Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

CASTELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Nicholas Christonikos

Counsel for Respondent:
Susan Maddox, ALU

Introduction

1. The applicant initially contested the Administration's decision not to pay him certain emoluments related to travel, assignment and relocation expenses. The applicant's entitlement to the payments depends largely upon whether he had served a continuous period of employment for one year or more but also upon whether his non-compliance with certain formal requirements can be waived as provided in the Department of Peacekeeping Operations' Human Resources Handbook.

2. On 14 March 2007 the applicant was employed by the UN for the period commencing on 4 April and ending on 31 December 2007. On 4 January 2008 he entered into a further contract of employment effective from 1 January 2008 until 30 June 2008. The effect of the second contract was to convert his initial period of employment from almost nine months to almost fifteen months. His work continued without change. Employment for twelve continuous months or more obliged the Organization to pay additional entitlements not available in the case of employment for a shorter period. The applicant was informed on 25 February 2008 that, as eleven months would expire on 4 March 2008, he was required to take a "break-in-service" from 4 March 2008 with a "reappointment" from 7 March to 30 June 2008. The applicant declined to undertake this break-in-service and continued to work as before during this period and following, performing the same duties, at the same desk, in the same office, answering to the same manager, with the same colleagues and being paid at the same rate. The respondent claims, nevertheless, that he was not employed in the same position under his second contract and that he was not employed by the Organization during the days specified as the break-in-service. When the applicant later sought to obtain his entitlements, the Organization refused to pay, claiming that the second contract was invalidly entered into since it converted his initial contract of less than twelve months' duration into an appointment for a year or more and such contracts were required to be reviewed by the central review bodies (CRBs) before they could be effected, which did not occur.

3. The wife of the applicant traveled to New York on 29 April 2007 after the applicant assumed his first position and returned to Switzerland on 2 December 2007. His wife and child returned to New York on 9 March 2008. On 31 March 2008 the applicant sought payment of the travel expenses for the March 2008 trip and also an assignment grant for the travel of his wife and child to New York. Only after the hearing and when I sought further submissions on this point did it become clear that the applicant's present claim for an assignment grant related to his wife's stay in New York from April 2007. The applicant's present position is that he does not seek reimbursement in respect of the travel expenses of March 2008 but wishes to obtain payment for his wife's air fares incurred in April 2007 and of the assignment grant payable in respect of her stay at that time. The applicant's counsel accepted that this matter was not before the Tribunal since no application had been made to the Administration for payment of these amounts. There had been no refusal to pay them and there was simply no decision for the Tribunal. Accordingly, it is unnecessary to deal with the applicant's claim for travel expenses or assignment grant.

Details of the applicant's employment

4. The first contract was "strictly limited to service with UNMIN [UN Mission in Nepal] and extension of the appointment is subject to the extension of the present mandate of the mission and availability of funding". This rather suggests that, if the mandate were indeed extended and funding made available, the contract would be extended. On 18 December 2007 the Security Council extended the mandate of UNMIN. As is later mentioned, funding was also obtained, explicitly to support the applicant's (and others') continued employment. The second contract did not have any similar clause but provided, "This appointment is limited to service with UNOMIG [UN Observer Mission in Georgia]". It is agreed on all sides that this is an error (claimed by the respondent, but neither admitted nor disputed by the applicant to be typographical) as the applicant never worked for UNOMIG and, as has been mentioned, in fact his actual work never changed.

5. On 28 March 2008 the Applicant accepted an offer for another job and accordingly resigned from his position on 7 April 2008.

The issues

6. The applicant's claim, essentially, is that his entitlements should be considered on the basis that he was employed for a continuous period of a year or more. The respondent denies this claim. He submits that the second contract was invalidly entered into because the Administration failed to comply with its rules concerning contracts having the effect of extending a term of employment to a year or more and that he was entitled, despite appearances, to treat the applicant as having taken a break-in-service.

7. If an employer enters into a contract giving more to the employee than might have been the case had the employer followed its own internal processes, it is difficult to accept that it acts in good faith by attempting to use its overwhelming bargaining strength to wrest back from the employee that to which he or she has a legal right, hereby attempting to force the applicant to accept a break-in-service or, when it has permitted the employee to keep working, by refusing to treat his or her employment as continuous. It has not been suggested (and rightly so) that the applicant acted in bad faith in accepting the respondent's offer of a six month contract.

8. There is no evidence that, at the time that the second contract was offered, the relevant authorized person or persons did not consider all the material factors. There is no doubt that the Organization, through its agents, was fully aware of the terms of the second contract and the effect that twelve months' continuous service would have on the applicant's entitlements. If there was a procedural failure (which, as will be seen, I do not accept), it was merely about the application of the Organization's own internal processes. The notion that this failure occurred was very much an afterthought by the respondent, stated only when the applicant protested about the refusal to pay his entitlements. I might add, there is no evidence that, had the procedure now contended to be required been followed, the same contract would not have been offered. As I point out below, the CRBs are not at all concerned with

the entitlements attributable to the particular appointments in respect of which they exercise their functions and are not authorized to advert to or consider such matters.

9. The claim made by the applicant for relocation expenses depends on the interpretation of sec 11 of ST/AI/2006/5 of 24 November 2006, which provides for the payment of a "relocation grant" on "appointment or assignment for one year or longer". It is conceded on behalf of the respondent that, if the applicant's service had been for a continuous period of one year or longer, he would be entitled to the relocation grant and the mere fact that this service comprised two consecutive fixed-term contracts of less than a year would not disentitle him. Whilst one can readily accept the good sense of this interpretation of the Rule, I am not altogether sure that the term "appointment" is the same as "employment". However, since this was the practice at the time the contract was entered into, it was an implicit term that he would be accorded the entitlement of a staff member who had been employed continuously for a year. Indeed, it was conceded from the very beginning by the Administration that, if the applicant's service were continuous, he would be entitled to this grant: this was the reason explicitly given for requiring the applicant to take the break-in-service.

10. I should mention an additional line of argument that was not put to me, at least explicitly, by the parties but, as it raises a matter of fundamental principle, I would not wish it to be thought I had overlooked it. It is obvious that a relocation grant is a significant and appropriate entitlement for a staff member who is to be or has been has been employed for a year or more. The continued employment of a staff member after a break-in-service proves that the UN, as it happened, required his or her services for the year or more (even though this was or might have been uncertain at the outset). The break-in-service appears to be merely a device designed to evade the compensation required to be paid to a staff member who serves for an uninterrupted period of a year or more: it serves no managerial or organizational purpose. Since, in these circumstances, it is part of the agreement that the staff member will be reemployed after the break-in-service, although there is *in form* a termination of one contract and the commencement of another, *in substance* the

employment has continued, despite an actual break in payment on the one hand and in work on the other. Indeed, it seems fairly clear that the employee would have an enforceable right to reemployment if the UN reneged on the arrangement. It is in substance indistinguishable from leave without pay. The mere fact that there are two *contracts* does not change the fact that the *employment* has continued for a year or more. The break-in-service thus has every appearance of a sham. That the UN can procure the agreement of staff members to an artificial arrangement by which they forgo significant entitlements is, it may reasonably be inferred, a reflection of the overwhelming bargaining power of the UN as an employer. In other jurisdictions of which I am aware, the rule granting the entitlements would be interpreted as requiring them to be paid if, *in substance*, the staff member had been employed continuously for a year even if, *in form*, there was an actual break in continuity. In short, the court would interpret the rule as excluding any sham discontinuity from consideration. This is not to deny the legal position that there are two contracts separated by time: it is to deny that, correctly interpreted, the rules as to compensation permit the employee's entitlements to be adversely affected by a sham. Such a rule would not be interpreted as permitting evasion, by an artificial device, of the obligations it imposed and the entitlements it provided unless such an interpretation were required by very explicit language indeed. As will be seen, the language of the relevant Rules here is not explicit in this respect and would not satisfy this requirement. The parties did not address this very important issue of principle. The resolution of the dispute has already been substantially delayed and, since I have been able to dispose of the case upon other grounds, I have decided not to require further submissions to be made on the point. Accordingly, I do not propose to discuss it further. I should emphasize that I have not formed a concluded view, one way or the other, about it.

The role of the central review boards

11. The respondent's case depends upon establishing that the second contract was valid and, accordingly, gave the applicant no legal right to its continuation to the date expressed in it for expiry, namely 30 June 2008. The respondent relies on the terms of rule 104.14 as promulgated in ST/SGB/2003/1. That rule substituted central

review bodies (a Board, a Committee and a Panel) for the Appointment and Promotion Board and Committee (and subsidiary bodies) that had been created under earlier bulletins and had subsisted for some years. To understand how this might be relevant in the present case, it is necessary to retrace history a little.

12. A convenient starting point for discussing the previous system is ST/SGB/1999/5 dated 3 June 1999. This Instrument (rules 104.12 and 13) referred to permanent appointments and three forms of so-called "temporary appointments": probationary, fixed-term and indefinite. A fixed-term appointment had its expiration date specified in the letter of appointment and could be granted for any period not exceeding five years. Although there was no expectancy of renewal or of conversion to any other type of appointment, where five years of "continuous service" in fixed-term appointments had been completed, a staff member who met certain specified criteria could be considered for a permanent appointment. The functions of the Appointment and Promotion Board and related bodies was also referred to in rule 104.14. Generally speaking the Board was to make recommendations in respect of "[p]roposed probationary appointments and other proposed appointments of a *probable* duration of one year or more, excluding the appointment of persons recruited specifically for service with a mission…" (italics added). The Board had no function in respect of a fixed-term contract, since it had a *certain* duration. On the other hand, both probationary and indefinite appointments were quite capable of lasting for a year or more and were of uncertain duration, hence potentially within the remit of the Board.

13. Rule 104.12 in ST/SGB/2002/1 of 1 January 2002, a subsequent iteration, contained an identical provision as previously in respect of fixed-term appointments, in particular that they were not to exceed five years. It also contained in rule 104.14, with some changes, the provisions relating to the Appointment and Promotion Board but its duty to make recommendations in respect of "[p]roposed probationary appointments and other proposed appointments of a probable duration of one year or more, excluding the appointment of persons recruited specifically for service with a mission" remained the same.

14. Substantial changes were effected by ST/SGB/2003/1, which came into effect on 1 January 2003, but rule 104.14 retroactively from 1 May 2002. The functions of the Promotion and Appointment Board and its related bodies were taken over by a Central Review Board, Committee and Panel (with *ad hoc* subsidiary bodies), described as "central review bodies" (CRBs) (rule 104.14 (a)), which were created (in what appears to be an unnecessarily complicated procedural minuet) by ST/SGB/2002/6, also effective on 1 May 2002. Their functions were stated as follows in rule 104.14:

> "*Functions of the central review bodies*
>
> (h) *Appointment and promotion*
>
> (i) The central review bodies shall advise the Secretary-General on all appointments of one year or longer and on the promotion of staff after such appointment, except in the following cases:
>
> a. Appointment of persons recruited specifically for service with a mission;
>
> b. Appointment of candidates having successfully passed a competitive examination, in accordance with rule 104.15;
>
> c. Appointment at the entry level or promotion within the General Service and related categories of candidates having successfully passed an entrance test or examination, under conditions defined by the Secretary-General;
>
> (ii) The central review bodies shall review the process for compliance with the pre-approved selection criteria and shall offer recommendations. Where these recommendations are not in line with those of the relevant manager, they shall transmit their recommendations for final decision to the Secretary-General, who shall give due consideration to the recommendations of the central review bodies."

The respondent relies on this provision to contend that the applicant's second contract, having the effect of extending his period of service to more than a year, required review by the CRB for its validity.

15. It will be seen that, under rule 104.12 (as contained in ST/SGB/2002/1 and carried through into ST/SGB/2003/1) a fixed-term appointment could be made for a period not exceeding five years. Rule 104.12(b)(iii) itself envisages a period of "continuous service" in the context of the possibility of converting a succession of fixed-terms into permanent appointment. As distinct from the Promotion and Appointment Board having the duty to advise on "proposed appointments of a probable duration of one year or more", the CRBs were required to advise the Secretary-General "on all appointments of one year or longer" (see rule 104.14(h)(i)). Each fixed-term appointment necessarily involves an expiration date specified in the letter of appointment and, therefore, whether the advice of the CRB were necessary or not would be immediately apparent. (Of course, some appointments, not being fixed term appointments, might turn out to be for periods of one year or longer, such as indefinite and probationary appointments but a CRB had no functions in respect of these appointments, except that it would review the suitability for permanent appointment of probationers under rule 104.14 (i)(i).)

16. It seems to me that rule 104.14(h)(i) applies severally to each distinct appointment. Applying ordinary English usage, an appointment of six months is not the same as an appointment "of one year or longer" although it might result, of course, in a period of continuous service of one year or longer if it were added to an earlier term of sufficient length. The natural meaning of the phrase "appointment" and as used throughout the Rules is a specific engagement; it is not cumulative but singular. Moreover, the distinction between appointment on the one hand and continuous service had been embodied in the Rules at least since ST/SGB/1999/5 and, I suspect, long before that. If it had been intended to oblige a CRB to advise on an appointment that would have the effect of conferring continuous service of one year or more by virtue of accumulation, then it would have been a simple matter to use language already long utilized in the Rules in order to make that clear.

17. I have mentioned the creation by ST/SGB/2002/6 of Central Review Boards, Committees and Panels. Section 5 provides for their functions in respect of the selection of staff, essentially to approve appropriate selection criteria, ensure that

candidates were evaluated accordingly and proper procedures were followed. This process did not and could not apply to the appointment of staff to fixed-term contracts of less than a year. This provision enabled compliance with sec 8 of ST/AI/2002/4 ("The central review bodies shall review the proposal for filling a vacancy made by the department/office concerned to ensure that candidates were evaluated on the basis of the pre-approved evaluation criteria and/or that the applicable procedures were followed, in accordance with sections 5.1 to 5.6 of ST/SGB/2002/6"), which also came into effect on 1 May 2002. ST/AI/2002/4 is the Administrative Instruction promulgated to implement a new staff selection system. It concerns "staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the 100 series of the Staff Rules" (sec 3.1) and creates an elaborate process of notification of posts "approved for one year or longer" (sec 4.2), applications, evaluation and selection of various categories of applicants. This scheme did not cover appointments to fixed term contracts for less than one year. In my view, sec 104.14(h) of ST/SGB/2003/1 was not designed to create a distinct wider role for CRBs in respect of fixed-term contracts of less than a year's duration that might have the effect of extending a period of employment to one year or more. Not only the language of the provision itself but the overall scheme of which it is a part requires this conclusion.

18. As has been noted, the applicant's first contract was for the fixed-term of almost nine months, subject to continuation of the mission. Such appointments could not be made under the system of employment of which CRBs were an integral part. That employment, provided for at the time by ST/AI/2006/3, applied only to "staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the 100 series of the Staff Rules": sec 3.1. The first contract was not and could not be one of these appointments. The second contract was for six months. It was not capable of being dealt with in accordance with ST/AI/2006/3. The "appointment of one year or longer" to which sec 3.1 refers and thus to which ST/AI/2006/3 applies does not refer to a fixed-term of appointment of less than twelve months, even though, if accumulated on an existing contract, it might

effect a continuous period of employment of more than twelve months. There are, in fact and in law, two contracts of employment effecting two legally distinct appointments. The second contract cannot be regarded as a mere amendment or extension of the first.

19. Whilst it is true that, by and large, the law looks to substance rather than form, there are occasions when form is substance, especially in the case of contracts because, irrelevant exceptions aside, the agreement of the parties (the substance) is *constituted*, as distinct from *represented*, by the contract (the form). Here, there can be no doubt that the first contract came to an end at midnight on 31 December 2007 and the second contract commenced immediately at midnight on 31 December 2007. They both specifically so provided. At all events, the respondent cannot be heard to say, having himself stipulated the form of the contracts, that they are one rather than two. In law, they are two contracts, quite apart from the specification of the different missions. The mere fact that the period of the second immediately follows the period of the first cannot change this fundamental attribute.

20. It is also worth noting that the fundamental issue raised by the respondent does not concern in the slightest degree the applicant's fitness for the appointment, whether others might have been appointed to the position or whether evaluation criteria should have been devised and applied and, of course, the question of pre-approved criteria does not arise. In the present case, the issue to which the claimed involvement of the CRB goes is whether the applicant should receive the entitlements applicable to an employee who has served continuously for twelve months or more or whether this obligation can be avoided by artificially creating a discontinuity. With such a question the CRB would have been utterly unconcerned. There is, therefore, substantial incoherence in reasoning that the applicant should not have obtained the contract granted to him because of the failure by the CRB to intervene. I do not make much of this, as a significant degree of incoherence seems to have been for decades characteristic of the maze of the UN's Regulations, Rules, Secretary-General's Bulletins, Administrative Instructions and Guidelines and, no doubt, many hours of

innocent pleasure can be obtained by contemplating its complexities. But certainly an argument that relies on this aspect is unlikely to be attractive.

21. To put this last point more shortly, an additional reason for not accepting the "continuous service" interpretation of the phrase "appointments of one year or longer" is found in the nature of the obligation of the CRB under rule 104.14(h)(ii) to review the "process for compliance with the pre-approved selection criteria and…offer recommendations" (I think, in respect of the extent of compliance). Compliance with pre-approved selection criteria is not relevant to fixed-term contracts of less than one year duration.

22. It follows that there was no requirement that the applicant's second contract should be submitted to a CRB for review and advice.

Was the applicant appointed to a mission?

23. It will have been noted that one of the exceptions in rule 104.14(h) to the requirement for CRBs' advice to the Secretary-General operated where the staff member was "recruited specifically for service with a mission". The primary evidence for such an appointment is, of course, the contract itself. The first contract stipulated that the applicant's appointment was "limited strictly to service with UNMIN and extension of the appointment is subject to the extension of the present mandate of the mission and availability of funding". In the result, the mandate was indeed extended to late July 2008 and, as will be seen, funding was also forthcoming. The second contract stipulated that the "appointment is limited to service with UNOMIG". It appears to be accepted that this latter reference was a mistake, but a mistake for what? This is a matter entirely within the knowledge of the respondent but no evidence was tendered as to what the author intended to insert but mistakenly did not. The applicant accepted the offer in its terms. It is far from clear that the respondent's claim that a typographical error was made is significant. Apart from this claim, what does the evidence show? It is accepted on behalf of the respondent that the applicant was recruited to UNMIN, albeit he was working in New York. The need for the applicant's continuing services was the very reason for the second

contract and it is also accepted on behalf of the respondent that his work did not actually change at any point. Having been recruited to UNMIN, it seems to follow as a matter of logic as well as fact that his work for UNMIN continued. There is certainly no evidence that it ceased.

24. The advice to the Secretary-General envisioned by Rule 104.14 is preliminary to an appointment. Not surprisingly, the crucial question is the nature of the would-be staff member's recruitment and, as one would expect, it is this point that marks out the mission exception. Once the contract was entered into, the role of the CRB was at an end. Accordingly, even if the staff member's job changed, the contract (subject to the possibility of termination) subsisted and the reason for his original entry into employment (the purpose of his recruitment) naturally did not change. Here, the contract came to an end on 31 December 2007 but the applicant's job (on the evidence) did not change. I do not see how it can be validly argued that the initial recruitment to UNMIN had somehow altered, whether the relevant date was March 2007 or 1 January 2008. Nor do I see how the second appointment could validly be characterized as a "recruitment" but, if I am wrong about this, then it was a recruitment either to UNOMIG in terms of the contract or UNMIN in terms of the fact.

25. I was informed from the bar table by Ms Maddox for the respondent without objection that there was a problem with funding and that maintenance of funding for UNMIN could not continue past 31 December 2007. This submission was supported by tendering an email dated 15 November 2007 in which the Officer-in-Charge of the Field Budget and Finance Division of the Department of Field Services, requested the Executive Officer of the Department of Peacekeeping Operations to provide "GTA Funds to support the Field Budget and Finance Division". The email stressed that the funds were essential to permit the Division "to *extend* the appointments of the following temporary staff…" (italics added). The applicant was identified in the list as having UNOSEK, UNPOS, UNMIN, UNAMID/JSMT" as his assignments, all of which are missions (and appears, therefore, to exclude UNOMIG, though it does not lead to any inference as to the name that was intended to be inserted). Although it

may well be that the funding arrangements changed, I do not accept that it follows that the applicant's appointment to UNMIN had come to an end, at least by 4 January 2008, the date upon which the contract was signed (effective 1 January 2008), let alone that his original recruitment was either changed or somehow had been superseded by a new and different recruitment. The email pleading for funds states "approved" in January 2008 (date is obscure). It was submitted by Ms Maddox that, the source of financing being GTA funds, it followed that the applicant could not be regarded as having been "recruited to a mission". It is not at all obvious that the mere change of funding varies the character of either a recruitment or an appointment. It is not for the Administration to unilaterally vary the character of the contract of employment by changing the pocket out of which an employee's remuneration is paid. Insofar as the tendered email shows anything, it shows that the applicant acquired new responsibilities in addition to UNMIN. It certainly does not support in any respect the submission that there was a new "recruitment". The whole thrust of the email is the intention, apparently satisfied, to continue the old recruitment for a further six months. That, as it happened, the applicant did not actually go to Nepal does not seem to me to affect the legal position.

26. In short, the applicant was recruited to UNMIN, he continued to work for UNMIN and all that changed was the pocket out of which he was paid. The argument put on behalf of the respondent, referring to what the applicant as a finance officer would have realized or should have known about the unpredictable and seemingly haphazard financing arrangements of the Administration, demonstrates an approach to employment contracts destructive of transparency, inconsistent with the requirements of good faith, productive of uncertainty and redolent of the pea and thimble trick: now you see it, now you don't.

27. Accordingly, even if the second contract was otherwise one on which the CRBs should have advised the Secretary-General, it fell within the exception in rule 104.14(h)(i)(a).

The legal status of the first and second contracts

28. Even if rule 104.14(h) of ST/SGB/2003/1 applied to the second contract, thus obliging the CRBs to tender advice to the Secretary-General, I am of the view that the Administration's failure to comply with the obligation does not invalidate the contract. The contract was created when the Administration's offer was accepted by the applicant. There was no duty on the applicant to examine whether the person making the offer was authorized to do so. He was entitled to act upon the representation implicitly made to him that the offer was properly authorized and the terms of the contract were agreed upon. The offer was relevantly unconditional, as was his acceptance. The contention that the contract was invalid because of the omission by the CRBs to advise the Secretary-General on the appointment, assuming that this was the applicable procedure, should be rejected. To the contrary, the correct conclusion is, in accordance with the principles of contract law, that the contract was valid and fully enforceable once the unconditional offer was unconditionally accepted.

29. I should mention that the contract required the applicant to sign an acknowledgement in the following terms:

> "I hereby accept the appointment described in this letter, subject to the conditions therein specified and to those laid down in the Staff Regulations and in the Staff Rules governing temporary appointments for a fixed term. I have been acquainted with these Regulations and Rules, a copy of which has been transmitted to me with this letter of appointment."

30. This condition, which is too vague to be given legal significance, is not in terms incorporated in the contract. Nor can it be regarded as making the acceptance of the contract conditional in any material way. The notion of being "acquainted" with the Staff Rules and Regulations, as distinct from particular rules or regulations – and reference to those "governing temporary appointments for a fixed-term" is not a particularization of any utility – is fanciful, if not absurd. It does not assist in determining the significance or otherwise of the role of the CRBs. In this regard, I note that the respondent itself submitted that there are no relevant staff rules or

regulations that control the appointment of staff members in the professional category for appointments of less than one year.

31. Even if there might be a hypothetical question about the validity of the contract, the respondent is estopped from denying its validity. His agent or agents, having apparent authority to do so, represented in effect that the contract was valid and that all necessary procedures had been followed. The applicant acted in reliance on that representation and undertook the duties for which he had been contracted and for which he was paid, confirming the mutually binding character of the contract. I do not accept the argument that he should or would have known that the contract was invalid. This submission can scarcely be taken seriously in light of the obscurity of the Rules submitted to be relevant. At all events, the applicant was entitled to act on the basis that the Administration was fully aware of its own internal obligations and requirements and that the offer made to him complied with them. Accordingly, the respondent cannot be heard to argue that contract which he induced the applicant to enter was invalid. The secondary argument that it should be regarded as a contract for something less than six months fails by parity of reasoning. I need hardly point out that a contract for a specific period of six months is, for all relevant purposes, an entirely different contract to one for three months.

32. If the second contract was valid and enforceable, could it be unilaterally terminated by the respondent as he here purported to do? In my view the answer must be no. The contract permitted termination in accordance with specific Rules governing that matter. Here, the relevant Staff Rules (ST/SGB/2002/1) provided for termination in specific circumstances (see Art IX), none of which applied in the present situation: "if the necessities of service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory or if he or she is, for reasons of health, incapacitated for further service…or for such other reason as may be specified in the letter of appointment", subject to notice and a termination payment. The fact is that no preconditions for termination occurred here. Since the Secretary-General did not purport to act under this provision, it is not necessary to discuss it further.

Was there a break-in-service?

33. The respondent contends that, as the second contract was invalid, it had a legal right to terminate the applicant's employment on 4 March 2008. Even if it had this right (which, for the reasons already stated, is not the case), it did not in fact exercise it. The applicant declined to comply with the respondent's "requirement" and did not take any break-in-service. The respondent did nothing but expostulate. The applicant was in fact and in law employed throughout. He continued to undertake the work for which his services had been contracted and he continued to be paid for doing so. There is no factual or legal basis which permits the respondent to maintain otherwise. This is so because in law either the employment continued or, as in fact the paid service continued, the respondent is estopped from contending to the contrary. The applicant sold his labour; the respondent paid for it. I might be old-fashioned, but this is employment in my book.

Travel and assignment expenses

34. As I have mentioned, the applicant does not press his claims for travel and assignment expenses in the Tribunal but has indicated an intention to make an application in the appropriate form to the Administration. It is clear that this application is made *ex post facto* and will be considered in accordance with the usual practice applying in such cases. I understand that a time limit applies. In my view, it would not be appropriate for the Administration to apply such a time limit in this case having regard to its mistaken approach to the length of the applicant's employment. That position has only been corrected by proceedings undertaken by the applicant and it would be wrong for the Administration to hold against him his delay in applying when that application would have been refused had been made in a timely way because of the Administration's incorrect view of the applicant's continuous service and its attempt to require him to accept a break-in-service. It should go without saying that the application for travel expenses and the assignment grant should be considered upon the basis that the applicant was employed for a continuous period of one year or more.

Conclusion

35. In respect of the relocation grant the application is upheld.

Remedy

36. The respondent is to pay to the applicant the relocation grant applicable at the time of the applicant's relocation. *Prima facie*, the respondent should pay interest from 7 days after the date on which the applicant sought payment until the date of payment at either the relevant standard 30 day bank bill rate or the rate provided by the New York Civil Procedure Rules. As this matter was not the subject of submissions, in the absence of agreement within seven days the parties are to provide written submissions to the Tribunal as to this issue.

(*Signed*)

Judge Adams

Dated this 13th day of November 2009

Entered in the Register on this 13th day of November 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York