



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

Judgment No. 2014-UNAT-399

**Eggesfield
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Inés Weinberg de Roca
Judge Luis María Simón

Case No.: 2013-447

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Robbie Leighton

Counsel for Appellant/Respondent: Paul Oertly

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary General of the United Nations of Judgment No. UNDT/2012/208, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 31 December 2012 in the case of *Eggesfield v. Secretary General of the United Nations*. On 1 March 2013, the Secretary General filed an appeal and Mr. Martin Eggesfield filed his answer on 3 May 2013.

Facts and Procedure

2. The parties do not dispute the following facts:¹

... [Mr. Eggesfield] joined the United Nations in 1996 as a Communications Technician at the FS-4 level. He served in several peacekeeping missions before joining [United Nations Mission in Côte d'Ivoire (UNOCI)] in or around 2003. Since 1 January 2008, [he] served as a Chief Communications Officer at the FS-6 level on a fixed-term contract. ...

... On or around 19 August 2010, whilst under appointment with UNOCI, [Mr. Eggesfield] applied for a position with [United Nations Assistance to the Khmer Rouge Trials (UNAKRT)] (Phnom Penh, Cambodia), at the FS-5 level. On 8 June 2011, [he] received an offer of appointment from the United Nations Department of Economic and Social Affairs ("DESA") for a position with UNAKRT at the FS-5 level. [DESA] provides administrative and human resources support to UNAKRT.

... [Mr. Eggesfield] accepted the offer on 10 June 2011, indicating that he would be able to travel to UNAKRT on 10 July 2011. His letter of appointment stated that it was for a fixed-term appointment of one year "in the Secretariat of the United Nations". The letter was counter-signed by an official of the Office of Human Resources Management ("OHRM") of the United Nations Secretariat "[o]n behalf of the Secretary-General".

... On 10 June 2011, [Mr. Eggesfield] informed the Chief Civilian Personnel Officer ("CCPO") of UNOCI of his acceptance of the offer from UNAKRT. He also advised him that he would therefore not seek a renewal of his appointment with UNOCI, which was due to expire on 30 June 2011. [Mr. Eggesfield] requested the CCPO to arrange his repatriation to Brisbane, Australia. ...

...

¹ Impugned Judgment, paras. 5-8, 11-13.

... On 3 October 2011, [Mr. Eggesfield] requested that the Assistant Secretary-General, OHRM, reinstate him in accordance with staff rule 4.18 in view of the fact that he had been reappointed within twelve months of separation from service from UNOCI.

... On 4 November 2011, the Chief of Section III, Human Resources Section (“HRS”), Learning, Development and HR Services Division (“LDS”), OHRM, informed [Mr. Eggesfield] that his request [for reinstatement] was denied, stating that, in OHRM’s view, UNOCI and UNAKRT were separate entities independent of each other. OHRM stated that, because [Mr. Eggesfield’s] contracts with the two entities were “not linked, connected in any way administratively, budgetary or by mandate and are mission/project related, there is no basis in fact or rationale for a reinstatement when moving from one entity to another”. ...

... On 28 November 2011, [Mr. Eggesfield] requested a management evaluation of the decision not to reinstate him. On 16 January 2012, [he] was informed that the Under-Secretary-General, Department of Management, had decided to accept the recommendation of the Management Evaluation Unit to uphold the contested decision not to reinstate [him] under staff rule 4.18(a).

3. On 15 March 2012, Mr. Eggesfield filed an application with the UNDT contesting the decision not to grant his request for reinstatement, and on 13 April 2012, the Secretary-General filed his reply. On 31 December 2012, the Dispute Tribunal issued Judgment No. UNDT/2012/208, in which it determined that the administrative decision denying Mr. Eggesfield’s request for reinstatement was based on an erroneous interpretation of Staff Rule 4.18 and should be rescinded. The UNDT ordered that Mr. Eggesfield be reinstated in service.

Submissions

The Secretary General’s Appeal

4. The Secretary-General seeks to vacate the Judgment and dismiss the application in its entirety. He claims that the UNDT erred in fact and law in holding that the decision not to reinstate Mr. Eggesfield was inconsistent with Staff Rule 4.18 and unlawful.

5. The UNDT erred in law and fact when it concluded that the Administration could not rely on the terms of its offer of appointment, which Mr. Eggesfield unconditionally accepted and satisfied, thereby creating a valid and binding contract. Mr. Eggesfield never requested

that reinstatement be a condition of the contract; thus, he got what he bargained for and is bound by the contract.

