



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

BALAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Alan M. Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 10 August 2012, the Applicant filed an application contesting the decision of the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”), dated 1 February 2012 not to grant her a permanent appointment (“contested decision”).

2. At the time of the contested decision, the Applicant was employed on a fixed-term contract, under the category National Officer, at the NO-B/X level, for the Department of Public Information at the United Nations Information Center (“UNIC”) in Bucharest, with a functional title of National Information Officer.

Background

3. In 1946, the Department of Public Information (“DPI”) was created by the General Assembly through Resolution A/RES/13(1) (Organization of the Secretariat). The DPI was among several administrative Organizations which were established to assist the Secretary-General in the effective discharge of his administrative and general responsibilities under the Charter and the efficient performance of those functions and services required to meet the needs of the several organs of the United Nations.

4. The United Nations DPI has 63 Information Centres, one of them being UNIC Bucharest, which, *inter alia*, promote global awareness and greater understanding of the work of the United Nations.

Facts

5. The Applicant joined the United Nations in November 1998. On 23 June 2009, the Secretary-General promulgated 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), which entered into force on 26 June 2009.

6. On 29 January 2010, the ASG/OHRM approved the issuance of “Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009” (“Guidelines on conversion”).

7. By memorandum dated 14 April 2010, the Director, Strategic Communications Division, DPI, sent a list of eligible staff members who he recommended for conversion to permanent appointment to the Officer-in-Charge, Executive Office, DPI. In his memorandum, the Director stressed that he had decided not to recommend three categories of staff members, otherwise eligible for conversion. He wrote, *inter alia*:

In submitting this, I would like to note that although they would otherwise be eligible (based on age, length of service and performance), within the OHRM’s guidelines, I have decided not to recommend:

- Staff from UNICs Bucharest, Tripoli and Warsaw who occupy posts funded by the host country as the continuation of their posts is subject to the availability of such funding;
- The incumbents of the remaining two posts at UNIC Bucharest, which are covered by the regular budget, in view of the likelihood that UNDP will be reducing its presence in Romania in the next year or so;

...

8. On 16 April 2010 the Officer-in-Charge, Executive Office, DPI, and the Officer-in-Charge, Human Resources Services, OHRM, sent a memorandum to the ASG/OHRM, with respect to the Applicant’s conversion to permanent appointment. In their recommendation, they indicated that as of 22 November 2003, the Applicant had completed five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules and was under the age of 53 years, hence eligible for consideration for conversion to permanent appointment. They further noted that the Applicant had received performance ratings indicating that she successfully met or exceeded performance in her five most recent performance evaluations. The Officers also indicated, however, that

the Applicant was serving in an entity that was downsizing or expected to close and recommended that the Applicant not be offered a permanent appointment.

9. On 15 May 2010 the Chief Centre Operations Section, DPI, wrote to the Applicant and other staff members, informing them that DPI had decided not to recommend conversion to permanent appointment for staff members serving in Information Centers that depended on extra-budgetary contributions. He noted that such conversion would not be in the interest of the Organization, in view of the fact that the contributions from host governments were voluntary and as such subject to change with little notice, which could create unwarranted liabilities for the Organization with respect to termination entitlements payable to staff members if their contractual status were to be permanent.

10. In May 2010, the Applicant contacted the Chief, Centre Operations Section, DPI, inquiring whether a formal, individual decision from OHRM regarding her non-conversion to permanent appointment would be issued. The Chief, Centre Operations Section, DPI responded, noting that his earlier message was not the formal personalized OHRM notification and that he was unaware when OHRM might send such notification. He also reiterated his earlier communication that none of the staff members in Bucharest were being recommended for conversion and further told the Applicant of the possibility of UNIC closing down, due to the funding problems.

11. By memorandum of 28 June 2010, the Human Resources Services, OHRM, sent a negative recommendation with respect to the conversion to permanent appointment of the Applicant and other staff members to the Central Review Panel (“CRP”). In its submission, the Human Resources Services, OHRM, stated that the Applicant and her colleagues were occupying posts funded by the host countries and that the continuation of their posts was subject to availability of government funding. Additionally, it was mentioned that UNIC in Bucharest and another country were scheduled to be closed “in the near future.”

