UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/142
Judgment No.: UNDT/2012/121
Date: 7 August 2012
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ROCKCLIFFE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RELIEF

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the United Nations Stabilization Mission in Haiti ("MINUSTAH"), contested the decisions to subject her to a retroactive break in service from 29 May to 4 June 2009 and to place her on an appointment of limited duration (as opposed to a fixed-term appointment) from 5 to 30 June 2009, prior to appointing her on a fixed-term contract effective 1 July 2009. The Applicant sought, *inter alia*, rescission of the contested decisions, reinstatement of "all entitlements accrued during her more than 17 years of service [on] a [contract] under 100 series [of the Staff Rules]", and compensation for emotional distress.

2. On 2 March 2012, the Dispute Tribunal rendered *Rockcliffe* UNDT/2012/033, in which it found that the break in service was unlawful and did not reflect the true facts, as no actual break in service or separation took place. The Tribunal also found that the decision to place the Applicant on an appointment of limited duration between 5 and 30 June 2009 was unlawful.

3. The Tribunal thereafter directed the parties to attempt to agree on appropriate relief. The parties were unable to come to an agreement and the Tribunal ordered that they file further submissions and attend a hearing on relief. The hearing was initially set for 19 June 2012, but, at the parties' request, it was moved to 17 July 2012. Although the parties initially indicated that they would call witnesses at the hearing, no witnesses were called.

4. At the hearing on relief, the parties reached a partial settlement of the Applicant's claims. Specifically, the parties agreed that the Applicant shall be awarded 7.5 days of salary at the GS-7 level, step X; 4.5 days of salary at the FS-6 level, step X; and 9 days of mission subsistence allowance. It was clear to the Tribunal that the parties intended these amounts to be calculated using the relevant scale in place at the time of the contested decisions. As the settlement reached by the parties did not contain any reference to the payment of retroactive interest, none will be ordered so as not to disturb the settlement reached.

5. In view of the settlement on salary days and mission subsistence allowance, for which Counsel are commended in securing, only two of the Applicant's claims remain outstanding, namely (i) the Applicant's request that the Organization consider her for conversion to a permanent appointment, and (ii) her claims for compensation in connection with the delayed home leave and family leave.

Consideration

Continuity of service

6. As the decisions to subject the Applicant to a retroactive break in service and to place her on an appointment of limited duration between 5 and 30 June 2009 were found unlawful, the Applicant should be treated as if those decisions were never implemented. Thus, her service should be deemed uninterrupted and continuous on a 100 series fixed-term contract. As the United Nations Appeals Tribunal stated in *Castelli* 2010-UNAT-037, "the administration may not subvert the entitlements of a staff member by abusing its powers, in violation of the provisions of the Staff Regulations and Staff Rules". Accordingly, as the Applicant is to be treated as if her service was continuous and uninterrupted, the Tribunal shall make appropriate orders to reinstate the Applicant to the position she would have been if not for the unlawful decisions.

Home leave and family leave

Nature of the delay

7. It is agreed that, with the finding that the Applicant's service is continuous, she should have been eligible for family leave on 1 June 2009 and for home leave on 1 December 2009. Instead, as a result of the unlawful imposition of a break in service, retroactively applied and recorded only in October 2009, the Applicant's entitlement to family leave was deferred to December 2009 and her entitlement to home leave was deferred to June 2010. She seeks compensation in the amount of

three months' net base salary for the emotional turmoil and distress caused by the deferral of her right to home leave and family leave. In the alternative, she requests that she be reimbursed for the lump sum option for home leave to which she would have been entitled in December 2009. The Applicant states that she travelled home at her own expense in December 2009 and, if not for the unlawful decisions, she would have received her home leave entitlements for that trip.

8. The Applicant did not challenge the Respondent's submission that, although her family leave entitlements were made available to her in December 2009 and her home leave entitlements in June 2010, she did not use her entitlements during the period of 2010 to 2012. No evidence has been provided to the Tribunal that the Organization somehow precluded the Applicant from taking family leave after December 2009 and from taking home leave after June 2010. Thus, the Applicant has failed to persuade the Tribunal that she was deprived of her leave entitlements as opposed to them being deferred by six months. This is confirmed in the Applicant's submission of 12 July 2012, in which states that "as a result of the unlawful imposition of a break in service, the Applicant's entitlements to Family Leave and Home Leave were *deferred* to December 2009 and June 2010 respectively" (emphasis added).

Compensation for the delayed leave

9. The Applicant did not submit or give evidence that she intended to take family leave during the period of June 2009 to December 2009, when it was improperly delayed. Thus, the Tribunal finds that the Applicant did not suffer any loss with respect to the delay of her family leave.

10. The Applicant's home leave was delayed from December 2009 to June 2010. She submitted that she would have taken advantage of her home leave in December 2009 as she had to travel home at her own expense that month. It was submitted by the Applicant at the hearing on relief that the lump sum value of her home leave was USD1,200. This figure was not contested by the Respondent.

The Tribunal considers it fair to award the Applicant the sum of USD1,200 as compensation for the economic loss suffered by her as a result of not receiving her home leave entitlement in December 2009, when it should have been made available to her and when she would have likely used it. As this entitlement would have been made available to the Applicant in December 2009, it follows that it should be subject to retroactive interest, which shall be ordered in accordance with the established case law (see *Warren* 2010-UNAT-059, *Fayek* UNDT/2010/194).

Compensation for emotional distress

11. As the United Nations Appeals Tribunal stated in *Antaki* 2010-UNAT-095, not every violation will necessarily lead to an award of compensation; compensation may only be awarded if it has been established that the staff member actually suffered damages. The Applicant elected not to testify and tendered no evidence of any emotional turmoil and distress she allegedly suffered due to the delay in her leave entitlements or the contested decisions in general, and the Tribunal finds that her claims in this respect have not been proven. In these circumstances, the Tribunal finds that the Applicant's claims for compensation for emotional distress stand to be rejected.

Consideration for permanent appointment

12. With respect to her request to be considered for conversion to permanent appointment, the Applicant submits that if not for the contested decisions, she would have been entitled to that consideration. The Respondent submits that the Applicant's service was not continuous and she is not entitled to consideration for conversion.

13. In her original application, the Applicant requested "that all entitlements accrued during her more than 17 years of service under a 100 series contract be reinstated". Accordingly, the Tribunal considers that although the Applicant did not specifically identify consideration for conversion to permanent appointment as one of

claims for relief, the Tribunal finds that it is covered by the general reference to "all entitlements" and the Applicant's claims in that respect are therefore receivable.

14. The rules on conversion relevant to the Applicant were set out in former staff rules 104.12(b)(iii) and 104.13 and Secretary-General's bulletin ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009). All staff members with five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules and under the age of 53 years were eligible for consideration for conversion to a permanent appointment and were to be given every reasonable consideration for this conversion. Section 3 of ST/SGB/2009/10 states that every eligible staff member shall be reviewed by the department or office where he or she currently serves to ascertain whether the criteria for conversion have been met.

15. In the judgment on liability (*Rockcliffe* UNDT/2012/033), the Tribunal ruled that the decisions to place the Applicant on a break in service and on an appointment of limited duration were unlawful. The Applicant, in fact and in law, continued to be on a fixed-term appointment in June 2009, thus continuing her uninterrupted service that began in 1992. As the Applicant's service was in fact continuous as of 30 June 2009 and she was under the age of 53 years, she satisfied the eligibility criteria for consideration for conversion to a permanent appointment and should have been considered for it.

16. The Respondent did not lead evidence demonstrating that there are presently any obstacles to the Administration's consideration of the Applicant for conversion to a permanent appointment. Accordingly, an appropriate order will be made to this effect.

17. Article 10.5(a) of the Tribunal's Statute requires the Tribunal, in cases where the contested administrative decision "concerns appointment, promotion and termination", to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision or specific performance.

In the Tribunal's considered view, art. 10.5(a) should not be interpreted too broadly as if it was meant to cover all decisions somehow related to appointment, promotion, and termination matters. The Tribunal finds that the clause should be interpreted as applying primarily to decisions not to appoint or promote a staff member or to terminate her or his appointment. The likely rationale for including this clause in the Statute is, *inter alia*, to avoid affecting third-party rights and to avoid imposing reinstatement or continued employment where the relationship between the parties has irretrievably broken down.

18. In the Tribunal's considered view, an order for the Administration to consider the Applicant for conversion to a permanent appointment is not an order to appoint the Applicant. There is no indication that the ongoing relationship between the Applicant and the Organization is anything other than successful. Furthermore, no third-party rights would be affected if the Administration considers the Applicant for conversion. If the outcome of such consideration is not in favour of the Applicant, it would result in a new decision capable of being appealed by the Applicant. Thus, when ordering that the Applicant be considered for conversion to a permanent appointment, the Tribunal is not required to set an amount of compensation as an alternative.

Observation

19. The Tribunal notes, with regret, that this case has resulted in unnecessary litigation over matters that could have—and should have—been settled by the parties represented by experienced Counsel, particularly in view of the judgment on liability. The amount of resources expended by the parties and the Tribunal on this case far exceeds the relief and costs associated with the contested decisions.

Orders

20. As agreed by the parties, the Applicant shall be paid the following amounts at the relevant rates applicable at the time of the contested decisions: (i) 7.5 days of

salary at the GS-7 level, step X; (ii) 4.5 days of salary at the FS-6 level, step X; and (iii) 9 days of mission subsistence allowance. These sums are to be paid within 60 days after the judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sums are not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

21. The Applicant shall be paid USD1,200 as compensation for the delayed home leave entitlement plus interest at the applicable US Prime Rate from 1 December 2009 until the date of payment. If payment is not made within 60 days of the date this Judgment becomes executable, an additional five per cent shall be added to the US Prime Rate until the date of payment.

22. The Applicant shall be given full and fair consideration for conversion to a permanent appointment.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 7th day of August 2012

Entered in the Register on this 7th day of August 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York