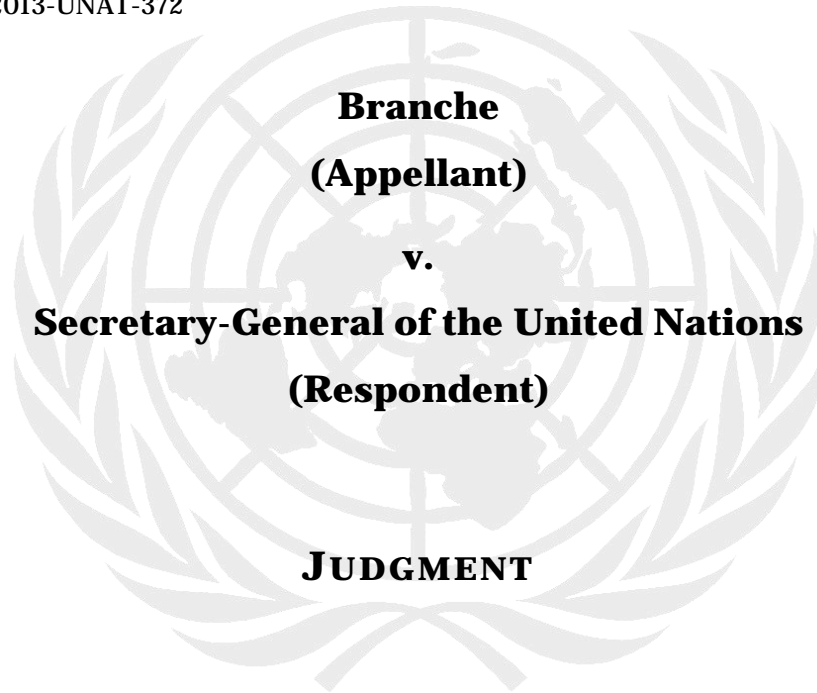




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-372



**Branche
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Mary Faherty
Judge Inés Weinberg de Roca

Case No.: 2012-423

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Appellant: Miles Hastie

Counsel for Respondent: Zarqaa Chohan

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it the appeal by Ms. Jennifer Branche of Judgment No. UNDT/2012/170, issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 7 November 2012 in the case of *Branche v. Secretary-General of the United Nations*.

Facts and Procedure

2. The following factual findings by the UNDT are not disputed by the parties:¹

... On 21 April 1998, [Ms. Branche] entered into service as a P-3 Legal Officer with the United Nations Office at Geneva (“UNOG”) on a 100 series short-term appointment. [She] remained in this position until 30 June 1999.

... On 7 July 1999, [Ms. Branche] was appointed to [the International Labour Organization (ILO)] as a P-3 Legal Officer under a short-term contract and, on 1 February 2001, her contract was converted to a fixed-term [a]ppointment. ... In July 2001, following the completion of her two-year probationary period, [she] was appointed to the position of ILO Contracts Manager at the P-4 Level.

... From 12 September 2002 to 11 September 2003, [Ms. Branche] was on special leave without pay following which she returned to her post in ILO. In October 2006, the ILO appointed [Ms. Branche] to the position of Acting Chief of Procurement.

... On 4 May 2007, [Ms. Branche] was seconded from ILO to the United Nations Secretariat under the terms of the [Inter-Agency Mobility Accord (IAMA)] and the Memorandum of Inter-Organization Exchange (“MIOE”) [between the ILO and the United Nations Secretariat] 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”).

... On 12 February 2009, per the terms of the IAMA and the MIOE, the ILO requested that [Ms. Branche] 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 [she] transfer to the United Nations Secretariat. On 4 May 2009, [Ms. Branche’s] transfer from ILO to the UN was completed.

... On 22 September 2009, following the June 2009 promulgation of ST/SGB/2009/10 [(“Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered by 30 June 2009”)], [Ms. Branche] wrote to the Executive Office of DM requesting the conversion of her fixed-term appointment to a permanent appointment.

¹ Impugned Judgment, paras. 4-12.

... On 30 June 2010, [Ms. Branche] 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[, she] requested that her request be reconsidered.

... On 2 July 2010, [Ms. Branche] 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 [Rules] 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, [Ms. Branche] 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.

... On 27 August 2010, [Ms. Branche] requested management evaluation of the decision that she was not eligible for conversion to permanent appointment. On 22 September 2010, the Management Evaluation Unit (“MEU”) upheld the contested decision.

3. Ms. Branche filed an application challenging the administrative decision in the Dispute Tribunal, which dismissed her application on 7 November 2010. In so doing, the UNDT concluded that Ms. Branche had “only served two years and two months as a staff member under the Staff Rules of the United Nations” since her years of service with the ILO were not the equivalent of 100 Series service under the United Nations Staff Rules; thus, the UNDT found that she did not have the requisite five years of continuous service needed for eligibility for conversion to a permanent appointment.

4. On 12 December 2012, Ms. Branche filed an appeal of the UNDT Judgment, and the Secretary-General filed his answer to the appeal on 6 February 2013.

5. On 29 July 2013, Ms. Branche filed a motion seeking leave to file new authorities, with an attached proposed annex. The Secretary-General filed his observations on the motion on 7 August 2013. On 21 August 2013, the Appeals Tribunal issued Order No. 151 (2013) granting, in part, and denying, in part, Ms. Branche’s motion and ordering the parties to file concurrent legal

memoranda addressing the application of the Appeals Tribunal's decision in *O'Hanlon*² to the pending appeal. The parties' legal memoranda were received on 28 August 2013.

Submissions

Ms. Branche's Appeal

6. The UNDT erred in interpreting the IAMA and its application to ST/SGB/2009/10. Ms. Branche argues that the language of Section 5.1 of the IAMA, which pertains to transfers, "is broad and clear" and the phrase "for all purposes" requires that the United Nations Secretariat must give her service credit for the same period ILO gave her service credit.

7. The UNDT erred in concluding conversions to permanent appointments should be considered under Article IV of the IAMA, which pertains to the relationship between the staff member and the various United Nations organizations, rather than under Article V of the IAMA, which pertains to staff benefits and entitlements.

8. The UNDT also erred in understanding the broad context of the other provisions of the IAMA, as well as the distinction or difference between staff exchanges and transfers.

9. The UNDT failed to properly consider the purpose behind the IAMA and its implementation mechanisms; thus, the UNDT Judgment contravenes the very purpose behind the IAMA, which is to facilitate inter-agency mobility by ensuring no loss of accrued benefits, such as service credits.

10. The Appeals Tribunal's decision in *O'Hanlon* sets two relevant precedents: First, that qualifying service for the purposes of consideration for conversion to a permanent appointment does not have to be exclusively under the UN Staff Rules. Second, that the provisions of a transfer agreement concerning the relevance of service in a releasing organization to calculation of service in a receiving organization are applicable to the calculation of qualifying service for consideration for conversion to a permanent appointment.

11. Ms. Branche requests that the Appeals Tribunal rescind the contested administrative decision and "order that the Administration should credit [her] for her ILO service in considering her for permanent appointment".³

² *O'Hanlon v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-303.

12. Finally, Ms. Branche contends that conversions to permanent appointments do not fall within the provisions of the Dispute Tribunal Statute that require an alternative to the rescission of a contested decision, as was properly found in *Rockcliffe v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/121. If the Appeals Tribunal were to hold that an alternative must be afforded the Secretariat, however, Ms. Branche requests that the alternative be the payment of two months' net base salary as non-pecuniary damages in compensation "for the contractual uncertainty that was wrongly accrued and will wrongly accrue" and that, at the time of separation from service, she be paid the termination indemnity associated with a continuing appointment for the same years accrued.

The Secretary-General's Answer

13. The UNDT correctly concluded that Ms. Branche does not meet the eligibility criteria for consideration for conversion to a permanent appointment by focusing on Article 4.3 of the IAMA. After a staff member transfers to a receiving organization, only the regulations and rules of the receiving organization govern the new contractual relationship.

14. Ms. Branche has not established any errors warranting a reversal of the UNDT Judgment. She has served with two distinct organizations (the ILO and the United Nations Secretariat), each of which has its own 100 Series Staff Rules, and the contractual relationship with the organization she is currently serving with - the United Nations Secretariat - is the key consideration.

15. Ms. Branche has failed to show that the UNDT erred in its interpretation of Article 5.1 of the IAMA. There is nothing in Article 5.1 that requires prior service with the ILO to automatically render a staff member eligible for consideration for permanent appointment with the receiving organization; rather, eligibility depends solely on the staff member's contract with the receiving organization. Article 4.4 of the IAMA, which pertains to the nature of the appointment in the receiving organization, gives discretion to the receiving organization regarding the terms of the appointment, including its duration.

³ Footnote omitted.

16. Service credit is recognized by the IAMA solely for the purpose of ensuring that a staff member who is seconded or transferred to another agency does not lose any entitlement or benefit. It does not affect the contractual relationship between the staff member and the receiving organization, which is governed by Article IV of the IAMA.

17. Neither Article 5.1 nor any other provision in Article V of the IAMA refers to permanent appointments. Thus, there is no support for Ms. Branche's argument that a permanent appointment is an entitlement or benefit under Article V of the IAMA. The Organization's Staff Regulations and Rules routinely distinguish appointments and promotions from entitlements and benefits.

18. The *O'Hanlon* case is not dispositive of this appeal since the facts differ. In *O'Hanlon*, the releasing organization was the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), which is a subsidiary organ of the General Assembly; whereas, in the present case, the releasing organization, the ILO, is a specialized agency and a legally independent organization that is not controlled by General Assembly resolution 37/126.

Considerations

19. The history of conversion of fixed-term appointments to career appointments within the United Nations system is vital to understanding Ms. Branche's appeal. More than 30 years ago, at the urging of the International Civil Service Commission, the General Assembly passed resolution 37/126 (17 December 1982), which decided that "staff members on fixed-term appointments upon completion of five years continuous good service shall be given every reasonable consideration for a career appointment".

20. Toward this end, former Staff Rules 104.12(b)(iii) and 104.13 were promulgated. Former Staff Rule 104.12(b)(iii), regarding fixed-term appointments, provided:

[U]pon completion of five years of continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff regulation 4.2, and who is under the age of fifty-three years, will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization.⁴

⁴ Regulation 4.2 provides:

"The *paramount consideration* in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall

21. On 23 June 2009, the Secretary-General issued ST/SGB/2009/10 (“the Bulletin”) to implement the provisions of former Staff Rules 104.12(b)(iii) and 104.13 for “staff members ... who have become or will become eligible for such consideration by 30 June 2009”.

22. Section 1 of the Bulletin sets forth the requirements for a staff member to be eligible for consideration for a permanent appointment and Section 2 sets forth the criteria for granting a permanent appointment. Section 1 provides that to be eligible for consideration for conversion to a permanent appointment, 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.

23. On 29 January 2010, the Assistant Secretary-General for OHRM issued the Guidelines on Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered as at 30 June 2009 (Guidelines). In addition to the eligibility requirements of the Bulletin, the Guidelines require that “[t]he staff member must be in active service with the UN Secretariat at the time that he or she is considered for conversion to a permanent appointment”.

be paid to the importance of recruiting the staff on as wide a geographical basis as possible.” (Emphasis added.)

Similarly, former Staff Rule 104.13 regarding permanent appointments provided:

- (a) The permanent appointment may be granted, in accordance with the needs of the Organization, to 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 high standards of efficiency, competence and integrity established in the Charter, provided that:
- (i) They have completed the period of probationary service required ...;
 - (ii) The period of probationary service has been waived ...; or
 - (iii) They have completed five years of continuous service under fixed-term appointments and have been favourably considered under the terms of rule 104.12(b)(iii).

24. Ms. Branche's appeal focuses on whether she met the eligibility requirement of "five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules", as of 30 June 2009. There is no dispute that she meets the other eligibility requirements of age and active service with the Secretariat as of 30 June 2009.

25. Ms. Branche served in various professional positions with the ILO from 7 July 1999 to 4 May 2007, with the exception of a year (from 12 September 2002 to 11 September 2003) when she was on special leave without pay.⁵ On 4 May 2007, she was seconded from the ILO to the United Nations Secretariat and two years later she transferred to the Secretariat, pursuant to the MIOE and the IAMA.

26. As of 30 June 2009, Ms. Branche had served only two years and two months with the Secretariat. The question before this Tribunal is whether her service with the ILO should be counted in determining whether she has "five years of continuous service" under Section 1 of the Bulletin. This Tribunal concludes that her service with the ILO must be counted, and finds that she meets the eligibility requirement of five years of continuous service, for the reasons discussed below.

27. Staff Rule 4.9(a) provides that "[i]nter-organization movements are defined in and shall be governed by an inter-organization agreement among the organizations applying the United Nations common system of salaries and allowances".

28. In November of 2005, the United Nations System Chief Executives Board for Coordination entered into the IAMA on behalf of 32 United Nations funds, programs, entities and organizations, as well as specialized agencies participating in the United Nations system. These organizations include both UNRWA and the ILO, for example.

29. The intent or purpose behind the IAMA is to assure that, with the staff members' consent, the participating organizations can fully utilize their staff to meet the organizations' changing global needs by enabling staff exchanges and transfers between the organizations. This intent or purpose is reflected in the IAMA Preamble, which states in pertinent part:

⁵ Impugned Judgment, paras. 5, 6. Although not relevant to the calculation of Ms. Branche's five years of continuous service, the Guidelines provide: "Special leave with or without pay for any duration will not interrupt the continuity of service nor render the staff member ineligible for consideration for conversion to permanent appointment. However, periods of special leave without pay exceeding one month will not be counted towards the five years."

1.1 Mobility is critical for strengthening the cohesiveness as well as effectiveness of the UN system's response to global challenges and for building a competent, versatile, multi-skilled and experienced international civil service;

1.2 The [IAMA] is rooted in the desired principles of greater harmonization, precision and flexibility, and engenders responsiveness to the diverse needs and requirements of UN common system organizations and their respective staff members.

30. Article V of the IAMA sets forth the benefits and entitlements of staff members who transfer and exchange under the IAMA, including provisions regarding service credit. Regarding a staff member who has transferred, Article 5.1 provides: "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(s) where he/she actually served."⁶ A similar provision, Article 5.15, applies to a staff member who has been exchanged.

31. The UNDT concluded that Article 5.1 of the IAMA did not apply in determining whether Ms. Branche has "five years of continuous service" under Section 1 of the Bulletin, and that her service with the ILO could not be counted. Instead, the UNDT determined that Article IV of the IAMA, which pertains to the contractual relationship between the staff member and the receiving organization, governs all aspects of Ms. Branche's service with the Secretariat. The UNDT, which did not have the benefit of our decision in *O'Hanlon*, erred as a matter of law in reaching these legal conclusions.

32. In *O'Hanlon*, this Tribunal interpreted the Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff Among the Organizations Applying the United Nations Common System of Salaries and Allowances (Inter-Organization Agreement) to require that "service in the releasing organization will be counted as service in the receiving organization".⁷ We determined that Mr. O'Hanlon's service in the releasing organization, UNRWA, did not need to be under the 100 Series of the Organization's Staff Rules, noting that "[w]hen the Rules are similar but have a different name, according to the Inter-Organization Agreement, the service is counted as service in the receiving organization".⁸ This Tribunal then concluded that Mr. O'Hanlon's prior service with UNRWA must be counted in determining whether he meets the eligibility requirement of "five years of continuous service" under Section 1 of the Bulletin.

⁶ Emphasis added.

⁷ *O'Hanlon*, para. 22.

⁸ *Ibid*, para. 23.

33. The specific provision in the Inter-Organization Agreement interpreted in *O'Hanlon* is remarkably similar to Article 5.1 of the IAMA, which pertains to service credits for staff who transfer under the IAMA. Under the rationale of *O'Hanlon*, Article 5.1 of the IAMA governs the calculation of Ms. Branche's service credits "*for all purposes*",⁹ including pursuant to Section 1 of the Bulletin. Thus, Ms. Branche's service with the ILO must be counted toward the eligibility requirement of five years of continuous service for conversion to permanent appointment. This conclusion is consistent not only with the rationale of *O'Hanlon*, but with the intent or purpose behind the IAMA.

34. The criteria for granting a staff member a permanent appointment are set forth in Section 2 of the Bulletin, which provides:

[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 they meet the highest standards of efficiency, competence and integrity established in the Charter.

35. This matter should be remanded to the Administration to consider whether Ms. Branche meets the criteria for granting a permanent appointment set forth in Section 2 of the Bulletin, ST/SGB/2009/10.

Judgment

36. Judgment No. UNDT/2012/170 is reversed. The case is remanded to the Administration to consider whether Ms. Branche meets the criteria for conversion to permanent appointment set forth in Section 2 of ST/SGB/2009/10.

⁹ Emphasis added.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar