administration’s decision is unlawful because the Administration, in making the decision, failed to properly exercise its discretion and to consider all requisite factors or criteria, the appropriate remedy would be to remand the matter to the Administration to consider anew all factors or criteria;[footnote omitted] it is not for the Tribunals to exercise the discretion accorded to the Administration. However, in the present case, remand is not available because Mr. Eggesfield has retired from service with the Organization. Thus, based on the Administration’s failure to lawfully consider his request for reinstatement and to comply with Staff Rule 4.18(a), the Appeals Tribunal awards moral damages to Mr. Eggesfield in the amount of USD 5,000.

36. The Tribunal notes that in the absence

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41. The Tribunal notes that in order to respect employees' fundamental right to be informed promptly and correctly about all their contractual rights and obligations, the Organization is expected to act in good-faith and conduct in advance, before the administrative issuance establishing the conditions for reinstatement under staff Rule 4.18 (a) will be adopted, a review of all cases involving staff members re-employed within one year after a break in service and to give a full and fair consideration to each case after promulgation. For an equal treatment of all staff members, the Tribunal recommends for the review to include also cases where staff members requested reinstatement and the request was denied, since the absence of the conditions for reinstatement affected the lawfulness of such decisions. Further, the Organization is to analyze the impact of the lack of denial of reinstatement upon other related matters, for example the eligibility and suitability of each concerned staff member for consideration for conversion to permanent appointment and to review, when necessary, the previous negative decisions by considering him/her eligible and/or granting retroactively a permanent appointment.

Conclusion

In the light of the foregoing, the Tribunal DECIDES,

42. The application is granted.

43. The Applicant's request for reinstatement and the decision not to consider him eligible for conversion to permanent appointment are remanded to the Administration for reconsideration, based on the decision regarding his reinstatement.

(Signed)

Judge Alessandra Greceanu

Dated this 31st day of July 2014

Entered in the Register on this 31st day of July 2014

(Signed)

Hafida Lahiouel, Registrar, New York