



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

Judgment No. 2015-UNAT-570

**Hajdari
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Rosalyn Chapman
Judge Richard Lussick

Case No.: 2014-662

Date: 30 October 2015

Registrar: Weicheng Lin

Counsel for Mr. Hajdari: Robbie Leighton/OSLA

Counsel for Secretary-General: Zarqaa Chohan

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2014/108/Corr.1, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 4 August 2014 in the case of *Hajdari v. Secretary-General of the United Nations*. The Secretary-General appealed on 3 October 2014 and Mr. Besnik Hajdari, represented by counsel, answered on 5 December 2014.

Facts and Procedure

2. On 1 January 2000, Mr. Hajdari joined the United Nations Interim Administration Mission in Kosovo (UNMIK) as a Security Guard/Radio Operator on an Appointment of Limited Duration under the former 300 series of the Staff Rules at the GL-3 level.

3. On 1 January 2004, Mr. Hajdari's appointment was converted into a fixed-term appointment (FTA) under the former 100 series of the Staff Rules.

4. On 1 June 2005, Mr. Hajdari resigned from his position with UNMIK, with effect from 3 June 2005. He resigned in order to take up a new position as locally recruited staff with the Department of Safety and Security (DSS) in New York as of 13 June 2005.

5. On 13 June 2005, Mr. Hajdari signed a letter of appointment with DSS that indicated the effective date of appointment as 13 June 2005. He subsequently served with the Organization on consecutive FTAs.

6. On 7 March 2011, in the context of an exercise reviewing the eligibility of staff for conversion to permanent appointments, Mr. Hajdari was notified that he was not eligible as he had had a 10-day break in service between 3 and 13 June 2005, being the dates he resigned from service with UNMIK and took up service with DSS. Accordingly, he did not satisfy the requirement of "five years of continuous service" on FTAs as required by Section 1(a) 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).

7. On 6 May 2011, Mr. Hajdari requested management evaluation of the decision that he was not eligible for conversion to permanent appointment due to the 10-day break in service between his assignments with UNMIK and DSS. On 19 May 2011, Mr. Hajdari supplemented

his request with arguments that noted, inter alia, that “the Secretary-General has the power to reinstate staff members for administrative purposes” and stated “Mr. Hajdari is willing to return all end-of-service entitlements he might have received with his separation from UNMIK”.

8. By letter dated 12 July 2011, the Management Evaluation Unit (MEU) informed Mr. Hajdari that the Secretary-General affirmed the contested decision, finding that a plain reading of “continuous” means without interruption. The MEU further noted that Mr. Hajdari “did not contest the decision not to reinstate [him] at the relevant time, which would have been incumbent upon [him] to do had [he] been of the view that the Administration had erred on this matter”. It noted that his failure to challenge his June 2005 break in service within the requisite time meant that its legality could not be revisited in the context of his challenge to his non-eligibility for conversion to a permanent appointment.

9. On 17 August 2011, Mr. Hajdari filed an application with the UNDT appealing the contested decision.

10. On 30 July 2014, the UNDT issued its Judgment, granting Mr. Hajdari’s application. The UNDT found that Mr. Hajdari truly believed that in order to be able to report for duty with DSS 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 on 30 June 2005, but that his resignation would not affect the continuity of his service; rather, he believed that his resignation was only a procedural formality required to enable him to relocate from UNMIK to United Nations Headquarters in New York. The UNDT, noting that there are no time limits within which a staff member must request reinstatement, also found that Mr. Hajdari expressed his desire to be reinstated on 19 May 2011 as part of his submission of additional particulars to his original request for management evaluation, and thus concluded that the Secretary-General erred in failing to address his reinstatement request prior to addressing the issue of his eligibility for conversion. Accordingly, the UNDT remanded Mr. Hajdari’s case to the Administration for consideration of his reinstatement request and a reconsideration of the decision that he was not eligible for conversion to permanent appointment based on the decision regarding his reinstatement.

Submissions

The Secretary-General's Appeal

11. The UNDT erred in ruling on the lawfulness of the 2005 break in service. Firstly, Mr. Hajdari voluntarily resigned and separated from UNMIK in order to take up a new post with DSS in New York as required by Staff Rule 4.4 concerning locally recruited staff. Secondly, Mr. Hajdari had altogether failed to challenge his separation from service from UNMIK or make any request for reinstatement, after his arrival in New York or since. The UNDT thus exceeded its jurisdiction in examining the validity of Mr. Hajdari's 2005 break in service and in ordering the Administration to consider him retroactively for reinstatement in the context of his challenge to the decision finding him ineligible for conversion to a permanent appointment.¹

12. Further, under Staff Rule 4.18, it is to be specifically stipulated in the letter of appointment where a staff member is reinstated. Mr. Hajdari was thus aware that he was reemployed and not reinstated or transferred when he signed his letter of appointment, and his "belief" that he had to resign in order to take up his duties with DSS is irrelevant.

13. The UNDT also erred in concluding that Mr. Hajdari had requested to be reinstated in his 2011 management evaluation request and that the Administration should have addressed this request. In *Eggesfield*, the staff member had requested reinstatement within two and a half months of taking up his new position.² In contrast, Mr. Hajdari had failed to make any request for reinstatement upon taking up his new post in New York in 2005; rather, he contested the decision that he was ineligible to be considered for permanent appointment. Mr. Hajdari should have requested reinstatement *before* the Administration considered his eligibility for a permanent appointment;³ his failure to request reinstatement before his eligibility for permanent appointment was considered meant that the Administration was entitled to take into account his 2005 break in service when considering his eligibility for permanent appointment in 2011.

14. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment.

¹ Citing *Kulawat v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-428.

² See *Eggesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-399.

³ Citing *Terragnolo v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-447.

Mr. Hajdari's Answer

15. The Secretary-General's reliance on *Kulawat* is misplaced since that matter turned on whether Ms. Kulawat's resignation from the United Nations Organization Mission in the Democratic Republic of the Congo at the time was voluntary. In the instant case, there is no dispute that Mr. Hajdari was required to resign and separate from UNMIK in order to comply with Staff Rule 4.4 in taking up his new appointment with DSS. As no factual dispute arose in the instant case as to the voluntariness of Mr. Hajdari's resignation, the concerns that caused the Appeals Tribunal to overturn the UNDT's decision in *Kulawat* are not applicable to the present matter. Further, the Organization should have considered his reinstatement *sua sponte* upon his acceptance of another fixed-term appointment within the Organization.

16. The Secretary-General's claim that the UN Staff Regulations and Rules do not provide for reinstatement or transfer for locally recruited staff member fails to acknowledge that the Organization has failed to promulgate conditions for reinstatement, as required under Staff Rule 4.18. As the Appeals Tribunal held in *Egglesfield*, the failure to establish conditions for reinstatement prejudices staff members who seek reinstatement.⁴ Mr. Hajdari met the two promulgated conditions for reinstatement that appear in Staff Rule 4.18(a). Without promulgated conditions and an established procedure for reinstatement Mr. Hajdari could not be aware of how the rule on reinstatement applied to his situation.

17. As to the Secretary-General's assertion that Mr. Hajdari's letter of appointment alerted him to the fact that he was reemployed and not reinstated, the Appeals Tribunal in *Egglesfield* held that "reinstatement was not foreclosed by the absence of a reference to reinstatement in Mr. Egglesfield's letter of appointment".⁵

18. The UNDT did not err in finding that Mr. Hajdari had requested reinstatement in his 2011 management evaluation request and that the Administration should have addressed his request.

19. Insofar as the Secretary-General asserts that Mr. Hajdari should have requested reinstatement *before* the Administration considered his eligibility for a permanent appointment, in the absence of criteria or conditions establishing the procedure for how to request

⁴ See *Egglesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-399, para. 24.

⁵ *Ibid.*, para. 22.

reinstatement, it is not open to the Secretary-General to create a time limit for requesting reinstatement. Prior to being informed that he was ineligible for a permanent appointment Mr. Hajdari was not aware that his service with the Organization had not been considered continuous. Indeed, Mr. Hajdari's name had previously been included on a list of security staff members whom the Executive Office considered to have the requisite years of continuous service for the purposes of being considered for conversion to a permanent appointment. Further, in *Egglesfield* the staff member's retroactive request for reinstatement arose in the context of a challenge to the denial of benefits that would have accrued from continuous service. Mr. Egglesfield's request for reinstatement post-dated the denial of his benefits in that case, as in the instant case. The Secretary-General's reliance on *Terragnolo* is also misplaced since that challenge concerned a recruitment process which, by its nature, is time sensitive and requires finality, in contrast to a review of eligibility for permanent appointment, which is an entirely retrospective exercise where the same drivers for finality do not operate.

20. Mr. Hajdari requests that this Tribunal dismiss the Secretary-General's appeal in its entirety and affirm the UNDT Judgment.

