



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

CHIKUHWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

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

Introduction

1. The Applicant contests the decision communicated to her on 20 December 2010 denying her consideration for conversion to a permanent appointment. The Applicant “does not contend that she had a right to a permanent appointment; only that she had a right to be given full and fair consideration for conversion to one”.

2. The Respondent submits in his reply that the Applicant is not eligible for conversion to a permanent appointment as a result of the fact that she is currently employed on a temporary appointment, whose terms are applicable without regard to the period of her former service, and which cannot be converted to a permanent appointment.

Relevant facts

3. On 1 February 2002, the Applicant was appointed to the post of Public Information Assistant, Department of Public Information (“DPI”) in New York. She held this position until 31 September 2005. The Applicant was subsequently granted a fixed-term appointment with the Office for the Coordination of Humanitarian Affairs (“OCHA”). Her fixed-term appointment with OCHA was extended on 1 January 2008 for a two-year period, expiring on 31 December 2009.

4. Effective 11 November 2009, the Applicant resigned her position for the purpose of taking up a fixed-term appointment as a Personal Assistant with the United Nations Development Program (“UNDP”). The Applicant resigned from UNDP on 31 October 2010 for the purpose of returning to the Secretariat.

5. On 1 November 2010, the Applicant was appointed on a six-month temporary appointment as an Associate Security Sector Reform Officer, P-2 level, with the Department for Peacekeeping Operations (“DPKO”) in the United Nations Secretariat.

6. On 16 November 2010, the Applicant submitted her electronic performance assessment documents in support of a recommendation to consider her for conversion to permanent appointment. On 7 December 2010, she was informed that the Office of Human Resources Management (“OHRM”) had determined that she was not eligible for consideration to permanent appointment. On 20 December 2010, she was further advised that OHRM had made the determination that she was not eligible for consideration for conversion to a permanent appointment as a result of her earlier separation from service.

7. On 21 January 2011, the Applicant submitted her request for management evaluation of the contested decision. The Management Evaluation Unit (“MEU”) upheld the contested decision on 22 February 2011. The Applicant filed the present application on 4 April 2011 and the Respondent filed his reply on 4 May 2011.

8. By Order No. 20 (NY/2012), dated 6 February 2012, the Tribunal (Judge Ebrahim-Carstens) ordered the parties to file a joint statement, regarding the pertinent issues and facts on which they either agreed or disagreed in the present case. The parties were also asked to inform the Tribunal as to whether a mediated solution was achievable and whether the case required an oral hearing.

9. On 19 March 2012, the parties informed the Tribunal that they did not believe that a mediated solution was possible, that they disagreed over the main legal issues of the case and that they agreed that an oral hearing was not required. They further provided the Tribunal with a chronology of agreed facts.

10. On 26 June 2012, the case was reassigned to the undersigned Judge.

11. On 29 October 2012, the Applicant, whose temporary appointment with DPKO had been extended on four occasions since her initial 1 November 2010 appointment, was required to take a break in service of at least three months as a result of having reached the 729-day limit that a staff member can be employed on a temporary appointment.

12. In response to Order No. 239 (NY/2012), dated 28 November 2012, enquiring as to her current employment status, the Applicant informed the Tribunal that she had accepted a three-month temporary appointment as an Associate Security Sector Reform Officer, United Nations Operations in Côte d'Ivoire at the P-2 level and that she would be reporting for duty on 24 February 2013.

13. The Tribunal agrees with the parties' position expressed as part of their 19 March 2012 joint submission that an oral hearing is not required in this case and will decide the case on papers before it.

Consideration

Receivability

14. The Applicant requested management evaluation of the contested decision on 10 December 2010. The MEU rendered its decision on 21 January 2011 and she filed her application with the Tribunal on 4 April 2011. The receivability conditions set out by art. 8 of the Tribunal's Statute have therefore been met and this case will be considered by the Tribunal.

Applicable law

15. ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) of 23 June 2009 states:

Section 1

Eligibility

To be eligible for consideration for conversion to a permanent appointment under the present bulletin, a staff member must by 30 June 2009:

- (a) Have completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules; and

(b) Be under the age of 53 years on the date such staff member has completed or completes the five years of qualifying service.

Section 2

Criteria for granting permanent appointments

In accordance with staff rules 104.12(b)(iii) and 104.13, a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible 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 highest standards of efficiency, competence and integrity established in the Charter.

Section 3

Procedure for making recommendations on permanent appointments

...

3.4 In the absence of joint support for conversion to permanent appointment, including cases where the department or office concerned and the Office of Human Resources Management or local human resources office both agree that the staff member should not be granted a permanent appointment, the matter shall be submitted for review to the appropriate advisory body designated under section 3.5 below. The purpose of the review shall be to determine whether the staff member concerned has fully met the criteria set out in section 2 of the present bulletin. The advisory body may recommend conversion to permanent appointment or continuation on a fixed-term appointment.

...

3.7 Staff members who, after consideration, are not granted a permanent appointment will continue to serve on a fixed-term appointment, and shall not be eligible to be considered for a permanent appointment in the future.

16. The Staff Rules state, in part:

Rule 4.12

Temporary appointment

...

(c) A temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment.

Scope of the case

17. While the parties agree that the contested decision is that concerning the Applicant not being considered eligible for conversion to a permanent appointment, they disagree as to how to define the main legal issues of the case.

