



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

Judgment No. 2015-UNAT-574

**Couquet
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Rosalyn Chapman Judge Luis María Simón
Case No.:	2014-666
Date:	30 October 2015
Registrar:	Weicheng Lin

Counsel for Ms. Couquet:	Self-represented
Counsel for Secretary-General:	Rupa Mitra

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/112, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 20 August 2014 in the case of *Couquet v. Secretary-General of the United Nations*. On 20 October 2014, the Secretary-General filed his appeal, and on 27 November 2014, Ms. Catherine Couquet filed her answer.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant was appointed under a 100-series fixed-term appointment (“FTA”) as a Translator with the [International Criminal Tribunal for the Former Yugoslavia (ICTY)] on 1 October 2006. The FTA was extended several times, up to 31 March 2010.

... On 6 July 2009, the Applicant resigned from the ICTY, effective 8 August 2009, citing “personal reasons”. The Respondent produced several documents illustrating that the Applicant resigned, was repatriated and completed the full checkout process for her separation. The Applicant argued that these documents were unnecessarily produced as she did not deny the circumstances of her resignation effective 8 August 2009.

... On 15 October 2009, the Applicant was appointed on a one[-]year FTA with [the United Nations Assistance to the Khmer Rouge Trials (UNAKRT)]. The FTA was extended until her mandatory retirement from service at age 62, on 30 November 2013.

... On 30 October 2013, the Applicant submitted a request for enrolment in the [after-service health insurance (ASHI)] programme, which was received by the Health and Life Insurance Section (“Insurance Section”) of the United Nations Secretariat on 4 November 2013.

... On 29 November 2013, the Applicant received an e-mail stating that she was ineligible for enrolment in the ASHI programme as her separation Personnel Action form (“PA”) showed an entry on duty date (“EOD”) of 15 October 2009. The Applicant thereafter filed for management evaluation of the decision.

... On 17 January 2014, the administration upheld the decision following management evaluation noting that: whilst the administration agreed that the Applicant had a total qualifying participation period of 86 months, or approximately

¹ Impugned Judgment, paras. 6-11.

7.2 years, as a consequence of the application of staff rule 4.17(a), her 15 October 2009 EOD with UNAKRT was the applicable EOD for purposes of determining her eligibility to ASHI and the Applicant was therefore ineligible for ASHI as she did not meet the 10 year threshold.

3. On 15 March 2014, Ms. Couquet filed an application with the UNDT and the UNDT rendered its Judgment on 20 August 2014.

4. In determining Ms. Couquet's eligibility to enroll in ASHI, the UNDT examined Section 2.2 of Administrative Instruction ST/AI/2007/3 (After-service health insurance). The UNDT held that since Section 2.2 allows for accumulation of periods of participation in a health plan accrued under separate appointments without requiring any continuity of service, the date of Ms. Couquet's recruitment to the ICTY should be considered the operative date.

5. The UNDT rejected the relevance of Staff Rule 4.17 (Re-employment) for interpreting ST/AI/2007/3 on three grounds: first, the UNDT agreed with Ms. Couquet's submission that the primary purpose of Staff Rule 4.17 is to regulate the entitlements listed therein, to the exclusion of others. The UNDT held that Staff Rule 4.17 is not applicable to the question of ASHI because by its specificity and exclusivity it is not set out in the same context.

6. Second, the UNDT found that in accordance with the Appeals Tribunal's holding in *Scott*, the "[i]ntended consequence of ST/AI/2007/3 is so apparent from the face of it that there can be no question as to its meaning"² and therefore no external aid to its interpretation is appropriate. Moreover, any recourse to Staff Rule 4.17 is "misguided" because "the plain text of ST/AI/2007/3 is 'not specifically inconsistent with other rules set out in the same context'".³ The UNDT held that even if Staff Rule 4.17 was applicable, and even if there was a conflict in the application of the staff rule and the administrative instruction, preference had to be given to ST/AI/2007/3 as the *lex specialis*.

7. Third, the UNDT cited the Appeals Tribunal judgment in *Egglesfield* to reject the Secretary-General's argument that Ms. Couquet's new appointment should be treated as a case of re-employment, rather than a case of reinstatement. The UNDT found that the

² *Ibid.*, para. 27.

³ *Ibid.*, para. 28, citing *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225.

Administration's "failure to promulgate the necessary administrative issuance establishing 'conditions' for reinstatement should not be allowed to prejudice staff members".⁴

8. The UNDT also relied on the doctrine of *contra proferentem* ("interpretation against the draftsman") to support its conclusion regarding ST/AI/2007/3.

9. The UNDT held that Ms. Couquet's eligibility for ASHI should be based on the date of her recruitment to the ICTY in October 2006, and not the date of her recruitment to UNAKRT in October 2009. Based on this conclusion, the UNDT found that Ms. Couquet was eligible for ASHI and ordered the rescission of the contested decision and Ms. Couquet's retroactive enrolment from 1 December 2013 in ASHI.

Submissions

The Secretary-General's Appeal

10. The UNDT erred in concluding that Ms. Couquet's eligibility for ASHI should be determined based on the date of her recruitment to the ICTY in October 2006. Under Staff Rule 4.17, the date of recruitment that is relevant for determining the terms of appointment of a former staff member who receives a new appointment after separating from the Organization is the date of the new appointment. In Ms. Couquet's case, her new appointment with UNAKRT was a re-employment under Staff Rule 4.17. Ms. Couquet's eligibility for ASHI was therefore properly determined by reference to the date of her recruitment to UNAKRT in October 2009. The same logic applies to the functioning of other conditions of employment that turn on the date of recruitment, such as retirement age, pursuant to Staff Regulation 9.2.

11. The UNDT erred in disregarding Staff Rule 4.17 when interpreting ST/AI/2007/3. Section 4.17(c) is intended to enumerate exclusions to the general rule, set out in subparagraphs (a) and (b), that a staff member who is reemployed is treated as having a new appointment without regard to any period of former service. Since ASHI is not one of these exclusions, the general rule established in Staff Rule 4.17 does apply to determining the date of recruitment in ST/AI/2007/3. Moreover, and contrary to Ms. Couquet's contention, the definition of "recruited" in ST/AI/2007/3 is not clear and recourse to Staff Rule 4.17 provides

⁴ *Ibid.*, para. 29.

guidance on the matter not addressed in the administrative instruction and is appropriate. Such guidance should be treated as authoritative since Staff Rule 4.17 is of higher order in the hierarchy of norms than the administrative instruction. The UNDT also erred in relying on the Appeals Tribunal's *Egglesfield* judgment to support its conclusion that Staff Rule 4.17 could not apply to the interpretation of ST/AI/2007/3, as the facts in that case can be clearly distinguished from Ms. Couquet's case.

12. The UNDT erred in relying on Section 2.2 of ST/AI/2007/3 to interpret Section 2.1. Section 2.2 only provides details on how a staff member can accumulate periods of participation in the health insurance plan. The fact that ST/AI/2007/3 allows a staff member to add up all of his or her periods of contributory participation across all periods of service for the purpose of determining the period of contributory participation does not have any bearing on how the date of recruitment is to be defined. These are two separate issues.

13. The UNDT erred in applying the doctrine of *lex specialis* to this case. There is no conflict between the requirements of Staff Rule 4.17 and those of ST/AI/2007/3 and the two sets of provisions can be read together coherently. Even if there was any inconsistency between the two sets of requirements, the hierarchy of norms would dictate that Staff Rule 4.17 applies, as it is hierarchically superior to the administrative instruction.

14. The UNDT also erred in applying the doctrine of *contra proferentem*. This rule is traditionally applicable in the context of interpreting the terms of contracts, particularly in contracts of adhesion where there is unequal bargaining power between the parties. The application of this doctrine is intended to equalize the bargaining power between the parties to a contract, by establishing a rule whereby a contractual term may be interpreted in favour of the party who did not draft the contract since that party is presumed to have less bargaining power. However, an administrative instruction such as ST/AI/2007/3 is not a contract between the Organization and an individual staff member. Thus, the doctrine of *contra proferentem* does not apply.

15. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Ms. Couquet's Answer

16. The UNDT did not err in law when it concluded that her eligibility for ASHI should be determined based on the date of her entry into the common system, i.e. her recruitment to the ICTY in October 2006. This is also her starting date of participation in the United Nations Joint Staff Pension Fund (UNJSPF or Pension Fund) and health plan.

17. There is no basis in the Staff Rules, or elsewhere, to expand the approach to re-employment in Staff Rule 4.17 beyond the stated scope of that rule, which is “terms of new appointment” and which does not encompass, either expressly or conceptually, the matter of ASHI. ST/AI/2007/3 regulates the matter autonomously and exhaustively. Thus, there is no basis for importing into ST/AI/2007/3 norms from Staff Rules or other administrative regulations.

18. The Secretary-General is misguided when he claims that the UNDT's interpretation in the present case would be systematically inconsistent to the effect that it would “radically alter the functioning of other conditions of employment” that turn on the date of recruitment, such as the mandatory retirement age. ASHI is not an isolated instance in the system. For example, the UNJSPF Regulations and Rules setting out how the normal retirement age is determined for the purpose of pension entitlements provide that it is not the date of appointment that is controlling for the age qualifying for pension, but the date of first participation in the Pension Fund. Likewise, in the present case, the recruitment date taken into account for determining eligibility to enrol in ASHI is the recruitment which marks the start of participation in the health insurance.

19. Contrary to the Secretary-General's contention, the term “recruited” in ST/AI/2007/3 is clear and therefore, in accordance with the Appeals Tribunal judgment in *Scott*, “must be interpreted upon its own reading, without further investigation”.⁵ Moreover, nothing in the language of ST/AI/2007/3 suggests understanding “staff recruited before 1 July 2007” in Section 2.1(b) otherwise than at face value, that is as meaning staff having an entry into duty date in the Organization anterior to 1 July 2007. The UNDT's conclusion is also in line with the scope of applicability of ASHI as determined and approved by the General Assembly in resolution 61/246 in May 2007.

⁵ Citing *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 5.

20. The UNDT has rightfully found that Staff Rule 4.17 is not applicable in the context of ASHI. The Secretary-General erroneously invoked that the hierarchically superior rank of Staff Rule 4.17 would trump ST/AI/2007/3 as to the purported inconsistency. In order to consider the hierarchical relationship between norms, there must be normative equivalence, “translated in a requirement for a rather high degree of *ratione materiae* sameness in terms of both their normative content and function”. This sameness is absent in the present case. Staff Rule 4.17 deals with “terms of appointment”, which may differ for the same staff member and, in principle, are determined “without regard to any period of former service”. Conversely, terms of health insurance scheme are standardized for all staff members irrespective of their “terms of employment”. They directly rely on the duration of participation. Furthermore, ST/AI/2007/3 does not serve to implement Staff Regulations or Rules, but rather General Assembly resolution 61/264 on “Liabilities and proposed funding for after-service health”.

21. The UNDT was well founded to invoke the doctrine of *contra proferentem*. This doctrine may be inapplicable where relations between the Secretary-General and staff members are determined by norms expressed through the language required by the acts originating from the General Assembly. The Staff Rules and administrative issuances, however, through which the Administration exercises wide discretion in determining and modifying the rules and conditions of employment and issues guidelines on how the rules should be applied while the staff member has no influence on the content of the employment relation, perform indeed a function identical to adhesion contracts, where the other party has no ability to negotiate the terms of the contract. The UNDT was therefore correct in holding that the principle of *contra proferentem* applied.

22. While the Secretary-General contends that Ms. Couquet never asked for reinstatement nor contested the decision to treat her appointment with UNAKRT as a re-employment, she was never made aware of a “decision” to treat her new appointment with UNAKRT as re-employment. Moreover, as soon as she learned about the relevance of reinstatement, she asked to be reinstated on 10 February 2014 in an e-mail to the Assistant Secretary-General for Human Resources Management, but she has not received a response to date. Pursuant to the jurisprudence of the UNDT, there is no deadline to request reinstatement.

23. The UNDT did not err in citing *Egglesfield* in support of the proposition that staff members should not be prejudiced by the Administration's failure to promulgate the necessary administrative issuance establishing conditions and procedures for reinstatement. The Administration did not act in good faith when it placed before Ms. Couquet "hidden administrative hurdles". Even if the Appeals Tribunal were not to agree with the position of the UNDT regarding the interpretation of ASHI regulations, Ms. Couquet requests that the Appeals Tribunal confirm her entitlement to ASHI as a matter of equitable right.

24. Ms. Couquet requests that the Appeals Tribunal dismiss the appeal in its entirety and affirm the UNDT Judgment.

Considerations

25. Ms. Couquet was appointed under a 100-series FTA as a Translator with the ICTY on 1 October 2006. On 8 August 2009, she resigned from the ICTY citing "personal reasons". On 15 October 2009, she was appointed on an FTA with UNAKRT. Her mandatory retirement from service at age 62 came into effect on 30 November 2013.

26. On 30 October 2013, she applied for enrolment in the ASHI programme, but was ruled ineligible because of her entry on duty date of 15 October 2009. The Administration decided that pursuant to Staff Rule 4.17, her entry on duty date of 15 October 2009 rendered her ineligible as she did not meet the requirement of 10 years of participation in a contributory health insurance plan.

27. The UNDT correctly identified the crucial question for decision as being "whether to apply: (a) the starting date of the Applicant's initial FTA with ICTY (1 October 2006) in which case the Applicant qualifies for ASHI; or (b) the starting date of her subsequent FTA with UNAKRT (15 October 2009) in which case she does not qualify for ASHI".⁶

28. However, in attempting to determine the correct starting date, the UNDT held that Staff Rule 4.17 was not relevant as it "clearly restricts its scope of application to questions regarding 'the amount of any payment on account of termination indemnity, repatriation grant

⁶ Impugned Judgment, para. 14.

or commutation of accrued annual leave”.⁷ The UNDT turned instead to ST/AI/2007/3 to determine the relevant starting date. This was an error of law, as discussed below.

29. Staff Rule 4.17 provides as follows:

(a) 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.

(b) The terms of the new appointment shall be fully applicable without regard to any period of former service. When a staff member is re-employed under the present rule, the service shall not be considered as continuous between the prior and new appointments.

(c) When a staff member receives a new appointment in the United Nations common system of salaries and allowances less than 12 months after separation, the amount of any payment on account of termination indemnity, repatriation grant or commutation of accrued annual leave shall be adjusted so that the number of months, week or days of salary to be paid at the time of the separation after the new appointment, when added to the number of months, weeks or days paid for prior periods of service, does not exceed the total of months, weeks or days that would have been paid had the service been continuous.

30. Section 2 of ST/AI/2007/3 is in the following terms:

Section 2

Eligibility for after-service health insurance coverage

2.1 Individuals in the following categories are eligible to enrol in the after-service health insurance programme:

(a) A 100 series or 200 series staff member who was recruited **on or after 1 July 2007**, who while a contributing participant in a United Nations contributory health insurance plan as defined in section 1.2 above, was separated from service, other than by summary dismissal:

...

(ii) At 55 years of age or later, provided that he or she had been a participant in a contributory health insurance plan of the United Nations for a **minimum of ten years** and is eligible and elects to receive a retirement, early retirement or deferred retirement benefit under the Regulations of UNJSPF;

⁷ *Ibid.*, para. 22.

(b) A 100 series or 200 series staff member who was **recruited before 1 July 2007**, who while a contributing participant in a United Nations contributory health insurance plan as defined in section 1.2 above, was separated from service, other than by summary dismissal:

...

(ii) At 55 years of age or later, provided that he or she had been a participant in a contributory health insurance plan of the United Nations for a **minimum of five years** and is eligible and elects to receive a retirement, early retirement or deferred retirement benefit under the Regulations of UNJSPF;

...

2.2 For the purpose of determining eligibility in accordance with paragraph 2.1 above and cost sharing in accordance with paragraph 3.2 (b) below, participation in a contributory health insurance plan of the United Nations is defined to include:

(a) Participation in a contributory health insurance plan of other organizations in the common system under which staff members may be covered by special arrangement between the United Nations and those organizations;

(b) The cumulative contributory participation during all periods of service under 100 or 200 series appointments, continuous or otherwise. [...]

31. The UNDT held that:⁸

[t]he intended consequence of ST/AI/2007/3 is so apparent from the face of it that there can be no question as to its meaning. Section 2.1 of ST/AI/2007/3 describes the two categories of individuals eligible to *enroll* in the ASHI programme (recruited pre or post-1 July 2007); whilst sec. 2.2 applies *for the purpose of determining eligibility* in accordance with sec. 2.1. For purposes of determining eligibility, a staff member requires *cumulative* contributory participation *during all periods of service* under 100 or 200 series appointments *continuous or otherwise*, nothing more, nothing less. [...] [T]here is no ambiguity regarding the meaning of *all periods of service ... continuous or otherwise*. Furthermore, the requirement is for *cumulative contributory participation*, and not for continuous service or continuous contributory participation.

32. The UNDT decided that Rule 4.17 was not relevant and that⁹

the plain text of ST/AI/2007/3 is “not specifically inconsistent with other rules set out in the same context” [...]. The fact that service may not be considered as continuous

⁸ *Ibid.*, para. 27 (emphasis in original).

⁹ *Ibid.*, para. 28.

between a prior and new appointment[], does not affect one's EOD into the common system of the United Nations and the commensurate eligibility for participation in the United Nations Joint Staff Pension Fund and contributory health insurance plan, these being fundamental and essential terms of the conditions of employment, capable of protection by the doctrine of acquired rights.

Moreover,¹⁰

ST/AI/2007/3 does not contemplate continuity of employment for eligibility, but the requisite continuation of cover, the latter of which is not in dispute. The Tribunal finds that to give any other construction would give rise to disparity and absurdity.

33. The UNDT consequently decided that the relevant date for determining Ms. Couquet's eligibility to enrol in ASHI was the earlier date of her recruitment to the ICTY, that is, 1 October 2006. It accordingly held that she was eligible for ASHI and ordered that the contested decision be rescinded and that the Administration enrol her in ASHI retroactively from 1 December 2013.

34. We find that the UNDT fell into error in accepting Ms. Couquet's submission that "staff rule 4.17 is not relevant, and that staff rule 4.17(c) clearly restricts its scope of application to questions regarding 'the amount of any payment on account of termination indemnity, repatriation grant or commutation of accrued annual leave'."¹¹ The UNDT's conclusion that Staff Rule 4.17 was not relevant because of "its specificity and its exclusivity"¹² is clearly erroneous.

35. Rules 4.17(a) and (b) are clearly of general application while Rule 4.17(c) provides for specific exceptions. The Secretary-General is correct in his submission that "Staff Rule 4.17 makes it clear that subparagraph (c) is intended to enumerate exclusions to the general rule, set out in the preceding subparagraphs, that a staff member who is re-employed is treated as having a new appointment without regard to any period of former service. Periods of former service will be relevant only in cases enumerated in Staff Rule 4.17(c) – termination indemnity, repatriation grant or commutation of accrued annual leave [...] ASHI is not one of the exclusions specified in Staff Rule 4.17(c)."

¹⁰ *Ibid.*, para. 32.

¹¹ *Ibid.*, para. 22.

¹² *Ibid.*, para. 28.

36. The ordinary meaning of Rule 4.17 is clear and unambiguous. It is common ground that Ms. Couquet was re-employed, not reinstated. Accordingly, pursuant to Staff Rule 4.17(a), her re-employment with UNAKRT constituted a new appointment, which commenced on 15 October 2009. Pursuant to Staff Rule 4.17(b), the “terms of such new appointment” were fully applicable regardless of her period of former service, which could not be considered as continuous.

37. Section 2 of ST/AI/2007/3 sets out the eligibility criteria for enrolment in ASHI in the case of 100 series or 200 series staff members. The relevant parts of Section 2.1(b)(ii) require a minimum of five years’ participation in a contributory health insurance plan of the Organization in the case of staff members recruited before 1 July 2007, and, pursuant to Section 2.1(a)(ii), 10 years of similar participation in the case of staff members recruited on or after 1 July 2007.

38. We find that the UNDT erred in law in deciding that Section 2.2 of ST/AI/2007/3 applies to define the recruitment date in Section 2.1. Section 2.2 is limited to defining the meaning of “participation in a contributory health insurance plan of the United Nations”, which can include contributory participation accumulated during all periods of service. Nothing in the language of Section 2.2 indicates that its terms should apply to the definition of a staff member’s recruitment date in order to determine whether five or 10 years of contributory participation apply to be eligible for ASHI.

39. Staff Rule 4.17 and ST/AI/2007/3 do not deal with the same subject matter and their provisions are not in conflict. The UNDT therefore had no cause to invoke the maxims *lex specialis* and *contra proferentem* in support of its interpretation of ST/AI/2007/3. Assuming, arguendo, that the said provisions were in conflict, the staff rule would take precedence over the administrative issuance.¹³

40. The Appeals Tribunal has considered Ms. Couquet’s arguments in support of the UNDT Judgment and does not find them persuasive. Rather, this Tribunal is satisfied that the Secretary-General has discharged his burden of showing that the UNDT’s decision to determine Ms. Couquet’s eligibility for ASHI based on the date of her recruitment to the ICTY in October 2006 was erroneous.

¹³ See *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293, para. 32.

41. Finally, in her answer, Ms. Couquet alleges bad faith on the part of the Administration and requests that the Appeals Tribunal confirm her entitlement to ASHI as a matter of equitable right even in the event it does not agree with the position of the UNDT regarding the interpretation of ASHI regulations. These claims of bad faith and an equitable right were not considered by the UNDT and the Secretary-General has certainly not had an opportunity to be heard on them. We will not permit them to be raised for the first time on appeal and we rule that they are not admissible.¹⁴

42. For the foregoing reasons, the appeal succeeds.

Judgment

43. The appeal is allowed and the UNDT Judgment is vacated in its entirety.

¹⁴ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 25.

Original and Authoritative Version: English

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

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Simón

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

(Signed)

Weicheng Lin, Registrar