6. The UNDT erred in law and fact when it failed to apply the clear terms of Staff Rule 4.18(c), which require that reinstatement be set forth in the letter of appointment. Mr. Eggesfield signed the letter of appointment, although it did not provide for his reinstatement, after his request for reinstatement was denied by OHRM.

7. The UNDT erred in law by converting the Administration's discretionary power to reinstate a staff member into a binding obligation to do so. Staff Rule 4.18(a) uses the word "may" and requires the promulgation of "conditions" for the Secretary General to exercise his discretion to reinstate a staff member. In the absence of the promulgation of formal conditions, the UNDT erred on a question of law in holding that Staff Rule 4.18(a) creates a mandatory obligation.

Mr. Eggesfield's Answer

8. The Secretary-General has failed to appeal the UNDT's finding that the contested decision "was arbitrary and manifestly unreasonable, which, in itself, is a separate basis for the finding of unlawfulness". Thus, the ultimate decision of the UNDT cannot be disturbed on appeal.

9. The Secretary-General did not raise certain arguments before the UNDT and cannot properly raise them now before the Appeals Tribunal. Specifically, the Secretary-General did not raise a contract claim based on the offer of appointment or contend that the contract estopped Mr. Eggesfield from seeking reinstatement. Similarly, he failed to raise the claim that Staff Rule 4.18(c) requires that reinstatement be set forth in the letter of appointment.

10. The UNDT did not err in concluding that the Administration could not rely on the terms of its offer of appointment. Since the offer is silent on reinstatement, "it follows that this term had not yet been settled". Similarly, there is no evidence that the Administration considered re-employment to be a term of its offer of appointment or that there was a "meeting of minds".

11. Because the Staff Rules are part of a staff member's employment contract, a staff member's claim that a Staff Rule was unlawfully applied must be subject to judicial review.

Thus, Mr. Eggesfield cannot be barred from judicial review because he has accepted an offer of appointment that does not include reference to reinstatement.

12. It is common practice for staff members to commence service on the basis of an offer of appointment and for the letter of appointment to be entered into at the duty station, with retroactive effect. Moreover, when mistakes are made in a letter of appointment, they can be corrected with a further letter of appointment. Thus, subsection (c) of Staff Rule 4.18 does not bar Mr. Eggesfield's reinstatement.

13. Despite the language of Staff Rule 4.18, the Secretary-General has not promulgated rules setting conditions for the granting of reinstatement. This failure is the reason Mr. Eggesfield's request for reinstatement was not granted. Under *Valimaki-Erk*,² the Secretary-General's failure to promulgate regulations or rules setting forth "conditions" for reinstatement should not penalize the staff member.

14. In the absence of conditions to implement Staff Rule 4.18, the UNDT may examine the Administration's actions to determine if they were arbitrary and unreasonable, which is what the UNDT did.

15. The purpose of Staff Rule 4.18 is to confer "continuity of employment on staff members so they are not disentitled of benefits that normally accrue through continuous service". This is also in the interest of the Organization as it "promotes mobility and rewards loyalty amongst long serving staff". The UNDT's decision implements this purpose.

Considerations

16. Staff Rule 4.17(a) provides that "[a] former staff member who is re-employed under conditions established by the Secretary-General shall be given a new appointment unless he or she is reinstated under staff rule 4.18". Pursuant to Staff Rule 4.17(b), a new appointment means that the staff member's "service shall not be considered as continuous between the prior and new appointments".

17. Staff Rule 4.18 (ST/SGB/2011/1) provides:

² *Valimaki-Erk v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-276.

(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 as having been continuous ...

(c) If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment.³

18. On 4 November 2011, the Administration denied Mr. Eggesfield's request for retroactive reinstatement on the following grounds:

... UNOCI and UNAKRT were separate entities independent of each other. ... [B]ecause [Mr. Eggesfield's] contracts with the two entities were "not linked, connected in any way administratively, budgetary or by mandate and are mission/project related, there is no basis in fact or rationale for a reinstatement when moving from one entity to another. ... [R]einstatement per staff rule 4.18 is subject to conditions set by the Secretary-General which include staff selection procedures ... ⁴

19. On 16 January 2012, the Secretary-General accepted the recommendation of the Management Evaluation Unit to uphold the contested decision, stating:

... The Administration has discretion whether to reinstate a former staff member or not.

In this regard, ... Staff Rule 4.18(a) provides for reinstatement "in accordance with conditions established by the Secretary-General". ... [T]his language suggests that additional criteria will determine whether reinstatement is granted or whether a new appointment is offered. ... [S]uch conditions for reinstatement have not yet been established ... Therefore, these additional criteria are currently generated from the practice of the Organization.

... [S]ince the introduction of the new Staff Rules ... reinstatement has been granted in three cases, where the involved staff members were reinstated in the same offices of their respective department. ... [I]n practice the criterion was established, that reinstatement requires re-employment in the same office under the same conditions of service.

³ The criterion of being "in accordance with the conditions established by the Secretary-General" was added in 2011, with the promulgation of ST/SGB/2011/1. It did not exist in prior versions of the rules pertaining to reinstatement.

⁴ Impugned Judgment, para. 12.

... [Y]ou do not fulfill the narrow criterion that reinstatement requires re-employment in the same office under the same conditions of service.

... [A]s you commenced work under a fixed-term appointment at the FS-5 level with UNAKRT, you can not be reinstated into your previous fixed-term appointment at the FS-6 level with ONUCI.

20. The Dispute Tribunal determined that Mr. Eggesfield should have been reinstated retroactively because he came within the two expressed criteria for reinstatement in Staff Rule 4.18(a): he held a fixed-term appointment and he was re-employed under a fixed-term appointment within twelve months of separation of service. No other conditions for reinstatement have been established by the Secretary-General. To require a staff member to be re-employed by the same office or to be vetted in a particular manner adds conditions to reinstatement that are not set forth in Staff Rule 4.18(a). Accordingly, the UNDT concluded that the Administration's decision was unlawful. This Tribunal determines that the UNDT is correct and did not err in fact or law in reaching this conclusion.

21. As we held in *Valimaki-Erk*, "Staff Regulations [and Rules] embody the conditions of service and the basic rights and duties and obligations of United Nations staff members. They are supplemented by the administrative issuances in application of, and consistent with, the said Regulations and Rules."⁵

22. Initially, there is no merit to the Secretary-General's claim that Mr. Eggesfield cannot challenge the decision not to reinstate him because he entered into a binding contract with the Administration when he signed the offer of appointment or the letter of appointment, both of which were silent about reinstatement. Staff Rules are part of a staff member's employment contract and, as such, a staff member may challenge the unlawful application of a staff rule. He cannot be barred from judicial review by accepting an offer of appointment or an appointment letter that he alleges does not comply with Staff Regulations or Rules. Accordingly, the UNDT correctly concluded that reinstatement was not foreclosed by the absence of a reference to reinstatement in Mr. Eggesfield's letter of appointment.

23. It is not the role of the Dispute Tribunal "to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the [Dispute] Tribunal to substitute its own decision for that of the

⁵ *Valimaki-Erk v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-276, para. 42.

Secretary-General.”⁶ Nevertheless, the Dispute Tribunal has a duty to consider whether the Secretary-General exercised his discretion in a proper manner to determine “if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”.⁷

24. It was incumbent upon the Secretary-General to act within a reasonable time to establish “conditions” for reinstatement of staff members after Staff Rule 4.18(a) was amended to require him to do so. However, he concedes that he has not yet promulgated an administrative issuance establishing conditions for reinstatement under Staff Rule 4.18(a). This failure to establish conditions for reinstatement prejudices staff members who seek reinstatement.

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).⁸ 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;⁹ it is not for the Tribunals to exercise the discretion accorded to the Administration. However, in the present

⁶ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

⁷ *Ibid.*, para. 40. See also *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357.

⁸ *Valimaki-Erk v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-276.

⁹ See e.g. *Branche v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-372; *O’Hanlon v. Secretary-General of the United Nations*, Judgment 2013-UNAT-303.

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.

Judgment

28. The Secretary-General's appeal is dismissed and Judgment No. UNDT/2012/208 is affirmed, in part, and vacated, in part, as follows: the rescission of the administrative decision is affirmed; and the reinstatement of Mr. Eggesfield and the award to him of corresponding entitlements and benefits are vacated. Mr. Eggesfield shall be awarded USD 5,000 as moral damages, to be paid to him within 60 days from the date of the issuance of this Judgment to the parties. If payment is not timely made, interest shall be applied, calculated as follows: five per cent shall be added to the US Prime Rate from the date of expiration of the 60-day period to the date of payment.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar