



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/002

Judgment No.: UNDT/2013/087

Date: 11 June 2013

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

VANDAMME

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Brian Gorlick, OSLA

Counsel for Respondent:

Sarah Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. By application filed with the Registry of the United Nations Dispute Tribunal in New York on 10 January 2011, the Applicant contested the decision that he was ineligible for consideration for conversion to a permanent appointment due to his breaks in service. The Applicant submits that he was reappointed within less than a month of each of his two breaks in service, in accordance with a letter of appointment that was signed prior to each break, with the resulting breaks having been induced for administrative purposes and that he was therefore eligible for consideration for conversion to a permanent appointment.

2. The Respondent claims that the breaks in service in the Applicant's employment history, which resulted in his non-eligibility for consideration for conversion to a permanent appointment, are breaks that occurred in the natural course of his contracts expiring.

Facts

3. On 7 October 2002, the Applicant joined the United Nations Interim Administration Mission in Kosovo ("UNMIK") on an appointment of limited duration. His contract was extended until his separation from service on 30 June 2003.

4. On 13 July 2003, the Applicant reported for duty to the United Nations High Commissioner for Refugees ("UNHCR") on a fixed-term appointment ("FTA") under the then 100 series of the Staff Rules.

5. On 30 July 2004, the Applicant accepted an offer of appointment on a FTA under the 100-series of the Staff Rules with the then United Nations Mission in the Democratic Republic of the Congo ("MONUC"). The Applicant separated from service with UNHCR on 31 August 2004 and reported for duty with MONUC nine days later, on 9 September 2004.

6. On 3 September 2004, the Applicant signed a “Sworn Statement by Former UNHCR Staff Member [the Applicant] Before Notary Public or Similar Official in the Country of Relocation”. The purpose of the statement was to “serve as documentary evidence that the staff member has relocated away from the country of his last duty station”. As part of this statement, the Applicant also stated that he had relocated to Belgium on 1 September 2004 “after having separated from his employer UNHCR at the end of his contract on 31 August 2004”.

7. On 4 June 2006, the Applicant accepted an offer of appointment for an FTA under the 100-series of the Staff Rules with the Department of Safety and Security (“DSS”), United Nations Headquarters. The Applicant separated from MONUC on 31 August 2006 and reported for duty with DSS 24 days later, on 25 September 2006.

8. On 9 August 2010, the Applicant, in response to a request for clarification on his eligibility for the conversion of his FTA into a permanent appointment was informed by the Office of Human Resources Management (“OHRM”) that he was not eligible for consideration for conversion to a permanent appointment as he did not meet the requirement of five years of continuous service as a result of his breaks in service.

9. On 14 September 2010, the Applicant requested management evaluation of the decision that he was not eligible for consideration for conversion to permanent appointment. On 13 October 2010, the management evaluation unit (“MEU”) supported the Administration’s decision and, on 10 January 2011, the Applicant filed the present appeal. The Respondent filed his reply on 11 February 2011.

10. On 5 November 2010, the Applicant submitted a request to the Assistant-Secretary-General (“ASG”), OHRM, that he be retroactively reinstated as a result of his reappointments to the Organization on 13 July 2003, 9 September 2004 and 25 September 2006. In a memorandum dated 16 November 2010, the ASG denied the Applicant’s request due to the fact that his requests were made over a year after the effective dates of each appointment.

11. On 19 July 2012, the Tribunal issued Order No. 144 (NY/2012), whereby it requested that the parties inform it as to whether they objected to the Tribunal disposing of the present case on the papers. The Tribunal also requested that the Applicant file a submission and the Respondent a response if any, in support of his claim that the contested breaks in service were the result of administrative proceedings, including that the terms of his new appointments were agreed upon prior to the completion of each of his FTAs. The parties conformed to the Tribunal's order and neither of them objected that this case can be disposed of on the papers. As part of his response the Applicant provided the Tribunal with a 9 August 2012 "witness statement" in which he swore that as part of his separation from UNHCR he was told he "would have to resign if [he] chose to take up the post with MONUC". Similarly, the Applicant further stated that as part of his separation from MONUC he was informed "that it was standard practice to resign if a mission appointee wishe[d] to take up a post with the Secretariat".

Applicant's submissions

12. The Applicant's principal contentions may be summarized as follows:

a. The term "continuous service" is not clearly defined in any of the legal provisions. A plain reading of the relevant instruments may indicate a requirement of service without interruption but the underlying spirit of the provisions, in conjunction with the terms of former Staff Rule 104.3, allows for a much wider and less formalistic interpretation;

b. The Applicant has served exclusively with the Organization on consecutive FTAs under the 100 series of the Staff Rules. The breaks in service were for administrative purposes to allow for re-employment which is akin to a forced resignation. In both cases the Applicant was instructed by human resources personnel that he must resign and await further travel arrangements in order to take up his next assignment with the Organization.

Respondent's submissions

13. The Respondent's principal contentions may be summarized as follows:
- a. The term continuous is clear and does not suffer from any ambiguity, meaning without interruption. The requirements are clearly expressed in OHRM's Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009, which states at para. 5(a) that "[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. The Applicant's breaks in service were not for administrative purposes but rather occurred in the natural course of business. There is no evidence that the Applicant was instructed to take any of the contested breaks in service.

Consideration

Applicable law

14. ST/SGB/2009/7 (Staff Regulations of the United Nations and provisional Staff Rules) states:

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.

...

Rule 5.3

Special leave

(a) (i) Special leave may be granted at the request of a staff member holding a fixed-term or a continuing appointment for advanced study or research in the interest of the United Nations, in cases of extended illness, for child care or for other important reasons for such period of time as the Secretary-General may prescribe. In exceptional cases, the Secretary General may, at his or her initiative, place a staff member on special leave with full pay if he or she considers such leave to be in the interest of the Organization;

(ii) Special leave is normally without pay. In exceptional circumstances, special leave with full or partial pay may be granted;

(iii) Subject to conditions established by the Secretary General, family leave may be granted as follows:

a. As special leave with full pay in the case of adoption of a child;

b. As special leave without pay for a period of up to two years for a staff member who is the mother or father of a newly born or adopted child, with a possibility of extension for up to an additional two years in exceptional circumstances. The right of a staff member to be re-absorbed after the end of such special leave without pay shall be fully protected;

c. As special leave without pay for a reasonable period, including necessary travel time, upon the death of a member of the immediate family of the staff member or in case of serious family emergency;

(iv) Special leave shall not be authorized for governmental service in a political office, in a diplomatic or other representational post or for the purpose of performing any functions that are incompatible with the staff member's continued status as an international civil servant. In exceptional circumstances, special leave without pay may be granted to a staff member who is requested by his or her Government to render temporary services involving functions of a technical nature.

(b) Subject to conditions established by the Secretary-General, a staff member who has successfully completed the competitive examination and completed one year of service under a fixed-term appointment or who holds a continuing appointment and who is called upon to serve in the armed forces of the State of which the staff member is a national, whether for training or active duty, may be granted special leave without pay for the duration of such military service, in accordance with terms and conditions set forth in appendix C to the present Rules.

(c) The Secretary-General may authorize special leave without pay for pension purposes to protect the pension benefits of staff who are within two years of achieving age 55 years and 25 years of contributory service, or who are over that age and within two years of 25 years of contributory service.

(d) Staff members holding a temporary appointment may exceptionally be granted special leave, with full or partial pay or without pay, for compelling reasons for such period as the Secretary-General deems appropriate.

(e) Staff members shall not accrue service credits towards sick, annual and home leave, salary increment, seniority, termination indemnity and repatriation grant during periods of special leave with partial pay or without pay exceeding one month. Continuity of service shall not be considered broken by periods of special leave.

...

Rule 9.2

Resignation

(a) A resignation, within the meaning of the Staff Regulations and Staff Rules, is a separation initiated by a staff member.

(b) Unless otherwise specified in their letters of appointment, three months' written notice of resignation shall be given by staff members holding continuing appointments, thirty calendar days' written notice by those holding fixed-term appointments and fifteen calendar days' written notice by those holding temporary appointments. The Secretary-General may, however, accept resignations on shorter notice.

(c) The Secretary-General may require the resignation to be submitted in person in order to be acceptable.

...

Rule 9.4

Expiration of appointments

A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

...

Rule 9.6

Termination

Definitions

(a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.

(b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

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) 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

3.1 Every eligible staff member shall be reviewed by the department or office where he or she currently serves to ascertain whether the criteria specified in section 2 above are met. Recommendations regarding whether to grant a permanent appointment shall be submitted to the Assistant Secretary-General for Human Resources Management.

3.2 A similar review shall also be conducted by the Office of Human Resources Management or the local human resources office.

3.3 In order to facilitate the process of conversion to permanent appointment under the present bulletin, recommendations to grant a permanent appointment that have the joint support of the department or office concerned and of the Office of Human Resources Management or local human resources office shall be submitted to

the Secretary-General for approval and decision in respect of D-2 staff, and to the Assistant Secretary-General for Human Resources Management for all other staff.

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.

3.5 For the purpose of this section, the appropriate advisory body shall be:

(a) For staff at the D-2 level, the Senior Review Group;

(b) For staff at the P-5 and D-1 levels administered by offices located in New York, Geneva, Vienna and Nairobi, the advisory body shall be the Central Review Board established at the location. Staff members serving at other locations shall normally be considered by the Central Review Board in New York but may be referred to another Board in order to expedite the process;

(c) For staff at the P-2 to P-4 levels administered by offices located in New York, Geneva, Vienna, Nairobi, Addis Ababa, Bangkok, Beirut and Santiago, the advisory body shall be the Central Review Committee established at the location. The Central Review Committee in New York shall also consider eligible staff in the Field Service category;

(d) For staff in the General Service and related categories administered by offices located in New York, Geneva, Vienna, Nairobi, Addis Ababa, Bangkok, Beirut and Santiago, the advisory body shall be the Central Review Panel established at the location.

3.6 The recommendations of the advisory body shall be submitted to the Secretary-General for decision in respect of staff at the D-2 level. Recommendations in respect of all other staff members shall be submitted for decision to the Assistant Secretary-General for Human Resources Management.

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. ST/AI/2010/4 (Administration of temporary appointments) states:

Section 14

Successive temporary appointments

14.1 Upon reaching the limit of service under one or under several successive temporary appointments within a period of 364 days as set out under section 2 above or, exceptionally, 729 days under section 15 below, the staff member shall be required to have a break in service of a minimum of three months before being eligible for appointment to a new temporary position or for recruitment as a consultant or individual contractor in the same duty station within entities that apply the United Nations Staff Regulations and Rules, and shall be required to have a break in service of a minimum of 31 days if the new appointment or recruitment as a consultant or individual contractor is in a different duty station within entities that apply the United Nations Staff Regulations and Rules.

17. ST/AI/2010/4/Rev.1 (Administration of temporary appointments) states:

Section 5

Eligibility

Eligibility of a staff member who has held or is holding a fixed-term, continuing or permanent appointment

...

5.2 Upon separation from service, including, but not limited to, expiration or termination of, or resignation from, a fixed-term, continuing or permanent appointment, a former staff member will be ineligible for re-employment on the basis of a temporary appointment for a period of 31 days following the separation. In the case of separation from service on retirement, a former staff member will be ineligible for re-employment for a period of three months following the separation. This equally applies, mutatis mutandis, with respect to a former or current staff member who has held or holds an appointment in another entity applying the United Nations Staff Regulations and Rules and who applies for a temporary position with

18. ST/SGB/2013/1 (Administration of fixed-term appointments) states:

Section 3

Appointment and re-employment

...

3.10 Upon separation from service following resignation from a fixed-term appointment, a former staff member will be ineligible for re-employment for a period of 31 days following the separation.

3.11 A staff member serving under a fixed-term appointment in the General Service category who applies in response to a regular and not temporary vacancy announcement, and who is selected and offered a Field Service or National Professional Officer position following a competitive process, must resign from his or her current position and separate from the Organization. The individual may then be re-employed no earlier than seven days following the separation.

3.12 In the case of separation following a mutually agreed termination of appointment, unless otherwise specified in the agreement, a former United Nations common system staff member will be ineligible for re-employment for a period of three years following the separation.

3.13 In the case of separation from service on retirement, a former staff member will be ineligible for re-employment on a fixed term appointment.

19. OHRM Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 state:

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.

...

d. Staff who were in the Secretariat on 30 June 2009 on a 100 series appointment will be eligible for consideration for conversion to permanent appointment even though part of such service under the 100 series of the Staff Rules was performed outside the Secretariat in an another entity that was governed by the 100 series of the Staff Rules prior to 1 July 2009.

Receivability

20. The Applicant is contesting the 9 August 2010 decision to consider him ineligible for consideration for a permanent appointment. The management evaluation request was made on 14 September 2010 and the MEU responded on 13 October 2010. The present application was filed on 10 January 2011, which is within 90 days from the date on which the Applicant received the MEU's response. The application meets all the receivability requirements outlined in art. 8 of the Dispute Tribunal's Statute.

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 for conversion to permanent appointment. Furthermore, sec. 3.4 states that "[t]he advisory body may recommend conversion to permanent appointment or continuation on [an FTA]". 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 an FTA with the United Nations Secretariat.

24. Therefore, for a staff member to be eligible for consideration for 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 all of them have been met that a staff member can actually be considered eligible for conversion to a permanent appointment.

26. In the present case, the Applicant, who was born on 1 July 1967, was 43 when he enquired about his eligibility for conversion to a permanent appointment. He was therefore under the age of 53 while he was employed on an FTA under the 100 series of the Staff Rules.

27. The Tribunal must therefore consider whether, by 30 June 2009, the Applicant had completed five years of continuous service on an FTA under the 100 series of the Staff Rules.

28. Prior to being appointed to an FTA under the 100 series of the Staff Rules in the Secretariat of the United Nations, the Applicant, who is currently an active staff member, worked for UNMIK under appointments of limited duration under the 300 series of the Staff Rules until his separation from service on 30 June 2003.

29. The Applicant's next appointment was with UNHCR and it started on 13 July 2003. This appointment was an FTA under the 100 series of the Staff Rules and it was extended until his separation from service on 31 August 2004.

30. The Applicant's next FTA was with MONUC. He reported for duty on 9 September 2004 and stayed on this post until his separation from service on 31 August 2006. The Applicant reported for duty for his next FTA with DSS on 25 September 2006. This appointment was extended every other year for a new two-year term until 24 September 2012.

31. By 30 June 2009, the Applicant had separated from service on three separate occasions. Once for 12 days between his appointment of limited duration and his first FTA (30 June 2003–13 July 2003) and then between each of his FTA's (eight days between 31 August 2004 and 9 September 2004 and 24 days between 31 August 2006 and 25 September 2006).

32. Staff rule 9.4 states that a temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date that was agreed to by the parties and specified in his or her letter of appointment, while staff rules 4.12 and 4.13 state that a temporary appointment and/or a fixed-term appointment do not carry any expectancy, legal or otherwise of renewal. The separations from service in the present case were determined by the expirations of the contracts as part of the natural course of business in accordance with the Applicant's terms of appointments (*ope legis*) and not by a resignation or termination seeing that a separation as a result of expiration of appointment is not a termination (see staff rule 9.6).

33. ST/AI/2010/4, which was implemented on 27 April 2010, introduced mandatory breaks in service between temporary appointments. Section 14.1 states:

Upon reaching the limit of service under one or under several successive temporary appointments within a period of 364 days as set out under section 2 above or, exceptionally, 729 days under section 15 below, the staff member shall be required to have a break in service of a minimum of three months before being eligible for appointment to a new temporary position or for recruitment as a consultant or individual contractor in the same duty station within entities that apply the United Nations Staff Regulations and Rules, and shall be required to have a break in service of a minimum of 31 days if the new appointment or recruitment as a consultant or individual contractor is in a different duty station within entities that apply the United Nations Staff Regulations and Rules.

34. On 26 October 2011, ST/AI/2010/4/Rev.1 introduced a mandatory break in service between an FTA, continuing or permanent appointment, and a temporary appointment. Section. 5.2 specifically states that:

Upon separation from service, including, but not limited to, expiration or termination of, or resignation from, a fixed-term, continuing or permanent appointment, a former staff member will be ineligible for re-employment on the basis of a temporary appointment for a period of 31 days following the separation. In the case of separation from service on retirement, a former staff member will be ineligible for re-employment for a period of three months following the separation. This equally applies, mutatis mutandis, with respect to a former or current staff member who has held or holds an appointment in another entity applying the United Nations Staff Regulations and Rules and who applies for a temporary position with the Secretariat.

35. In relation to the Applicant's last two breaks in service, the Tribunal notes that he was separated from a FTA and he was re-employed under an FTA. In this case there was no administrative rule requiring him to take a mandatory break in service for a certain period of time or other type of interdiction for re-employment between two FTAs. Such a rule was only introduced for FTAs by sec. 3.10 of ST/AI/2013/1, dated 22 April 2013, which states that "[u]pon separation from service following resignation from [an FTA], a former staff member will be ineligible for re-employment for a period of 31 days following the separation". Section 3.12 states

that “in the case of separation following a mutually agreed termination of appointment, unless otherwise specified in the agreement, a former staff member will be ineligible for re-employment for a period of three years following the separation”, and sec. 3.13 states that “in the case of separation from service on retirement, a former staff member will be ineligible for re-employment on a fixed-term appointment”.

36. In the Applicant’s case there were no legal provisions to impose on him breaks in service between his FTAs and the Administration did not issue any such decisions.

37. In *Villamorán* UNDT/2011/126, the Tribunal held that for staff members on an FTA, who are being reappointed under temporary appointments following the expiration of their FTA, there was no requirement in law to take a 31 days break in service prior to the new temporary appointment and that the administrative decision to impose such a measure was *prima facie* unlawful. ST/AI/2010/4 was not applicable in *Villamorán* seeing that the former and the new appointments were not both temporary. ST/AI/2010/4/Rev.1, which was adopted on 26 October 2011, introduced the requirement for breaks in service in such situations. (See also *Omer* UNDT/2011/188, *García* UNDT/2011/189 and *Neskorožhana* UNDT/2011/196, in which the Tribunal decided in the same way).

38. The circumstances of the present case differ from the above cases. In the present case, the Applicant was re-employed on an FTA after his breaks in service, and not under a temporary appointment, and there were no administrative decisions to impose on him a 31 day, or less, break in service between his FTAs.

39. After each separation from service the Applicant was re-employed in accordance with the provisions from staff rule 4.17(a) which states that a former staff member who is re-employed under conditions established by the Secretary-General shall be given a new appointment unless he or she is reinstated under staff rule 4.18(a).

40. Staff rule 4.17(b) regarding re-employment must be read and interpreted in connection with staff rule 4.18 which focuses on reinstatement. These staff rules state:

Rule 4.17

Re-employment

...

(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 month 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 members 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 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 letter of appointment.

41. The Tribunal finds that para. 4.18(b) is mandatory because the text includes the word “shall”. Per *a contrario*, in cases where staff rule 4.17 is applicable to a new appointment, the period between the separation and the re-employment cannot be considered part of the continuous service and this is an implicit rule. The exception in staff rule 4.17(b) is applicable only for the calculation of salaries and allowances if the re-employment is within twelve months from the separation from service.

42. The Tribunal notes that the Applicant received the offers for the new FTAs and he expressly accepted each of them prior to his separations from service. Each new contract was under a suspension term which delayed the beginning of the legal effects to a further precise date (*dies certus an et quando*) and the period between the separation from service and the beginning of the new contract is a break in service.

43. The Applicant’s letters of appointment are clear evidence that after each break in service he was re-employed under a new FTA and that he was not reinstated. Upon each of his new appointments the Applicant never requested to be reinstated so that his appointments could be considered continuous. It was only on 5 November 2010, following the August 2010 negative response to his request for clarification on his eligibility to be considered eligible for a permanent appointment, that the Applicant made a request for retroactive reinstatement. This request was denied on 16 November 2010. This decision was not contested in front of MEU.

44. In conclusion, only if a former staff member under an FTA or continuous appointment is re-employed under an FTA or continuing appointment within 12 months of his separation from service and is reinstated, the period between the separation and the re-employment will be considered as part of the continuous service.

45. Furthermore, continuity of service shall not be considered broken by periods of special leave, which can be granted at the request of a staff member holding an FTA or continuing appointment. In exceptional cases, the Secretary-General may, at

his or her initiative, place a staff member on special leave with full pay (see staff rule 5.3). In the present case, the Applicant was not on special leave during his breaks in service.

46. It is only under the two exceptions, reinstatement and special leave, that the continuity of service is not interrupted between the prior and the new FTA. However, neither is applicable in the present case.

47. OHRM's Guidelines do not add new conditions because the rule is not indicating a certain period of time for a break in service, so any period between the separation from service and the beginning of the new contract must be considered a break in service, except the periods of special leave and the period between separation and reinstatement. Therefore in the present case, five years of continuous service means that the FTAs are without any breaks in service. The five years of continuous service have to have been completed before 30 June 2009.

48. As previously concluded, the Applicant's separations from service resulted from the expiration of his appointments in accordance with the terms agreed by both parties and not from the Organization's abuse of power through administrative instructions or measures imposed on him by OHRM. The Applicant was not forced by the Organization to take any of the aforementioned breaks in service before or after his separation from service and they were not administratively imposed separations. There is no evidence that the Applicant was instructed by any staff member from human resources that he must resign and await further travel arrangements.

49. In accordance with his 3 September 2004 sworn statement, the Applicant "separated from his employer UNHCR at the end of his contract 31 August 2004". All three of the Applicant's separations from service were the result of the expiration of his appointments and not as a result of his resignation (which is a separation from service initiated by the staff member).

50. Therefore, the Applicant's 9 August 2012 statement that he was advised by human resources personnel from UNHCR in May 2003 and from MONUC in June 2006 to resign is not relevant to the case.

51. The Applicant was not eligible for consideration for conversion to permanent appointment, because one of the cumulative conditions of ST/SGB/2009/10, to have five years of continuous service before 30 June 2009, was not fulfilled. The contested decision is lawful.

Conclusion

52. **In the view of the foregoing, the Tribunal DECIDES:**

53. The application is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 11th day of June 2013

Entered in the Register on this 11th day of June 2013

(Signed)

Hafida Lahiouel, Registrar, New York