



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

D'ASPREMONT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicants:

Jeffrey C. Dahl
Jonathan Goldin

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 29 May 2012, the Applicant, a staff member of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), filed an application contesting the decision of the Assistant Secretary-General for Human Resources Management (“ASG/OHRM”) not to grant her a permanent appointment (“contested decision”).

Employment Background

2. The Applicant was born on 11 May 1953 and joined the Organization on 26 July 2000 as a Clerk at the General Service level (G-4/I) working for ICTY under a Fixed-Term Appointment. Her initial contract was for three months and, upon its expiration, was extended by a month and 27 days to 22 December 2000.

3. Before the expiry of the extension, the Applicant got an employment offer to work for the Organization for the Prohibition of Chemical Weapons (“OPCW”). Consequently, she tendered in her resignation letter to ICTY which was to take effect on 30 November 2000.

4. The Applicant’s Letter of Appointment at OPCW indicates that she was offered a “local short-term appointment”, as an Administrative Assistant at the GS-6 level, with 11 December 2000 as her entry of duty date and expiring on 10 March 2001.

5. The Applicant was offered another contract by OPCW from 11 March 2001 to 3 April 2001 which was later extended to 18 May 2001. This was the end of the Applicant’s employment with the OPCW.

6. On 6 June 2001, the Applicant was offered a fixed-term appointment with ICTY as a Secretary at the G-5/V level. This contract has been extended severally with various modifications in level and functional title and, currently, the Applicant works as a Judges’ Assistant, at the G-5/X level, holding a fixed-term appointment.

Facts

7. On 12 August 2010 the Applicant submitted her application for consideration for conversion to permanent appointment.

8. On 12 July and 16 August 2010, ICTY Registrar transmitted to the ASG/OHRM the names of 448 eligible staff members, including the Applicant, who had been found suitable for conversion by ICTY and who were therefore “jointly recommended by the Acting Chief of Human Resources Section” and the ICTY Registrar.

9. OHRM disagreed with ICTY recommendations and on 19 October 2010, it submitted the matter for review to the New York Central Review bodies (“CR bodies”) stating that “taking into consideration all the interests of the Organization and the operational realities of ICTY, OHRM [was] not in the position to endorse [ICTY] recommendation for the granting of permanent appointment”, as ICTY was “a downsizing entity and [was] expected to close by 2014 as set out in the latest report on the completion strategy of the Tribunal (A/65/5/Add.12) following the Security Council Resolution 1503 (2003)”.

10. On 18 February 2011, ICTY staff members, including the Applicant, were informed that there had been no joint positive recommendation by OHRM and ICTY on the granting of permanent appointments and that, accordingly, the cases had been referred “to the appropriate advisory body, in accordance with sections 3.4 and 3.5 of ST/SGB/2009/10”. As a result, on 4 April 2011, OHRM returned the matter to the CR bodies, requesting that they review the full submissions of ICTY and OHRM and provide a revised recommendation.

11. By memorandum dated 27 May 2011, the New York CR bodies informed the ASG/OHRM that they endorsed again the recommendation made by OHRM “on non-suitability for conversion of all recommended [ICTY and ICTR] staff to permanent appointments, due to the limitation of their service to their respective Tribunals and the lack of established posts”.

12. By memorandum dated 20 September 2011, the ASG/OHRM informed the ICTY Registrar that:

Pursuant to my authority under section 3.6 of ST/SGB/2009/10, I have decided in due consideration of all circumstances, giving full and fair consideration to the cases in question and taking into account all the interests of the Organization, that it is in the best interest of the Organization to ... accept the CRB's endorsement of the recommendation by OHRM on the non-suitability [for conversion of ICTY staff].

13. By letter dated 6 October 2011, the ICTY Registrar informed the Applicant of the decision of the ASG/OHRM not to grant her a permanent appointment.

14. On 2 December 2011, the Applicant requested management evaluation of the contested decision and in a memorandum dated 17 January 2012, received by the Applicant on 18 January 2012, the Management Evaluation Unit upheld the decision of the Secretary-General not to grant her a permanent appointment.

15. On 29 May 2012 the Applicant filed her application contesting the decision not to grant her a permanent appointment. The application was served on the Respondent on 5 June 2012 with a reply due on 5 July 2012.

16. The Applicant, on 18 June 2012, filed a motion of extension of time to file her application which she had earlier submitted on 29 May 2012. The reasons advanced for the late filing of her application were that she was suffering from a temporary total disability and as a result, she could not file her application on time. In support of her motion, she produced a medical certificate issued by an ICTY Medical Officer who had placed the Applicant on an extended period of sick leave from 15 February to 9 May 2012.

17. On 25 June 2012, the Respondent filed his reply in which he, *inter alia*, contested the receivability of the application *ratione temporis*. He also submitted that the Applicant was not eligible for consideration for conversion.

18. The Tribunal issued Order No. 123 (GVA/2012) on 9 July 2012 ruling that the Applicant's case was receivable *ratione temporis*.

19. By Order No. 125 (GVA/2012) dated 11 July 2012, the Tribunal ordered the Applicant to file comments and provide supporting documents on the Respondent's submissions regarding her eligibility for consideration for conversion by 25 July 2012.

20. On 26 July 2012, the Applicant filed a motion for extension of time to comply with Order No. 125 (GVA/2012). The Applicant's counsel argued that the Applicant was on sick leave and all documents requested by the Tribunal were in her office, that counsel was on vacation hence the eight hour time difference hampered effective communication between them. He therefore sought an extension by two weeks to respond to the Order.

21. By Order No. 130 (GVA/2012), issued on 31 July 2012, the Tribunal rejected the Applicant's motion for extension of time on grounds that it was filed after the expiry date to comply with the Order, and that no medical certificates had been produced in support of the assertion that the Applicant was on sick leave. The hearing of the Applicant's case scheduled for 22 August 2012 was cancelled.

22. On 11 April 2013, the Tribunal ordered the Applicant through Order No. 40 (GVA/2013), to produce supporting documentation of her status, duration and nature of employment with the OPCW by 6 May 2013.

23. On 6 May 2013, the Applicant filed the ordered documents.

24. The Tribunal issued a case management Order No. 55 (GVA/2013) on 13 May 2013, ordering the parties to file reasoned objections, if any, to the application being determined based on their written pleadings. The parties did not file any objections.

Applicant's submissions

25. The Applicant's principal contentions can be summarized as follows:
- a. The decision of the ASG/OHRM denying her conversion to permanent appointment because she was serving at ICTY is *ultra vires* the United Nations Charter;
 - b. The exclusion of the entire ICTY staff members from consideration for conversion to permanent appointment based on the fact that ICTY was downsizing is discriminatory, unfair and unlawful, and an abuse of discretion and;
 - c. The ASG/OHRM decision that ICTY staff members are not part of the Secretariat is unlawful and depicts unequal treatment and discrimination.
26. The Applicant prayed the Tribunal to grant her the following remedies:
- a. To order the ASG/OHRM to convert her fixed-term appointment to a permanent appointment;
 - b. Alternatively, to order the ASG/OHRM to grant her a permanent appointment limited to service with ICTY;
 - c. To award her compensatory damages as a result of the discrimination she suffered, and to account for the loss of recognition and career advancement possibilities and;
 - d. To award any other relief the Tribunal deems just and proper.

Respondent's submissions

27. The Respondent's principal contentions can be summarized as follows:
- a. The Applicant is not eligible for consideration for conversion to permanent appointment because she resigned and separated from the service of the Organization;
 - b. The Applicant's service with ICTY prior to 6 June 2001 could not be counted towards her eligibility for a permanent appointment because she had a break in service from 30 November 2000 to 6 June 2001;
 - c. The Applicant was not eligible for consideration for conversion because on the date she completed five years of continuing service she was above 53 years of age;
 - d. The Applicant did not have any legal expectancy or right, irrespective of the length of her services, to be granted a permanent appointment;
 - e. The Administration correctly followed the applicable procedures required for considering applications for permanent appointments and;
 - f. The burden of proof rests with the Applicant to demonstrate that there was prejudice and or procedural irregularities in reaching the contested decision.

Issue

28. The Tribunal finds that the main issue for consideration in this matter is the Applicant's eligibility for consideration to conversion to permanent appointment.

Consideration

29. The 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) entered into force on 26 June 2009 reads:

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.

30. The Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 (the guidelines), *inter alia* provide as follows:

Eligibility for consideration

5. 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.

b. As at 30 June 2009, the staff member must have completed five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules. (Service on appointments under the 200 and 300 series will not count towards the five years of continuous service as these series of the Staff Rules do not provide for a permanent appointment); and

c. The staff member must have been under the age of fifty-three years on the date on which he or she reached the five years of qualifying service.

31. Regarding the Applicant's eligibility, the Tribunal notes that she was born on 11 May 1953 and, therefore, turned 53 years old on 11 May 2006.

32. The Tribunal further notes that by 11 May 2006, the Applicant had had continuous service with the Organization for a period of four years, 11 months and five days.

33. With respect to the crucial time prior to 6 June 2001 and regardless of the nature of the Applicant's contractual relation with OPCW, the Tribunal holds the view that at least parts of it, constitute breaks in service that cannot be considered as part of the necessary experience for the determination of "continuous service".

34. The concept of break in service in the framework of the United Nations has been adjudicated upon in several cases by ruling that "[i]n the context of the United Nations, a break in service consists of a certain period of time between two contracts, governed by the United Nations staff rules, during which a person is not employed by the Organization" (See *Dunda* UNDT/2013/034; also see *Villamorán* UNDT/2011/126, *García* UNDT/2011/189 and *Neskorozhana* UNDT/2011/196).

35. The Applicant first joined the Organization on 26 July 2000, and resigned effective 30 November 2000 from ICTY to join OPCW. By the time of her resignation, the Applicant had only worked four months and five days at ICTY.

36. The Applicant's new employment with OPCW commenced on 11 December 2000, in effect placing her out of the Organization's employment for a period of at least 10 days.

37. The Applicant's contract at OPCW expired on 18 May 2001 and she rejoined ICTY on 6 June 2001. It follows that the Applicant had at least another 18 days in which she was not in any kind of service relevant under ST/SGB/2009/10.

38. In *Dunda* UNDT/2013/034, the Applicant separated from the service of the Organization following a break in service, in the form of a resignation, to commence new employment with a different department within the Organization. The Tribunal found that the Applicant was ineligible for consideration for conversion because the break in service affected his continuous years' of service with the Organization.

39. In the case at hand, the Tribunal notes that both breaks were initiated by the Applicant and not by the Organization, as it is often the case (see *Kulawat* UNDT/2013/058). During these voluntary breaks there was no contractual relation between the Applicant and the Organization.

40. As a result, the Applicant's prior employment neither with ICTY, between 26 July 2000 to 30 November 2000, nor with OPCW could possibly be used to make up for the required five years of qualifying service for conversion to permanent appointment because the Applicant had separated from the Organization. The Applicant's continuous years of service began accumulating anew when she rejoined ICTY on 6 June 2001.

41. The Tribunal finds that the breaks in service in the Applicant's employment history disrupted her accumulation of continuous service with the Organization, which was a fundamental requirement for eligibility for consideration for conversion. Consequently, the Applicant was ineligible for consideration for conversion to permanent appointment as the breaks in service resulted in her not having acquired five years of continuous service on a fixed-term appointment.

42. Finally, the Tribunal wishes to emphasize that the lack of competence of the ASG/OHRM to take the contested decision, as was held in *Ademagic et al* UNDT/2012/131, *Malmstrom et al* UNDT/2012/129 and *Longone* UNDT/2012/130, has no impact on the Applicant's case.

43. Whether a staff member is eligible for consideration has to be assessed against clear and objective criteria, established in ST/SGB/2009/10, and is not open to the exercise of any discretion. In the case at hand, since the Applicant did not fulfill the eligibility criteria, there was no discretion to allow her to be considered for conversion to permanent appointment. It follows that even if the decision had been taken by a competent organ within the Organization, it was not legally possible, to come to another result with respect to the Applicant's lack of eligibility. Therefore, the Tribunal finds that the fact that the decision was taken by the ASG/OHRM did not in any way impact the Applicant's chances for consideration for permanent appointment.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Thomas Laker

Dated this 23rd day of May 2013

Entered in the Register on this 23rd day of May 2013

(Signed)

René M. Vargas M., Registrar