Considerations

21. At the outset, we note that Mr. Hajdari's separation from UNMIK and reemployment with DSS in New York in June 2005 was governed by the Staff Regulations and Rules in effect at the time, namely ST/SGB/2005/1, and not ST/SGB/2011/1, as referenced by the UNDT in its Judgment and the parties on appeal. Accordingly, former Staff Rule 104.3 on "Reemployment", the predecessor of Staff Rule 4.18, and Staff Rule 104.6 concerning "Local recruitment" applied.

22. The Secretary-General appeals on the grounds that the UNDT erred: (i) in ruling on the lawfulness of the 2005 break in service, and (ii) in concluding that Mr. Hajdari asked to be reinstated in his 2011 management evaluation request and that the Administration should have addressed his reinstatement request prior to addressing the issue of his eligibility for conversion.

23. The challenge before the UNDT was in respect of the decision by OHRM that Mr. Hajdari was not eligible for conversion pursuant to Section 1(a) of ST/SGB/2009/10, which provided:

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; [...]

24. The Secretary-General submits that the UNDT erred in ruling on the lawfulness of the 2005 break in service and remanding the case to the Administration for consideration of his reinstatement request and a reconsideration of the decision that he was not eligible for conversion to permanent appointment based on the decision regarding his reinstatement. The Secretary-General contends the UNDT decision was contrary to our jurisprudence on “break in service” in relation to eligibility for conversion to permanent appointment.

25. We uphold the Secretary-General’s appeal for the following reasons.

26. The Appeals Tribunal has held in *Carrabregu*,⁶ *Kulawat*⁷ and *Schoone*⁸ that resignation by a staff member, whether voluntarily or upon request by the Administration in order to take up a new appointment, results in a break in service, which may in turn disqualify a staff member for consideration for a permanent appointment. If a staff member took issue with the requirement that he or she resign from his or her post to take up another function elsewhere as in the foregoing cases, he or she should have challenged it at the time by requesting management evaluation.

27. The Appeals Tribunal has further held in both *Carrabregu* and *Kulawat* that, in the context of reviewing the legality of the Administration’s decision(s) that the staff members were not eligible for permanent appointment, the UNDT exceeded its competence by reconsidering the information in each staff member’s personnel record and making purported findings on the “facts” underlying their respective separations that resulted in the disputed breaks in service.⁹ In both cases, as well as in *Schoone*, the staff members failed to challenge that they were required to separate from service for the purpose of taking up a new appointment at any point prior to being found ineligible for conversion to permanent appointment.

⁶ *Carrabregu v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-485.

⁷ *Kulawat v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-428, citing *Santos v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-415.

⁸ *Schoone v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-375.

⁹ *Carrabregu v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-485, paras. 25-27; *Kulawat v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-428, paras. 33 and 35.

28. The Appeals Tribunal in *Carrabregu* and *Kulawat* held that irrespective of the lawfulness of a required break in service, the resignation and separation from service itself constituted a break in service which independently rendered the staff members ineligible for conversion to a permanent appointment.¹⁰

29. In the present case, the UNDT determined that Mr. Hajdari had expressed his desire to be reinstated on 19 May 2011 as part of his submission of additional particulars to his original request for management evaluation of the decision not to grant him a permanent appointment, wherein he also offered to refund the end of service entitlements he received upon separation from UNMIK.

30. Notwithstanding that under the Staff Rules then in effect, as today, no clear administrative issuance outlined how or to which office a staff member should request reinstatement, we agree with the Secretary-General that the UNDT erred in finding that Mr. Hajdari's 2011 additional observations to the MEU constituted a valid request for reinstatement upon which the Administration was obliged to act. The MEU was established by General Assembly resolution 63/228 with a specific mandate to *review* contested administrative decisions, not to make decisions in respect of staff members' requests in the first instance.

31. It is common cause that Mr. Hajdari never challenged his separation from service from UNMIK or, at any time after his arrival in New York, made any request to the appropriate Human Resources office to be reinstated pursuant to former Staff Rule 104.3 which governed re-employment, including reinstatement, at the time.¹¹ His resignation in order to take up an appointment in another duty station, which he did not protest in any timely fashion, effectively constituted a break in service which ended his right to consideration for a permanent appointment. His belief that he was required at the time to resign in order to take up his appointment with DSS as a "locally recruited staff" is irrelevant.

32. From the foregoing, we hold that the UNDT erred in remanding the case to the Administration for reconsideration.

Judgment

33. The appeal is upheld and Judgment No. UNDT/2014/108 is vacated.

¹⁰ *Carrabregu, ibid*, paras. 27 and 29; *Kulawat, ibid*.

¹¹ Staff Regulations and Rules, ST/SGB/2005/1, in effect as of 1 January 2005.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Lussick

Entered in the Register on this 18th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar