UNITED NATIONS DISPUTE TRIBUNAL

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ROCKCLIFFE

v.

SECRETARY-GENERAL

Facts

5. This is an unusual case in which what happened factually is not always or entirely consistent with the documentary evidence. Due to the nature of this matter, therefore, the facts need to be set out in some detail, together with various correspondences.

6. The Applicant joined the Organization on 1 June 1992 and thereafter served continuously on a series of fixed-term appointments in the General Service ("G") category, the latest at the G-7 level.

7. On 1 December 2008, the Applicant, then at the G-7 level in the Field Budget and Finance Division, DFS, was released on temporary assignment to encumber the post of Budget Officer in the Professional category, P-3 level, in MINUSTAH. The initial assignment period of three months was subsequently extended to 31 May 2009.

8. Whilst on this temporary assignment, the Applicant was selected for the position of Budget Officer, Field Service ("FS") category, FS-6 level, at MINUSTAH on 22 April 2009.

9. On 13 May 2009, the Applicant left Haiti for New York, returning to Haiti on 5 June 2009. According to the Applicant, this was a vacation she took to see her family, and she used a combination of rest and recuperation ("R&R") days and annual leave days during that period. The Applicant testified that she has not been reimbursed for the trip.

10. On 21 May 2009, the Applicant sent an email to the Human Resources Assistant, confirming that they had a "short chat" and that "[u]p to this point it has been [the Applicant's] intention to resign and take the FS post[,] however due to all the changes [she] would like to review the terms before taking the step". The Applicant testified that her reference to "all the changes" was about being given an appointment of limited duration, which she wanted to discuss.

11.

15. Early morning on Monday, 1 June 2009, the Applicant sent an email to DFS, stating:

> You may know that I accepted a Budget Officer position at MINUSTAH last week. [The Human Resources Assistant] has notified m[e] that there needs to be a break in service in view of my current level.
>
> Kindly therefore work out with FPD the effective date of my separation from FBFD, and related matters, in order that I may return to the mission this Friday, 5 June [2009] as per my airline ticket and so as also to ensure my being [in] the mission to conduct a training planned for the next week.

16. The Human Resources Assistant confirmed to the Applicant by email later that day that she would be required to take a break in service of either three or seven calendar days prior to her new appointment, pursuant to a facsimile issued on 30 August 2006 by the Chief, Personnel Management Support Service, DPKO, to all Chief Administrative Officers and Directors of Administration of DPKO missions ("facsimile of 30 August 2006").

17. The Human Resources Assistant testified that it was, however, clear to her at the time that the Applicant "was not acting" the break in service requirement.

18. The Applicant thereafter submitted her

> 22 June 2005] which was quoted in the Staff Rules. Therefore I have stated my preference for continuous service in the letter and the issue can be resolved later and any necessary adjustments made.

19. According to the Applicant, on or around 3 June 2009, she had conversations with the Deputy Chief, Field Personnel Operations Section, FPD, and the Human Resources Assistant, and requested that an exception be made to the requirement of a mandatory break in service for General Service staff transferring to field service appointments. On 3 June 2009, the Applicant, by email to the Deputy Chief, Field Personnel Operations Section, FPD, stated:

> I had called you to seek advice and clarification regarding the break in service which I am told is mandatory for me to take, upon conversion from General Service to the Field Service.
>
> As requested here are the details which are relevant to my situation:
>
> …
>
> – [I] [w]as first told that I had to take a 3 day break and then later receive a call that the break would be 7 days. After researching this, I was told that there is an option to take 3 days [break in service] and therefore not receive a non-removal entitlement on return to HQ.
>
> – As I was printing my resignation, a colleague saw the document and advised me that I should not be taking any break—she then showed me an email from another staff member in the Field who had also converted but had questioned and received a positive outcome regarding this policy in that she was separated from HQ on one date and started with the mission effective the very next day.
>
> – Because of the timing I will be first converted to 300-series [i.e., appointment of limited du 0.1avb
>
> –

24. On 7 July 2009, the Executive Office of DPKO/DFS (these two departments share one Executive Office) emailed the Human Resources Assistant, stating that the Executive Office was unable to place the Applicant's replacement against her post because the Applicant was still encumbering it.

25. In support of the contention that the Applicant agreed to take a break in service, the Respondent relied on an alleged agreement to convert her R&R and annual leave travel to travel on completion of her term with MINUSTAH (check-out travel). On 7 July 2009, the Human Resources Assistant, wrote to the Executive Office of DPKO/DFS, with a copy to the Applicant, stating that the Applicant had agreed to consider her travel on R&R as check-out travel, so that a seven-day break in service would apply. The Human Resources Assistant stated:

> In [accordance] with the [Standard Operating Procedure], we have to observe a 7-day break-in-service for [the Applicant], given that she agreed to consider her travel on R&R as check-out travel on completion of detail with MINUSTAH.
>
> As the [Human Resources] Transition [personnel action form] has been approved [effective] 1 July 2009, kindly arrange to have it rescinded, in order for her separation to take effect close of business on 28 May 2009.

26. The Applicant expressed her strong disagreement with the above suggestion in an email sent to the Human Resources Assistant on 9 July 2009, stating (emphasis in original):

> Now that I am being told I have to re-apply for health insurance that I have held for 17 years. I [happened] to be now re-reading your email and am very surprised. I absolutely NEVER AGREED to have my R&R travel as check out travel. I cannot even imagine when you could have gotten this impression.
>
> Please explain.

27. The Tribunal finds on the documentary and oral evidence that no agreement had been reached that the Applicant would take a seven-day break in service and that

28. The Applicant was subsequently informed by the Human Resources Assistant on 27 July 2009 that FPD was "not in a position to waive the [break in service] requirement" and asked to state her preference "between one of two options, i.e., 3 days [break in service] (no repat[riation] travel) or 7 days (with reimbursement of your initial R&R travel at own expense as one-way repat[riation] travel combined with reappointment travel to MINUSTAH)".

29. The Applicant did not reply to the email of 27 July 2009.

30. On 25 July 2009, the Applicant requested management evaluation of the decision to "require her to take a break in service" and the decision to "transfer her from a 100-series contract to a 300-series contract [i.e., appointment of limited duration] for [26] days in June of 2009 until the new Provisional Staff Rules went into effect on 1 July 2009".

31. The Applicant was informed of the outcome of the management evaluation by letter dated 10 September 2009, which stated that the contested decisions did not violate her terms of appointment or contract of employment.

32. The Applicant was subsequently informed by letter of 6 October 2009 from the Acting Executive Officer, DFS, that her separation from service from her General Service-level contract would take effect retroactively on 28 May 2009.

33. The Human Resources Assistant told the Tribunal that the Administration "never really took action on any of the administrative requirements, personnel actions raised to regularize [the Applicant] until November [2009]". She said all administrative arrangements were processed only after the receipt of the decision of the Under-Secretary-General for Management on the outcome of management evaluation.

34. According to the Respondent, the Applicant's separation from her General Service appointment, effective 28 May 2009, was only processed on

30 October 2009. The Applicant's appointment of limited duration, from 5 to 30 June 2009, was processed by the Administration on 4 November 2009.

Applicant's submissions

35. The Applicant's principal contentions may be summarised as follows:

a. The policy for a break in service for a General Service-level staff member appointed under a fixed-term letter of Service contract has no basis in law. Further, even if the policy were permitted, the break in service was incorrectly applied to her retroactively despite the fact that she remained a staff member at all relevant times. Although the Applicant was on annual leave and R&R during late May and early June 2009, she was still in a

roundtrip was regarded as repatriation on completion of her temporary assignment;

b. With respect to the matter of the appointment of limited duration from 5 to 30 June 2009, the Respondent submits that the appointment of the Applicant complied with the relevant policies and procedures of the Organization. The Applicant accepted the offer for an appointment of limited duration in full knowledge of its legal nature;

c. The Applicant has provided no evidence of requesting an exception to be made under former staff rule 112.2(b), either in relation to the break in service or to the appointment of limited duration. In any event, the Administration evaluated the Applicant's comments at the time they were made and found no reason to deviate from the established policies and procedures, which was explained to the Applicant in a reasoned response.

Consideration

Break in service

Breaks in service and the contractual scheme

37. In the United Nations context, a break in service is, in essence, a certain period following the ending of a contract during which a person cannot be employed by the United Nations. The decision to impose a break in service is intrinsically linked to the staff member's contract as this period commences immediately after the end of the contract and continues for some time prior to the new appointment (*Villamoran* UNDT/2011/126, *Garcia* UNDT/2011/189, *Neskorozhana* UNDT/2011/196). A break in service also has the effect of interrupting continuous appointment.

38. A number of recent cases have dealt with the issue of breaks in service. Two legislative developments also took place in the recent years. Below is a brief outline of the recent case law and legislative developments.

39. On 13 November 2009, the Dispute Tribunal rendered *Castelli* UNDT/2009/075. In *Castelli*, the Administration attempted to impose a retroactive break in service on a staff member who served on temporary appointments that—due to the Administration's error—continued for two consecutive years, without him actually taking any such break in service, allegedly contrary to the rules or practices that existed at the time. The Tribunal found that the Administration's decision to impose a retroactive break in service was unlawful as it lacked proper legal basis and had the purpose of depriving him of his accrued benefits. In *Castelli* 2010-UNAT-037, rendered on 1 July 2010, the United Nations Appeals Tribunal affirmed *Castelli* UNDT/2009/075, finding that "the administration may not subvert the entitlements of a staff member by abusing its powers, in violation of the provisions of the Staff Regulations and Staff Rules".

40. On 12 March 2010, the Dispute Tribunal rendered *Gomez* UNDT/2010/042. This case concerned a staff member who was required by the Administration to take a three-day break in service between two temporary assignments. The Tribunal found for the staff member, stating that the Respondent had failed to provide any evidence of a lawful policy on mandatory breaks in service or to demonstrate a consistent application of the alleged policy.

41. Following *Castelli* and *Gomez*, on 27 April 2010, the Under-Secretary-General for Management promulgated administrative instruction ST/AI/2010/4 (Administration of temporary appointments), introducing the break in service requirement between consecutive temporary appointments exceeding 364 days or, in exceptional cases, 729 days.

42. On 12 July 2011, the Dispute Tribunal issued *Villamoran*. This case concerned a staff member whose fixed-term appointment had expired and who was

expected to continue working on a temporary appointment. The Administration required her to take a break in service of 31 days after the expiration of her fixed-term appointment and prior to her employment on a temporary contract, and the staff member filed an application for suspension of action of that decision. The Tribunal found that the break in service requirement between fixed-term and temporary appointments was based on a memorandum issued by the Assistant Secretary-General for OHRM, which was not a properly promulgated administrative issuance. The Tribunal found that, in the absence of a properly promulgated administrative issuance, for staff "who [were] being re-appointed under temporary appointments following the expiration of their fixed-term appointments, there [was] no requirement, in law, to take a break in service—be it 1 day or 31 days—prior to the temporary appointment". The Tribunal found that the break in service requirement was a significant, material contractual provision and that, to be considered part of the contract, it had to be introduced by properly promulgated administrative issuances.

43. Following *Villamoran*, the Administration permitted the extension of staff on fixed-term appointments until 31 October 2011 to allow for preparation and promulgation of a revised administrative instruction on temporary appointments that

The alleged basis for the break in service requirement in the Applicant's case

45. The Respondent submits that, with respect to the Applicant, the requirement of the break in service was based on: (i) para. 18 of sec. VIII of General Assembly resolution 59/296; (ii) facsimile of 30 August 2006; and (iii) DFS Standard Operating Procedure. For the sake of clarity, it is necessary to set these out in some detail.

46. Paragraph 18 of sec. VIII of General Assembly resolution 59/296 states (emphasis in original):

> *The General Assembly,*
>
> …
>
> 18. *Requests* the Secretary-General to continue the practice of using 300-series contracts as the primary instrument for the appointment of new mission staff.

47. The facsimile of 30 August 2006 provides (emphasis omitted):

> Subject: Implementation of General Assembly resolution 59/296 – Reappointment of staff in the General Service categories to [Field Service] posts in field missions
>
> …
>
> [6(b)] If the [General Service] assignee in a special mission is selected for a Field Service appointment (300 series) to the same special (non-family) mission in which the staff member was serving as an assignee and he/she opts to be returned to his/her parent duty station upon resignation his/her appointment at the General Service and related categories to finalize separation procedures at the parent duty station and office, the following procedures should be followed:
>
> …
>
> (vi) If the assignee returns to the parent duty station at the Organization's expense, before he/she is appointed to the [Field Service] category, there shall be a break of at least seven calendar days between the end of the individual's previous appointment and the effective date of his/her appointment as a Field Service mission appointee.
>
> (vii) However, if the staff member opts not to be returned to the parent duty station, a break in service of three calendar days is required.

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ineligibility for further employment. Provisions contained in the facsimile and the DFS Standard Operating Procedure cannot override the existing contractual framework as established by properly promulgated administrative issuances, particularly considering that they would have the effect of unilaterally varying the terms of employment of affected staff by introducing new material provisions and, possibly, taking away acquired rights (see *Garcia*, discussing the issue of acquired rights).

52. Accordingly, the Tribunal finds that, at the time of the Applicant's new appointment, there was no provision, in law, permitting the Administration to lawfully require the Applicant to take a break in service. The requirement for the break in service was therefore unlawful.

53. The parties disagree as to whether the policy on breaks in service was consistently applied to all affected staff members in situation similar to that of the Applicant. The Tribunal finds that the evidence in this case, including the admitted statement of the Programme Budget Officer, is insufficient to render a conclusive determination as to whether the break in service policy was applied consistently to all staff members in the Applicant's situation. In any event, even if the Tribunal were to accept the Respondent's case at its best—namely, that this policy was consistently

that the retroactive separation of the Applicant on 28 May 2009 amounted to an unlawful termination, with all the attendant consequences flowing therefrom.

60. However, the Tribunal need not consider whether the Applicant was subjected to an unlawful termination as this would imply that there was, in fact, some form of separation. The facts of this case indicate quite the opposite—no separation ever took place. It is clear from the evidence that from 29 May to 4 June 2009, the Applicant was on annual leave and R&R, and thus in the Organization's employ. The Applicant testified that, following her leave and R&R, she took no break in service, but reported straight back for duty in Haiti and was in continuous employment all along.

61. At the hearing, the Respondent also referred to the Leave Request Form, signed by the Applicant and her supervisor on 3 July 2009, indicating that the Applicant was on annual leave and R&R between 13 May and 2 June 2009. The exact circumstances under which this form was prepared are unclear. Two important points need to be made regarding it. Firstly, this form contains, in the "Remarks" section, a hand-written note stating that the Applicant "returned fro[m] AL 5 June", supporting the finding that the Applicant's R&R and annual leave continued until 5 June 2009, and that no break in service occurred. Secondly, the form was signed by the Applicant and her supervisor approximately one month *after* the end of the Applicant's annual leave. The Tribunal finds in all probability that this is another indication of the parties preparing the paperwork after the fact to create the fiction, which is consistent with the conduct of the parties during the trial. The Tribunal finds

to 30 October 2009, when the separation was apparently processed by the Administration.

63. The evidence in this case unequivocally demonstrates that no actual separation occurred, no break in service took place, and the Applicant's resignation letter was not accepted or acted upon by the Organization at the time and was subsequently overtaken by the parties' conduct continuing the relationship without any actual separation.

64. It was not until much later, in October 2009, that the Administration attempted to retroactively amend the Applicant's status, despite her clear disagreement. When the Administration created a new personnel action form in October 2009, retroactively separating the Applicant, it reflected a fiction and not the reality.

65. Therefore, the separation and the break in service not only lacked any legal basis, but also did not reflect the true facts and were a fiction and a sham.

Appointment of limited duration

66. In para. 18 of sec. VIII of its resolution 59/296, the General Assembly requested the Secretary-General "to terminate the practice of using 300-series contracts as the primary instrument for the appointment of new mission staff". Therefore, the General Assembly resolution provided that appointments of limited duration would be the "primary instrument" for the appointment of new mission staff, not the exclusive instrument.

67. The DFS Standard Operating Procedure stated:

> 2.2.4. Candidates recruited for service with a special mission … shall receive an initial appointment of limited duration (ALD) under the 300 series of staff rules … . Some exceptions may apply, as defined under 2.2.7.

68. Although sec. 2.2.4 of the DFS Standard Operating Procedure provided that "[s]ome exceptions may apply", it is unclear whether the DFS Standard Operating Procedure, in fact, contained any exceptions that would be consistent with the language of the resolution. For instance, sec. 2.2.7.1 of the DFS Standard Operating Procedure simply provided that "[appointments of limited duration] shall be granted to newly-recruited staff members appointed to serve at special missions. [Appointments of limited duration] are intended for service not expected to exceed four years". This is certainly not an exception to sec. 2.2.4.

69. If the effect of the DFS Standard Operating Procedure was such as to make the use of appointments of limited duration mandatory, it went beyond what was mandated by the General Assembly resolution. At the time, there was no legal requirement that the Applicant had to be employed on an appointment of limited duration.

70. Furthermore, the question arises as to whether the Applicant belonged to the category of "new mission staff", as stated in the General Assembly resolution. Albeit the Applicant worked in MINUSTAH on temporary duty assignment between December 2008 and June 2009, she was stationed in MINUSTAH and performed her work functions there. Contemporaneous documents do not explain why the Applicant was deemed "new mission staff" or whether this question was even considered, and the Respondent's submissions do not shed any light on this issue.

71. In fact, in all likelihood, the Applicant was not considered at the time to be "new mission staff" even by the Administration. In her email exchanges with the Administration of June 2009, the Applicant was informed that the break in service was applied to her because of para. 6(b) of the facsimile of 30 August 2006, which stated that for a General Service assignee selected for a Field Service appointment to the same special mission in which the assignee was serving, there shall be a break in service prior to the new appointment. This confirms that, at the time of the events in question, the Administration itself perceived the Applicant as returning to the same mission in which she was serving as an assignee. In any event, at the very least, the

question of whether or not the Applicant, as a new mission staff member should have been given due consideration at the time.

72. The Applicant was placed on an appointment of limited duration for 26 days only, from 5 June to 30 June 2009. Both the Administration and the Applicant

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79. The Tribunal finds that the Applicant's email of 3 June 2009 cannot be considered a request for an exception under former staff rule 112.2(b). It lacks the language one would reasonably expect to find in the impression that what is being requested is a consideration by the Secretary-General for an exception under that mechanism.

80. With respect to the issue of the appointment of limited duration, the Applicant relies on her meeting with the Human Resources Assistant on 29 May 2009. The Tribunal finds that the overall circumstances in this case make it highly unlikely that what the Applicant stated at the meeting of 29 May 2009 was formulated as a request for an exception under the mechanism envisaged by former staff rule 112.2(b). At that meeting, the Applicant voiced her disagreement with the type of appointment offered and requested reconsideration. However, a request for reconsideration is quite distinct from the mechanism envisaged by former staff rule 112.2(b). The Tribunal finds that it is not reasonable to expect that the Human Resources Assistant should have interpreted that conversation with the Applicant as a request for an exception under former staff rule 112.2(b).

81. Accordingly, on the evidence before the Tribunal finds that the Applicant has failed to establish that she had made requests for an exception under former staff rule 112.2(b). However, as stated above, the decisions to impose a break in service and to place the Applicant on an appointment of limited duration were unlawful, and the Tribunal's findings on liability, in the end, do not depend on its findings with respect to the alleged requests for an exception.

Conclusion

82. In all the circumstances, the Tribunal finds that:

a. The requirement imposed on the Applicant to take a break in service was unlawful and did not reflect the true facts as no actual break in service or separation took place;

b. There was no legal requirement for the Applicant to be placed on appointment of limited duration between 5 and 30 June 2009. The decision to give her an appointment of limited duration was manifestly unreasonable and therefore unlawful.

Orders

83. The parties shall attempt to resolve the issue of appropriate relief and inform the Tribunal, on or before 30 March 2012, if they have reached an agreement. If the parties are unable to reach a resolution, they will be directed to file further submissions.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 2nd day of March 2012

Entered in the Register on this 2nd day of March 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York