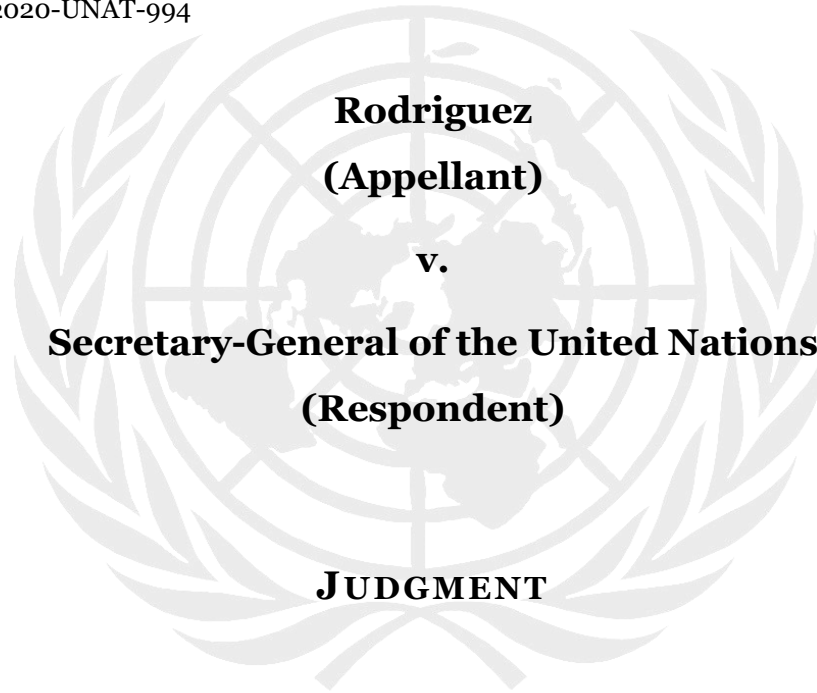




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-994



Before: Judge Sabine Knierim, Presiding
Judge Graeme Colgan
Judge Jean-François Neven

Case No.: 2019-1305

Date: 27 March 2020

Registrar: Weicheng Lin

Counsel for Ms. Rodriguez: Self-represented
Counsel for Secretary-General: Noam Wiener

JUDGE SABINE KNIERIM, PRESIDING.

1. Ms. Estrellita Concepcion Rodriguez contested before the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) the decision by the Insurance and Disbursement Service/After Service Health Insurance (IDS)/ASHI to find her ineligible to enroll in ASHI. The UNDT dismissed Ms. Rodriguez' application. We affirm the UNDT Judgment.

Facts and Procedure

2. On 15 September 2005, Ms. Rodriguez joined the United Nations Office for Project Services (UNOPS) as a Portfolio Assistant on an appointment under the former 100-series of the Staff Rules. On 1 May 2007, she was assigned from UNOPS to the United Nations Development Programme (UNDP), under a reimbursable loan agreement. From 11 May 2009 to 21 November 2010, Ms. Rodriguez served as a Resource Management Associate (RMA) with UNDP on an appointment of limited duration (ALD) under the former 300-series of the Staff Rules.

3. On 22 November 2010, Ms. Rodriguez was recruited by the UNDP Bureau of External Relations and Advocacy as a Programme Finance Associate on a new fixed-term appointment. On 30 September 2015, she reached the mandatory retirement age of 62 and retired from service.

4. Throughout her service with the Organization, Ms. Rodriguez' health insurance coverage was under the insurance plan of her spouse, also a staff member of the Organization, except for the first four months of her service (15 September to 31 December 2005) during which she contributed as the primary insurance holder. Upon her retirement, her spouse was still employed with the Organization and she continued to be covered under his health insurance.

5. On 8 June 2017, Ms. Rodriguez' spouse submitted an application for ASHI in anticipation of his upcoming retirement on 30 June 2017. On 22 June 2017, the IDS/ASHI informed him that if he was to retire on 30 June 2017, he would not be eligible for ASHI.

6. On 12 July 2017, Ms. Rodriguez informed IDS that she wished to apply for ASHI in conjunction with her husband's application.

7. On 28 August 2017, IDS informed Ms. Rodriguez that she was not eligible to enroll in ASHI. IDS noted that Ms. Rodriguez' latest reappointment was on 22 November 2010 and that as a staff member appointed on or after 1 July 2007, in order to be eligible for ASHI, she was required to have a minimum of 10 years' participation in the Organization's health insurance plans under qualifying contracts. IDS noted the two periods of her participation in the Organization's health insurance plans which qualified and counted towards the ten-year participation requirement (1 January 2007 to 30 April 2009 and 22 November 2010 to 30 September 2015 - IDS advised that her participation in the United Nations health insurance plans after her retirement from the Organization did not count towards her ASHI eligibility) and concluded that even accepting that she had insurance coverage during an additional period of September 2005 to December 2006, cumulatively these periods would still fall short of the minimum of ten years' participation. Ms. Rodriguez was therefore not eligible for ASHI.

8. On 29 August 2017, Ms. Rodriguez asked that her request be reviewed again, and on 27 October 2017, she requested management evaluation of the contested decision.

9. On 23 February 2018, Ms. Rodriguez filed an application with the Dispute Tribunal in New York. She argued that she had been recruited on 15 September 2005 under the former 100-series of the Staff Rules and was therefore eligible for ASHI pursuant to Section 2.1(b)(ii) of Administrative Instruction ST/AI/2007/3 (After-Service Health Insurance). It was unfair to reset her recruitment date to 22 November 2010 because of her ALD dated 11 May 2009 which should not be construed as reappointment. She submitted that the following periods of participation should be counted towards the ten-year participation requirement: 15 September 2005 to 30 April 2007; 1 May 2007 to 30 April 2009; 22 November 2010 to 30 September 2015; and 1 October 2015 to 30 June 2017 (after-service participation under spouse's insurance). As a result, she submitted that in any event, she had a total of ten years and four months' health insurance participation which rendered her eligible for ASHI. She expressly acknowledged that the period of 11 May 2009 to 21 November 2010, during which she had been serving on an ALD, would not be counted towards the ten-year participation requirement.

10. On 7 June 2019, the UNDT issued Judgment No. UNDT/2019/105 dismissing the application. The UNDT found that the letter of appointment for her fixed-term appointment with UNDP effective 22 November 2010 stated that she was being re-employed rather than reinstated and that therefore the terms of her new appointment fully applied without regard to

any period of former service. Turning to the calculation of the number of years that Ms. Rodriguez participated in the Organization's health insurance, the UNDT noted that only participation while serving on a former 100- or 200-series appointment or current fixed-term, continuing or permanent appointment was to be counted and that participation after retirement under a spouse's insurance plan could not count towards the ten-year participation requirement. The UNDT held that in addition to her participation in the Organization's insurance plan while on 100-series or fixed-term appointments (15 September 2005 to 30 April 2009 and 22 November 2010 to 30 September 2015), her participation under her spouse's insurance plan while she was on an ALD and he was on a fixed-term appointment (1 July 2009 to 21 November 2010) also counted towards the ten-year participation requirement. The UNDT concluded that the cumulative eligible participation in the Organization's health insurance plan amounted to a total of nine years and ten months and accordingly she did not meet the ten-year eligibility requirement for ASHI. The UNDT therefore dismissed the application.

11. Ms. Rodriguez filed an appeal on 6 August 2019 and the Secretary-General filed his answer on 7 October 2019. On 9 December 2019, Ms. Rodriguez filed a motion seeking leave to file additional pleadings and on 12 December 2019, the Secretary-General filed his response to the motion.

Submissions

Ms. Rodriguez' Appeal

12. The UNDT erred in concluding that Ms. Rodriguez did not meet the ten-year participation requirement. The UNDT erred in discounting the period of 1 May to 30 June 2009, equivalent to 0.16 years from the 10.05 years of qualifying service. Nevertheless, the result still yields a round-up figure of ten years.

13. Moreover, her participation in the health insurance while on an ALD should also be counted towards the ten-year participation requirement. The position of RMA she held while on the Reimbursable Loan Agreement on a 100-series appointment was a regular post and the ALD offer she received for that same post close to the end of her Reimbursable Loan Agreement and without the standard recruitment process was biased and not in accord with the ALD legal framework. The RMA position under the ALD was in fact a continuation of the RMA 100-series appointment.

14. Ms. Rodriguez asks the Appeals Tribunal to find that she had 10.05 years of participation in the Organization's health insurance plans and hence was eligible for ASHI.

The Secretary-General's Answer

15. The UNDT correctly found that Ms. Rodriguez had not participated in the Organization's health insurance plans for the required ten-year period while on a fixed-term appointment under the former 100-series of the Staff Rules or the subsequently consolidated Staff Rules to be eligible for ASHI. Mindful of the general rule developed in the jurisprudence that a party in whose favour an appeal has been decided is not permitted to appeal against a judgment on legal or academic grounds, the Secretary-General nevertheless points out that the UNDT erred in holding that the days between 1 July 2009 and 21 November 2010 should count towards the ten-year requirement. The fact that Ms. Rodriguez's spouse served on a 100-series fixed-term appointment does not change the fact that Ms. Rodriguez did not at the time serve on a fixed-term appointment and she herself had acknowledged in her correspondence and in her application before the UNDT that this period should not count towards the ten-year requirement. In any event, even if that period was counted towards the ten-year requirement, the total days would amount to 3,607, in other words less than ten years.

16. The UNDT correctly refrained from annulling the provisions of ST/AI/2007/3. The ASHI framework is grounded both in a General Assembly Resolution and ST/AI/2007/3, which the UNDT has no power to review.

Ms. Rodriguez' Motion for Additional Pleadings

17. Ms. Rodriguez further develops on the argument presented in her appeal that she should not have been placed on a 300-series ALD which she contends was discriminatory. Her service on the ALD should therefore fully count towards the ten-year participation requirement.

18. Ms. Rodriguez alleges inaccuracies in certain portions of the Secretary-General's answer.

Secretary-General's Response to Ms. Rodriguez' Motion for Additional Pleadings

19. Ms. Rodriguez reargues legal and factual aspects of her case without identifying exceptional circumstances justifying the filing of additional pleadings. The Secretary-General requests that the motion be denied in its entirety. In the alternative, the Secretary-General requests an opportunity to file a written submission in response to the additional pleadings.

Considerations

Motion to file additional pleadings

20. Article 31(1) of the Appeals Tribunal's Rules of Procedure reads:

Procedural matters not covered in the rules of procedure

1. All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Appeals Tribunal on the particular case, by virtue of the powers conferred on it by article 6 of its statute.

21. Furthermore, Practice Direction No. 1, Section II.A.3, provides:

27. A motion requesting the permission of the Appeals Tribunal to file a pleading after the answer to the appeal or, where applicable, the answer to the cross-appeal will be heard by the President or the Duty Judge.

28. A motion to file an additional pleading may be granted by the Appeals Tribunal if there are exceptional circumstances justifying the motion.

22. Ms. Rodriguez has not presented any exceptional circumstances justifying the filing of additional pleadings. Her motion is dismissed.

Merits of the Appeal

23. In her appeal, Ms. Rodriguez does not challenge the UNDT's finding that she was recruited after 1 July 2007. Consequently, this issue cannot be addressed or reviewed by the Appeals Tribunal and all legal provisions which deal with recruitments on or before 1 July 2007 are irrelevant for the present case.

Did the UNDT commit any errors in its calculation and, in the affirmative, would a correct calculation result in ten years of Ms. Rodriguez' participation in the Organization's health insurance plans?

24. The UNDT's calculation (nine years, ten months) is not correct. However, even a correct calculation of the three time periods accepted by the UNDT (15 September 2005 to 30 April 2009; 1 July 2009 to 21 November 2010; 22 November 2010 to 30 September 2015) does not result in the required ten years of participation but only nine years, ten months and 14 days.

25. Given this result, it is of legal relevance whether the time period between 11 May and 30 June 2009 (one month, 19 days) has also to be taken into account, as Ms. Rodriguez requests on appeal.

Time period between 11 May and 30 June 2009

26. The time period between 11 May and 30 June 2009 does not count for the calculation of Ms. Rodriguez' participation in the Organization's health insurance plans.

27. Firstly, Ms. Rodriguez, in her application to the UNDT, had expressly stated herself that the period between 11 May 2009 and 21 November 2010 did not count for the calculation of her participation. Only in her appeal, for the first time, does she claim that the time between 11 May and 30 June 2009 should also count. The Appeals Tribunal has repeatedly held that it is not possible for the parties to "change horses in midstream". A staff member who has expressly conceded in her application that a certain time period does not count for the calculation of his or her participation in the health insurance plans cannot, on appeal, request that the very time period should count. The Appeals Tribunal's function is to review the UNDT's judgment for error by the UNDT. A party is not permitted to assert his or her own failure to present an argument at first instance as a ground of appeal to say that the UNDT was in error. For this reason alone, Ms. Rodriguez' appeal must fail.

28. Further, the relevant provisions do not allow the Appeals Tribunal to find that the time period between 11 May and 30 June 2009 counts for the calculation of Ms. Rodriguez' participation in the Organization's health insurance plans. Sections 2.1(a)(ii) and 2.2(b) of ST/AI/2007/03 provide:¹

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;

...

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:

...

(b) The cumulative contributory participation during all periods of service under 100 or 200 series appointments, continuous or otherwise. Except in cases of extension of appointment beyond the normal age of retirement, only participation in a United Nations health insurance plan prior to the attainment of the normal age of retirement shall count towards meeting the five- or ten-year participation requirement for enrolment.

29. Ms. Rodriguez does not meet these conditions because, between 11 May and 30 June 2009, she did not serve under a 100- or 200- series appointment as required by Section 2.2(b) of ST/AI/2007/03. Instead, she served on an appointment of limited duration (ALD) under the former 300-series of the Staff Rules.

¹ Original emphases.

30. As to Ms. Rodriguez' argument that her ALD should count because the RMA position she held under the ALD was in fact a continuation of her former RMA 100-series appointment and because the ALD offer she received for that same post close to the end of her Reimbursable Loan Agreement and without the standard recruitment process was biased and not in accord with the ALD legal framework, we find that it is without merit for the present appeal. Though her duties might have been the same, the fact remains that Ms. Rodriguez, starting from 11 May 2009, was no longer under a 100-series appointment but under a 300-series appointment which is not within the scope of Sections 2.1(a)(ii) and 2.2(b) of ST/AI/2007/03. Further, Ms. Rodriguez is estopped from challenging the legality of her former ALD in the present appeal. This appointment went into legal force in 2009 and Ms. Rodriguez did not request management evaluation, nor did she file an application to the UNDT within the prescribed time limits under Staff Rule 11.2(b) and Article 8 of the UNDT Statute.

Time period between 1 July 2009 and 21 November 2010

31. Although this issue is not on appeal, to give guidance to the parties and the UNDT, we note that the UNDT committed an error of law and exceeded its competence in accepting the time period between 1 July 2009 and 21 November 2010 for the calculation of Ms. Rodriguez' participation in the health insurance plans on grounds that Mr. Rodriguez held a fixed-term appointment. In her application to the UNDT, Ms. Rodriguez had expressly conceded that the time period between 11 May 2009 and 21 November 2010 did not count for the calculation of her participation in the health insurance plans. Under these circumstances, it was not within the authority of the UNDT to find that a part of this time period did count. Additionally, the whole time period between 11 May 2009 and 21 November 2010 does not meet the conditions of Sections 2.1(a)(ii) and 2.2(b) of ST/AI/2007/03 because Ms. Rodriguez, at the time, did not serve under a 100- or 200-series appointment but under a 300-series appointment which does not fall within the scope of the provision. The fact that her spouse was serving on a fixed-term appointment from 1 July 2009 to 21 November 2010 while she was on an ALD was irrelevant since the issue was not whether Ms. Rodriguez was eligible for ASHI as his dependent, but on her own account.

Judgment

32. The appeal is dismissed and Judgment No. UNDT/2019/105 is affirmed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Knierim, Presiding
Hamburg, Germany

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Neven
New York, United States

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar