UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/076
Judgment No.: UNDT/2013/058
Date: 22 March 2013
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

KULAWAT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Security Coordination Officer in the United Nations Department of Safety and Security ("DSS") of the United Nations Secretariat, contests the decision, conveyed to her on 4 August 2011, that she was ineligible to be considered for a conversion of her fixed-term appointment to a permanent appointment. The Applicant states that the decision was made on the grounds that she did not meet the requirement of five years of continuous service under a 100-series appointment as specified in ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) due to the fact that her record reflects a break in service from 31 August 2006 until 9 September 2006.

2. The Applicant contends that the break in service in 2006 was not a voluntary act but that she had been told by management that since her contract was not due to end until December 2006 the only way in which she could take up her new appointment in New York in September 2006 was for her to separate from the Organization. She was not given a choice and accepted in good faith what she had been told and acted upon it. The Applicant points out that she separated from her appointment in the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC") for the sole purpose of commencing her appointment with DSS. She states that such a break, and the circumstances under which it took place, does not meet the requirements of a genuine separation and, as such, is not capable of interrupting "continuous service" for the purposes of former staff rule 104.13 (on permanent appointments), staff rule 13.4 (on fixed-term appointments) and sec. 1 of ST/SGB/2009/10. The Applicant submits that she meets the other requirements because her Official Status File reflects that she had been serving on 100-series fixed-term appointments since 28 January 2003.

3. The Respondent submits that the decision that the Applicant was not eligible for consideration for conversion to permanent appointment was lawful because she did not meet the requirements in ST/SGB/2009/10 in that she did not complete, as of 30 June 2009, five years of continuous service with the United Nations on fixed-term appointments under the former 100-series Staff Rules. Moreover, the Respondent submits that the lawfulness of the break in service in 2006 is not open to challenge because the Applicant failed to lodge a complaint within the requisite time limits.

4. At the hearing on the merits held on 22 January 2013, the Tribunal heard evidence from the Applicant as well as from Mr. Suren Shahinyan, Chief, Learning, Development and Human Resources Services Division, Office of Human Resources Management ("OHRM").

Relevant facts

5. According to ST/SGB/2009/10, a staff member is eligible for consideration to conversion for permanent appointment if, among other things, he or she has completed five years of continuous service under a 100-series appointment by 30 June 2009. Accordingly, the qualifying period of service is to be computed by working backwards from 30 June 2009 to establish whether the Applicant met the five-year continuous service requirement.

6. The record shows that the Applicant was serving in MONUC on a fixed-term appointment with effect from on 28 January 2003.

7. On or around 1 March 2006, the Applicant received an offer of appointment for a position in DSS, New York. On 13 March 2006, she accepted and signed the offer of a two-year fixed-term appointment under the 100-series Staff Rules.

8. On 20 June 2006, the Applicant informed OHRM that she planned to travel to New York by early September.

9. By letter of 28 June 2006, OHRM informed the Applicant that pre-recruitment formalities for her post in DSS had been completed and requested that she notify OHRM of the date on which she will report for duty.

10. In July 2006, the Applicant engaged in email communications with Mr. Richard Floyer-Acland, Chief of the Policy Unit in DSS, who would be her new supervisor in DSS, and it was agreed that she would report in New York in September 2006. The Applicant mentioned in her email of 7 July 2006 to Mr. Floyer-Acland that it had been suggested to her by MONUC that she take a few days in Bangkok, and he responded that "it is a good idea to get back to Bangkok for a break between MONUC and DSS".

11. On 19 July 2006, OHRM followed-up with the Applicant and requested that she indicate her date of travel so that visa and travel arrangements could be made for the Applicant and her husband. The next day the Applicant responded by email that following consultations with DSS she planned to travel to New York by the end of August–early September. She stated that it was likely that she and her spouse would be traveling to New York from Eritrea, where he resided at the time.

12. On 2 August 2006, the Applicant emailed the then Chief Civilian Personnel Officer ("CCPO") in MONUC that she planned to leave MONUC by 1 September 2006 and requested his "kind consideration for appropriate actions in facilitating [her] repatriation by 31 August 2006". On 10 August 2006, a Human Resources Assistant, MONUC, requested the Applicant to clarify whether her "departure from MONUC is separation or reassignment to UNHQ. It would be much appreciated if you forward the Offer you have received, and based on what I read from that offer I can do the required and necessary action".

13. By email of 10 August 2006, the Applicant wrote to MONUC to "confirm, after consultations with [her] new duty station in UN Secretariat, that [her] departure from MONUC is the separation". She attached a memorandum signed by her and

dated 2 August 2006, stating that, following her acceptance of an offer of employment with the Secretariat in New York, she "wish[ed] to end the assignment with MONUC by 1 September [2006]" and seeking "kind consideration for appropriate actions in facilitating [her] repatriation by 31 August 2006".

14. At the hearing the Applicant testified, in effect, that she had been told that, if she wanted to take up her appointment in New York, she had to take a break in service.

15. On 10 August 2006, the CCPO in MONUC wrote to the Applicant that in view of her memorandum of 2 August 2006 notifying them of her desire to separate from MONUC on 31 August 2006, he was providing her with the applicable administrative forms and details concerning her entitlements.

16. On 11 August 2006, the Applicant confirmed to MONUC that although she had initially wished to be repatriated to Bangkok, she now wished to travel to Eritrea, where her husband lived and worked.

17. On 12 August 2006, the Applicant confirmed to OHRM that MONUC was arranging her separation effective 31 August 2006. She stated that she would travel to New York from Eritrea on 10 September 2006 and would report for duty on 11 September 2006.

18. Upon OHRM's request for clarifications regarding the reason as to why the Applicant was traveling from Eritrea instead of her place of recruitment (Kinshasa, Democratic Republic of the Congo), she responded on 14 August 2006, stating the following:

> 1. MONUC is arranging for my separation date of 31 August 2006.
>
> 2. As for the travel arrangements, I have coordinated with MONUC Personnel Section for the repatriation to my home country. As the distance and travel costs from Kinshasa to Bangkok will likely

> be higher than to Asmara (Eritrea), MONUC agreed to arrange for my travel to Asmara, where my spouse is living.

19. The United Nations paid for the split shipment of her personal effects from Kinshasa to Bangkok and New York as well as her travel from Eritrea to New York. The Applicant was paid all other entitlements due upon her separation from MONUC, including repatriation grant.

20. On 31 August 2006, the Applicant departed MONUC for Eritrea.

21. On 9 September 2006, the Applicant travelled to New York from Eritrea and assumed her functions with DSS.

22. Approximately four years later, on 14 July 2010, the Applicant made a request, apparently for a correction of her records. Her request is not on record. By memorandum dated 22 February 2011 and entitled "Amendment of Records", the Applicant was informed by Mr. Jeppe Christensen, CCPO, United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO", which took over from MONUC), that:

> We have consulted with FPD [Field Personnel Division] and they have advised that it was a practice for any staff member serving in a field mission and who is selected for a position at [the Headquarters], to have to resign from their post with a 3-day break in service before appointment to a position in [the Headquarters]. In your case you accepted to do so in order to take up your appointment at [the Headquarters]. If you did not see that as appropriate, then it would have been advisable to have objected and appealed the decision at that point in time.
>
> On this basis, FPD has advised that it is too late to challenge the decision, and in consequence your record cannot be amended as requested in your email[.]

23. On 4 August 2011, the Applicant was informed by the Executive Officer, DSS, that she was ineligible to be considered for a conversion of her fixed-term appointment to permanent appointment because she did not meet the requirement of

five years of continuous service as specified in ST/SGB/2009/10 since the record of her work history included a break in service in September 2006.

24. On 9 August 2011, the Applicant filed a request for management evaluation seeking "rescission of the decision that she is not eligible for consideration for conversion to permanent appointment". On 12 September 2011, she received the decision on her request for management evaluation in a letter affirming the impugned decision.

Relevant legal provisions

25. Former staff rule 104.3 (ST/SGB/2002/1), in force at the time of the events in 2006, stated:

> **Rule 104.3**
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> **Re-employment**
>
> (a) A former staff member who is re-employed shall be given a new appointment or, if re-employed within twelve months of separation from service … he or she may be reinstated in accordance with paragraph (b) below. …
>
> (b) On reinstatement the staff member's services shall be considered as having been continuous … . The interval between separation and reinstatement shall be charged, to the extent possible and necessary, to annual leave, with any further period charged to special leave without pay.

26. Former provisional staff rule 4.17 (ST/SGB/2009/7), in force at the time of the Applicant's request dated 14 July 2010, stated:

> **Rule 4.17**
>
> **Re-employment**
>
> (a) A former staff member who is re-employed shall be given a new appointment unless he or she is reinstated under staff rule 4.18 below.

(b) The terms of the new appointment shall be fully applicable without regard to any period of former service, except when a staff member receives a new appointment in the United Nations common system of salaries and allowances less than twelve months after separation. In such cases, 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, weeks 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.

Rule 4.18

Reinstatement

(a) A former staff member who held a fixed-term or continuing appointment and who is re-employed under a fixed-term or a continuing appointment within twelve months of separation from service may be reinstated in accordance with paragraph (b) below.

(b) On reinstatement the staff member's services shall be considered as having been continuous, and the staff member shall return any monies he or she received on account of separation, including termination indemnity under staff rule 9.8, repatriation grant under staff rule 3.18 and payment for accrued annual leave under staff rule 9.9. The interval between separation and reinstatement shall be charged, to the extent possible, to annual leave, with any further period charged to special leave without pay. The staff member's sick leave credit under staff rule 6.2 at the time of separation shall be re-established; the staff member's participation, if any, in the United Nations Joint Staff Pension Fund shall be governed by the Regulations of the Fund.

(c) If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment.

27. Former staff rule 104.13 (ST/SGB/2002/1) stated:

Rule 104.13

Permanent appointments

(a) The permanent appointment may be granted, in accordance with the needs of the Organization, to staff members who, by their qualifications, performance and conduct, have fully

> demonstrated their suitability as international civil servants and have shown that they meet the high standards of efficiency, competence and integrity established in the Charter, provided that:
>
> …
>
> (iii) They have completed five years of continuous service under fixed-term appointments and have been favourably considered under the terms of rule 104.12(b)(iii).

28. Staff rule 13.4(b) (ST/SGB/2011/1) provides, in relevant part:

> **Rule 13.4**
>
> **100-series fixed-term appointment**
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> …
>
> (b) Notwithstanding that a 100-series fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment, a staff member who has completed five years of continuous service on a 100-series fixed-term appointment on or before 30 June 2009 who has fully met the highest standards of efficiency, competence and integrity and who is under the age of 53 years on the date on which he or she reaches five years of qualifying service will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization.

29. Section 1(a) of ST/SGB/2009/10 provides that to be eligible for conversion to a permanent appointment a staff member must, by 30 June 2009, have completed, or complete, five years of "continuous service" on fixed-term appointments under the 100-series Staff Rules.

30. Section 4 of the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 ("Guidelines"), as approved by OHRM on 29 January 2010, provides that:

> United Nations field mission staff members who held a 100-series fixed-term appointment limited to service with a specific mission or a 300-series appointment of limited duration in a United Nations field

> mission or an indefinite appointment as at 30 June 2009 are not eligible for review and conversion to a permanent appointment. However, Field Service Officers who held a 100-series fixed-term appointment not limited to service with a specific mission as at 30 June 2009 are eligible for consideration.

31. Section 5 of the Guidelines provides:

> With respect to the requirement of five years of continuous service, the following should be noted:
>
> a. A break in service of any duration prior to the date on which the staff member reached the five years of qualifying service will interrupt the continuity of service.

Consideration

Scope and receivability

32. The principal issue in this case is whether the decision not to consider the Applicant for conversion to permanent appointment is proper and lawful, having regard to the Tribunal's factual findings on the reasons and circumstances surrounding the break in service.

33. The Respondent submits that the doctrine of estoppel applies since the Applicant did not file a request for administrative review regarding her September 2006 break in service within the requisite time period, and this therefore precludes her from contesting the lawfulness of the break in service (see *Gomez* UNDT/2010/042).

34. The Respondent labours under a misconception regarding the scope of the case before the Tribunal. The contested decision is the decision finding the Applicant ineligible for conversion to a permanent appointment. To examine the issue of the propriety and lawfulness of the decision regarding conversion, the Tribunal must examine the factual background and circumstances to ascertain the activating cause of the Applicant's decision to separate from the Organization.

Administrative decisions must be based on proper reasons and take into account proper facts and considerations. The issue of the break in service forms one of the reasons, if not the principal reason, for the contested decision. Although the break in service is recorded in the Applicant's files and she may have received certain entitlements in connection with that separation, the issue in this case is whether the break in service in 2006 can be taken into account for the purpose of conversion to a permanent appointment.

35. The Applicant is not seeking a remedy for the separation of eight days in 2006 but for the consequences of that separation on her eligibility for consideration for permanent appointment. Therefore, the Tribunal is not being asked to and will not exercise jurisdiction and award a remedy over the issue of the break in service taken in 2006. However, the Tribunal does have jurisdiction over the issue of the decision denying eligibility for consideration for conversion to permanent appointment. The Applicant's claims regarding this decision are receivable and the contested decision must be reviewed as to its propriety and lawfulness.

36. At the outset of the hearing of 22 January 2013 it was agreed, after a preliminary discussion and before any evidence was adduced, that but for the eight-day break in service the Applicant met the eligibility requirements as to continuity of employment. In the circumstances it was necessary to hear evidence from the Applicant and any witness for the Respondent. In addition, the Tribunal granted leave to the Respondent to submit a memorandum dated 20 January 2013 from Mr. Richard Floyer-Acland, who was, at the material time, Chief of the Policy Unit in DSS, and the Applicant's supervisor during that period.

37. The Tribunal will consider the following matters:

a. Did the Applicant have, by 30 June 2009, a minimum of five years continuous employment under the 100-series Staff Rules?

b. If continuity of employment was interrupted, what was the reason for it? Do the circumstances constitute a voluntary act on the part of the Applicant or was she forced, induced or otherwise misled into separating from the Organization?

c. If the Applicant did not separate of her own volition what consequences flow from it?

Was the Applicant on an appointment under the 100-series Staff Rules during the qualifying period of service?

38. In his reply, the Respondent submitted the following:

> The Applicant's prior service, from 25 May 1995 to 31 August 2006, was under the 300-series of the former Staff Rules. Such service, which [is] under appointments of limited duration (ALD), does not count towards conversion under the 100-series of the Staff Rules (See ST/SGB/2003/3 [Staff Rules 301.1 to 312.6 governing appointments for service of a limited duration]). ALDs and short-term appointments were non-career appointments that did not carry any expectancy of renewal or of conversion to any other type of appointment.

39. By Order No. 261 (NY/2012), issued on 12 December 2012, the Tribunal ordered the Respondent to provide documentary evidence in support of his contention that from 25 May 1995 to 31 August 2006, the Applicant served on appointments under the former 300-series Staff Rules.

40. The Respondent replied to Order No. 261 on 17 December 2012, asserting that the "secondary reasons for why the Applicant's conversion was refused include her four separations from service prior to 31 August 2006 and her service under ALD".

41. The relevant period for counting qualifying service in this case is 1 July 2005 to 30 June 2009. It is noted that there is no contention between the parties that from

9 September 2006 to 30 June 2009 the Applicant was on an appointment under the 100-series Staff Rules.

42. A close perusal of copies of personnel action forms attached to the Respondent's submission demonstrates that the Applicant was under a 100-series fixed-term appointment during the period 28 January 2003 to 31 August 2006.

43. Accordingly, the record shows that during the qualifying period, from 1 July 2005 to 30 June 2009, the Applicant's appointments in MONUC and DSS were under the former 100-series Staff Rules.

Was the Applicant's appointment limited to a specific field mission?

44. The Respondent contends that the Applicant's service in MONUC was limited to that particular mission, and, therefore, in accordance with sec. 4 of the Guidelines, she was not eligible to be considered for conversion to permanent appointment. As mentioned above, sec. 4 of the Guidelines provides that only field service officers who held 100-series fixed-term appointments not limited to service with a specific mission as at 30 June 2009 are eligible for consideration.

45. There would appear to have been a misunderstanding about the scope of the Guidelines, even if the Tribunal were to accept that they could be relied on for the purposes of this case (see, e.g., *Korotina* UNDT/2012/178, *Egglesfield* UNDT/2013/006, *Guedes* UNDT/2013/031). Section 4 of the Guidelines concerns staff serving on fixed-term appointments limited to service with a specific mission as at 30 June 2009. In the Applicant's case, although her service was limited to MONUC from 25 May 2003 to 31 August 2006, she no longer had such limitation of service as of 30 June 2009, the date on which a determination of eligibility had to be made.

Did the Applicant's break in service render her ineligible for consideration for conversion to permanent appointment?

46. According to the Respondent, the plain meaning of staff rule 13.4, sec. 1 of ST/SGB/2009/10, and sec. 5(a) of the Guidelines, taken together, is that "continuous service" means service without interruption, and that any interruption of service that takes place prior to reaching the five years of service will render the staff member concerned ineligible to be considered for conversion to a permanent appointment.

47. In response to Order No. 261, the Respondent submits that the principal reason for finding the Applicant not eligible for consideration for conversion to permanent appointment is her break in service of eight days in 2006.

48. The Applicant maintains the view that the break in service in 2006 was not a genuine separation because she was wrongly told to resign her position in MONUC in order to take up the position in DSS.

49. It was agreed that the central issue for the parties and their witnesses to address was the circumstances under which the separation and break in service occurred in September 2006. There was a stark conflict between the parties in that the Applicant contended that she was "forced" to resign and the Respondent contended that the Applicant decided of her own volition to separate and collect all her benefits before commencing a new contract with DSS in New York. It became clear in the course of the hearing that by saying that she was "forced" to resign the Applicant was not alleging that undue pressure was placed on her to resign or separate but that she was induced to resign by being misled when she was told that the only way in which she could take up the position with DSS in September 2006 was to separate from her position in MONUC. The Tribunal finds this explanation credible.

50. It is not surprising that there is evidence on record that there had been discussions and communications between the Applicant and MONUC regarding the arrangements for her taking up duty in DSS New York. Specifically,

a. by email of 10 August 2006, MONUC requested the Applicant to forward a copy of her letter of appointment for them to determine whether she should be transferred or separated;

b. in response, in her email of the same day, the Applicant indicated that "following consultations with New York", she was being separated and not transferred from Kinshasa to New York.

51. There are no contemporaneous records before the Tribunal of the consultations that the Applicant had with "New York" and that resulted in her communication of 10 August 2006. However, in the absence of contemporaneous documentary evidence the Tribunal has to consider the evidence as a whole, including documents emanating at a later date and testimony given at the hearing. In particular, the Tribunal has to consider whether the evidence in this case tends to support the Applicant's version of events.

52. The Tribunal notes the Applicant's evidence at the hearing and the following:

a. Memorandum dated 22 February 2011 from Mr. Jeppe Christensen, CCPO, MONUSCO, to the Applicant, referring to her request dated 14 July 2010 regarding amendment to her personnel records and stating that "it was a practice for any staff member serving in a field mission and who is selected for a position at [the Headquarters], *to have to resign* from their post with a 3-day break in service before appointment to a position in [the Headquarters]" (emphasis added);

b. Mr. Richard Floyer-Acland's memorandum dated 20 January 2013, which was tendered by the Respondent and accepted into evidence, with

leave, subject to the Tribunal determining the weight to be given to it since it was unsworn and had not been tested. The memorandum confirms that Mr. Floyer-Acland, who was the Applicant's new supervisor in DSS, was supportive of her request "to take a few days leave to see her husband between two lengthy periods apart due to UN service" so that she would arrive refreshed and ready to start work, adding the following paragraph which the Tribunal considers significant:

> I discussed her date of arrival with administrators and human resources staff in DSS New York in terms [of] my unit's work programme and her own welfare. I do not remember anyone in administration or human resources advising me that time off in Asmara would constitute a break in service, and I am sure that had they done so I would have advised her to come straight to New York without taking time off. I assumed that these five days would be counted as normal annual leave.

53. Taking the evidence as a whole, the Tribunal finds that the break in service occurred at the insistence of the Organization, as evidenced by the Applicant's account, which is consistent with the memorandum of 22 February 2011 confirming the practice that existed at the time with regard to breaks in service. In taking the decision to separate the Applicant was not acting on her own free will but was following what she had been told to do if she wished to take up the appointment at the United Nations Headquarters.

54. At the time, there was no requirement in properly promulgated administrative issuances for staff members in the Applicant's situation to take a break in service between two appointments (see *Castelli* UNDT/2009/075, *Gomez* UNDT/2010/042, *Villamoran* UNDT/2011/126, *Rockcliffe* UNDT/2012/033). Even if the Tribunal were to accept that the Guidelines can be relied on for the purposes of this case, the Guidelines, issued more than three years after the events in 2006, do not take into account whether the break in service was lawful. (Notably, had such a break in service requirement been included in some other manuals or guidelines of OHRM in

2006 that were not issued as properly promulgated administrative issuances, it would have had no legal effect (see, e.g., *Villamoran*, *Rockcliffe*, *Korotina*, *Egglesfield*, *Guedes*).)

55. The Tribunal further finds that the Applicant's several days' leave in Eritrea could have and would have been treated as annual leave had she been transferred to New York instead of being separated.

56. The Tribunal also notes there is no evidence that any consideration was given to reinstating the Applicant in accordance with the provisions of former staff rule 104.3 or that she was even informed of that option at the time.

57. The Tribunal finds that, in the Applicant's case, the break in service that took place in 2006 shall not be taken into account for the purposes of consideration for conversion to a permanent appointment.

Remedies

58. In a number of judgments, the United Nations Appeals Tribunal ("UNAT") has ruled that an applicant must substantiate the pecuniary and/or non-pecuniary damages that she or he claims to have suffered in consequence of the Administration's violation(s) of her or his rights (see, for instance, *James* 2010-UNAT-009, *Sina* 2010-UNAT-094, *Antaki* 2010-UNAT-095 and *Abboud* 2010-UNAT-100). The quantification of the award therefore depends on the specific harm that the Tribunal assesses and determines that the individual applicant has suffered (*Solanki* 2010-UNAT-044). Article 10.7 of the Statute precludes an award of punitive damages.

59. The Applicant accepts that she did not suffer any pecuniary damage. However, at the hearing the parties were given leave to make submissions on non-pecuniary (moral) damages.

60. In her submission of 4 February 2013 on non-pecuniary damages, the Applicant asserts that the Tribunal has discretionary authority to receive a claim for moral damages even if it was not included in the application and that she demonstrated during the hearing that she "truly suffered emotional distress".

61. The Applicant "urge[d] the Tribunal to make an appropriate award that would make justice to her as a functioning staff member" of the Organization.

62. By submission dated 30 January 2013, the Respondent stated that the claim for moral damages was not included in the Applicant's application; it was not subjected to a management evaluation; the Tribunal's Statute and Rules of Procedure prohibit such a late claim to be so adjudicated; the Applicant only considered and requested a claim for moral damages when put to her by the Judge; the Applicant failed to demonstrated that she actually suffered emotional distress.

63. The Tribunal does not accept the Respondents contentions. Where a person's rights have been infringed there is an entitlement to a remedy. The Tribunal has power under art. 19 of the Rules of Procedure to give any direction or issue any order of its own motion so that justice may be done so long as the party affected by such a direction or order has a fair opportunity to deal with the matter. Not only did counsel for the Respondent have the opportunity to cross-examine the Applicant on her claim for moral damage but also to send in written final submissions within a mutually agreed timeframe. The Respondent has suffered no prejudice from the Applicant's amended plea on relief, and the Applicant is entitled to an award for non-pecuniary damage subject to proof of such damage.

64. The compensation to be determined in this case is for the non-pecuniary damage suffered, if at all, as a result of the decision to find her ineligible for consideration for conversion to permanent appointment. No element of the award is to reflect the trials and tribulations of working in a hardship duty station. Further, although the Applicant may have received certain entitlements in relation to

the break in service in 2006 (such as repatriation), they are apart and separate from the harm resulting from the contested decision finding her ineligible for conversion.

65. The Applicant claims anxiety and stress which she suffered when she was notified of the contested decision rejecting her request for consideration for conversion to a permanent appointment. It was particularly upsetting to have been informed that she was not eligible because of the break in service, which she was told she was obliged to take.

66. The Tribunal had the opportunity to form its own assessment as to the degree to which the decision to refuse her a permanent appointment and the reasons for that decision caused her anxiety or stress. The Tribunal assesses the degree of non-pecuniary damages as significantly above the minimal point but at the lower end of the scale of awards appropriate in such cases. In *Guedes* UNDT/2013/042, which concerned a misapplication of the relevant rules on eligibility for a permanent appointment, the Tribunal awarded the applicant the sum of USD3,000. In this case, the Applicant was declared as not eligible as a consequence of her acting in accordance with what was presented to her as the practice she was obliged to follow if she wished to take up her offer of appointment in New York. The Tribunal finds that the Applicant's distress is to be assessed at a higher level than *Guedes*. The Tribunal awards the Applicant the sum of USD7,000 as compensation for non-pecuniary damage.

Conclusion

67. The decision declaring the Applicant ineligible to be considered for a conversion of her fixed-term appointment to a permanent appointment is rescinded. The Applicant shall be given full and fair consideration for conversion to a permanent appointment.

68. The Tribunal awards the Applicant USD7,000. This sum is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is 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.

(*Signed*)

Judge Goolam Meeran

Dated this 22nd day of March 2013

Entered in the Register on this 22nd day of March 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York