18. The Applicant states that these issues are

whether the Applicant is ineligible for consideration for a Permanent Appointment because she had a Break in Service from the Secretariat, and because she is now serving on a Temporary Appointment, the facts that she accumulated the requisite five years of service on Fixed Term Appointments, and that during the Break in Service from the Secretariat she was serving on a Fixed Term Appointment at UNDP notwithstanding.

19. The Respondent identifies the issues as:

i. Does Staff Rule 4.12(c) preclude the Applicant from being converted from a temporary appointment to any other type of appointment, including a permanent appointment?

ii. Is the Applicant bound by the terms of her letter of appointment, which provide that her temporary appointment shall not be converted to any other type of appointment?

iii. Does Staff Rule 4.18 preclude the Applicant from being reinstated? Specifically, does Staff Rule 4.18(a) provide that only staff members re-employed under a fixed term or continuing appointment, and not a temporary appointment, may be reinstated?

iv. Does Staff Rule 4.17 preclude the Applicant from claiming any accrued entitlement arising from her previous employment with the Organization? Specifically, does Staff Rule 4.17(b) expressly provide that upon re-employment a staff member's service is not considered to be continuous and no regard is had to any period of former service?

v. Does Staff Rule 4.16(b)(ii) provide that recruitment of staff members in the General Service category to the Professional category

shall be made exclusively through competitive examination? Does this mean that a staff member in the General Service category may only be appointed to the Professional Category either by: (1) Successfully completing the competitive examination; or (2) Separating from the Organization and being reemployed in the professional category without any regard to their previous service in the General Service category?

20. The Tribunal finds that the above submissions, rather than identifying the relevant scope of the case, actually outline the legal arguments presented by the parties in this case. Based on the agreed identification of the administrative decision that the Applicant contests, the Tribunal therefore defines the issue to be considered as whether the administrative decision to consider the Applicant ineligible for a permanent appointment was lawful. However, when determining this matter, the Tribunal will take the above legal arguments into consideration.

Eligibility for permanent appointment

21. Section 1 of ST/SGB/2009/10 defines the eligibility requirements that have to be met by a staff member wishing to be considered for conversion to a permanent appointment. Namely, a staff member must, as of 30 June 2009, have completed or complete five years of continuous service on fixed term-appointments under 100 series of the Staff Rules and be under the age of 53 years.

22. Sections 2 and 3 of ST/SGB/2009/10 establish the procedure that has to be followed for granting a permanent appointment to a staff member who has been deemed eligible for consideration to conversion to a permanent appointment. Furthermore, sec. 3.4 states that “[t]he advisory body may recommend conversion to permanent appointment or continuation on a fixed-term appointment. Similarly, sec. 3.7 also states what is to occur if a staff member is not granted a permanent appointment following consideration, namely that they “will continue to serve on a fixed-term appointment, and shall not be eligible to be considered for a permanent appointment in the future”.

23. Upon reviewing ST/SGB/2009/10, the Tribunal concludes that for the purpose of determining the eligibility of staff members wishing to be considered for permanent appointment, the provisions contained therein have to be interpreted as a whole rather than independently from one another. Consequently, for a staff member to be eligible for conversion to a permanent appointment, he or she not only has to meet the criteria referenced under sec. 1 of ST/SGB/2009/10, but they must, as an initial requirement for the process defined in ST/SGB/2009/10 to even be applicable, and as expressed by the title and also by secs. 3.4 and 3.7 of ST/SGB/2009/10, be currently appointed on a fixed-term contract with the United Nations Secretariat.

24. Consequently, for a staff member to be eligible for consideration to conversion to a permanent appointment he or she must:

- (1) Be on a fixed-term appointment at the time of consideration;
- (2) The fixed-term appointment is with the United Nations Secretariat;
- (3) Have completed at least five years of continuous service by 30 June 2009;
- (4) The continuous service was completed on fixed-term appointments under the 100 series of the Staff Rules;
- (5) On the date the staff member completed the five years of qualifying service he or she was under the age of 53.

25. These requirements are cumulative and it is only once they have all been met that a staff member can actually be considered eligible for conversion to a permanent appointment.

26. The parties agree that at the time ST/SGB/2009/10 was promulgated, on 23 June 2009, the Applicant was employed by the Organization on a fixed-term appointment under the 100 series contract and that this appointment had been

initiated on 1 February 2002 and lasted until her separation from service to join UNDP on 11 November 2009. The parties further agree that after her separation from OCHA, the Applicant was on a fixed-term appointment with UNDP until her separation from service on 31 October 2010 for the purpose of joining DPKO on a temporary appointment on 1 November 2010, an appointment on which she remained until 29 October 2012.

27. Consequently, on 16 November 2010, the date on which the Applicant requested that she be considered eligible for consideration to conversion to permanent appointment, as well of the date of this Judgment, she was no longer appointed on a fixed-term contract. Rather, she was, and still is, an active staff member on a temporary appointment with the United Nations Secretariat.

28. In conclusion, the Respondent correctly determined that the Applicant was not eligible for conversion to a permanent appointment as she no longer met one of the requirements set out in the ST/SGB/2009/10, that she be on a fixed-term appointment with the United Nations Secretariat.

Conclusion

29. In the view of the foregoing , the Tribunal DECIDES:

30. The application is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 12th day of April 2013

Entered in the Register on this 12th day of April 2013

(Signed)

Hafida Lahiouel, Registrar, New York