12. In a letter dated 17 September 2010 from the Under-Secretary-General for Communications and Public Information (“USG”) to the Permanent Representative of Romania to the United Nations, the USG made reference to

several reminders that had been sent to the Government of Romania regarding its contributions to UNIC Bucharest, the delay in payment of the 2010 contributions and the repercussions this was having on the operations of UNIC Bucharest. The letter sought to know when the transfer of funds could be expected and also indicated the contributions expected for the year 2011. With reference to the Applicant's post, the USG wrote:

The funds covering the salary of the National Information Officer will run out by the end of October, requiring the Department to give notice to the staff member this month. With the remaining two staff members providing support functions only, UNIC would not be able to carry out its mandated functions and would, in fact, exist in name only.

13. In October 2010, the Applicant received an extension of her contract through 31 December 2010. On 12 January 2012, the CRP sent a memorandum to the ASG/OHRM regarding the Applicant's and other affected staff members' requests for conversion. The CRP made a recommendation not to grant a permanent appointment to the Applicant. It concluded that in view of the funding of the posts and the closing down of UNIC Bucharest in the near future, it was not in the interest of the Organization to grant the Applicant and other affected staff members a permanent appointment, who should not be considered suitable for conversion.

14. Subsequently, the ASG/OHRM took the decision dated 1 February 2012, informing the Applicant that her non conversion to a permanent appointment was based on the interests of the Organization and the operational realities of the Organization specific to UNIC Bucharest, which might not be sustainable in the future.

15. The Applicant requested management evaluation of the contested decision on 28 March 2012 and on 16 May 2012 she received a response, informing her that the Secretary-General had decided to uphold the decision not to grant her a permanent appointment.

16. On 6 June 2012, the Applicant signed a contract extension from 1 July to 31 October 2012. In the contract, under “official duty station”, it was indicated “limited to Bucharest, Romania.”

17. On 2 August 2012, the Applicant received a letter from the Executive Officer, DPI, informing her of the decision not to renew her contract beyond 31 October 2012. In the letter, the Applicant was informed that the reason for the decision was severe financial constraints faced by UNIC Bucharest and that on 2 April 2012, the Permanent mission of Romania to the United Nations had informed DPI that “it was not able to ensure its annual contribution to the Information Centre ... having in mind the scenario in which UNIC would find alternative sources to finance its activity.”

18. The Applicant filed her application on 10 August 2012 to which the Respondent filed his reply on 10 September 2012.

19. On 4 June 2006, the Tribunal issued case management Order No. 71 (GVA/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.

Parties' submissions

20. The Applicant's main arguments are:

- a. The inclusion of financial constraints as an additional criteria for conversion to permanent appointment required a specific promulgation of rules and policies or procedures;
- b. The contested decision is based on speculation with respect to the funding of the Applicant's post;
- c. To determine the effective date for conversion to permanent appointment, the ASG/OHRM should have considered the financial situation as of June 2009 and not February 2012;

d. The needs, interests and operational realities of the Organization are mere descriptive language and should not be used as a basis to reject applications for permanent appointment; and

e. The conversion into permanent appointment is attached to a staff member as a person and not to a specific post.

21. The Applicant requests the following remedies:

a. A declaration that the contested decision is unlawful;

b. Specific performance or rescission of the contested decision;

c. A declaration that the Secretary-General is under duty to consider the application for permanent appointment on an individual basis and that funding concerns cannot predetermine the outcome of such consideration;

d. Payment for termination indemnity at the time of her separation associated with continuing appointment for the number of years of service with the Organization;

e. Compensation for moral and pecuniary damages in the amount of 10,000 USD.

22. The Respondent's main arguments are:

a. The Applicant was accorded reasonable consideration for the conversion to permanent appointment in accordance with the relevant Rules and Regulations;

b. The Applicant had a right to be considered for permanent appointment but not a legal right to have her appointment converted;

c. Though the Applicant was eligible for consideration for conversion to permanent appointment, the operational realities of UNIC Bucharest, namely the financial constraints, made her unsuitable for conversion;

d. The annual contributions from the Government of Romania had become irregular, which made the continuing existence of UNIC Bucharest uncertain, therefore there was no expectation of a continuing need for the Applicant's services that would support the granting of a permanent appointment;

e. The Applicant was a National Officer whose contract was limited to Bucharest, Romania; she could therefore not be transferred to another post following the closure of UNIC Bucharest;

f. The Report of the International Civil Service Commission to the General-Assembly, A/61/30/Add.1, for the year 2006 provides under Chapter II on conditions of service that continuing contracts should not be granted where the mandate is finite, with no expectation of open-ended employment, an assurance that the Applicant did not have, since UNIC was facing financial difficulties;

g. There is no legal basis for the Administration to review the operational realities in the past, the operational realities considered were those at the time the decision was taken; and

h. The scope and purpose of permanent contracts is a tool designed to assist the Organization in maintaining programme continuity and addressing its continuing needs;

23. The Respondent requested the Tribunal to reject the application.

Consideration

24. 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), which 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.

25. Section 2 of ST/SGB/2009/10 provides the criteria for granting permanent appointments to staff members and stipulates that:

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.

26. 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 on conversion”), *inter alia*, provide as follows:

Criteria for granting permanent appointments

6. The criteria for granting permanent appointments are set out in section 2 of ST/SGB/2009/10. 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 high standards of efficiency, competence and integrity established in the Charter.

7. In determining the interests of the Organization for the purpose of granting a permanent appointment, the operational realities of the Organization shall be taken into account, in accordance with Section 2 of ST/SGB/2009/10.

...

10. Where the appointment of a staff member is limited to a particular department/office, the staff member may be granted a permanent appointment similarly limited to that department/office. If the staff member is subsequently recruited under established procedures including review by a central review body for positions elsewhere in the United Nations Secretariat, the limitation is removed.

27. Regarding the Applicant's professional attributes, it is undisputed that the Applicant fulfilled the eligibility criteria for granting permanent appointment as stipulated under sec. 1 of ST/SGB/2009/10. However, fulfilling the eligibility criteria under sec. 1 of ST/SGB/2009/10 is not more than a necessary prerequisite for being considered for conversion to permanent appointment.

28. The Tribunal must bear in mind that staff members eligible for conversion have no right to be granted a permanent appointment, but only that of being considered for conversion. The outcome of such consideration is a discretionary decision and in its discretion, the Administration is bound to take into account "all the interests of the Organization" and for the purpose to determine those interests "the operational realities" of the Organization. It is established case law that the Tribunal, in conducting its judicial review, may not lightly interfere with the exercise of administrative discretion, nor substitute its judgment for that of the Administration. Therefore the Tribunal's assessment is restricted to determining whether in the exercise of discretion, the Administration abused it or engaged in procedural impropriety (see *Sanwidi* 2010-UNAT-084, *Abbassi* 2011-UNAT-110, *Ljungdell* 2012-UNAT-265).

Interest of the Organization and operational realities

29. On 1 February 2012, the ASG/OHRM informed the Applicant of the decision not to grant her a permanent appointment, stressing that:

[T]his decision is taken after a careful review of your case. It takes into account all the interests of the Organization, and is based on the operational realities of the Organization, specifically that the operation of the United Nations Information Centre in Bucharest may not be sustainable in the future.

30. The Applicant argues that the decision not to grant her a permanent appointment should have been made based on the circumstances that existed prior to 1 July 2009, which was the date by which staff members were to be eligible for conversion to permanent appointment. As such, the status of funding to be taken into account in relation to UNIC Bucharest should have been that as of 30 June 2009 and not February 2012, date when the decision was taken.

31. The CRP reviewed the decision not to grant the Applicant a permanent appointment. It recommended that the Applicant not be considered suitable for conversion to a permanent appointment on grounds that the UNIC in Bucharest was downsizing and would be closed in the near future. Furthermore, two months after the contested decision was taken, the Government of Romania informed the Organization in writing that it would not be able to ensure its annual contribution to UNIC Bucharest and that it hoped that the Organization would find alternative funding sources.

32. The Applicant was appointed as a National Information Officer on a fixed-term appointment under the NO category. Former¹ staff rule 4.4 (b) provided that National Professional Officers shall be of the nationality of the country where the office concerned is located. The Applicant's contractual status with the Organization limited her to serve in Bucharest, Romania only. Therefore, the Applicant was only eligible to work in one country out of the many in which the Organization has its offices.

33. In view of this limitation of the Applicant's contractual status and of the operational realities faced by the UNIC Bucharest, the Tribunal finds that the determination by the Administration that the conversion of the Applicant to permanent appointment was not in the interest of the Organization was acceptable. Indeed, it cannot be in the interest of the Organization nor of its operational activities to grant permanent appointment to staff whose service, by the terms of their letter of appointment, is limited to an entity which is downsizing (see *Chowdhury* UNDT/2013/073). Accordingly, in the case at hand, the decision

¹ ST/SGB/2011/1 (Staff Rules and Staff Regulations of the United Nations)

not to grant the Applicant a permanent appointment constitutes a reasonable exercise of discretion on the part of the Administration.

34. Finally, the Tribunal rejects the Applicant's argument that the financial situation to be taken into account should have been that of the year 2009 and not that of 2012. Such an assertion presupposes the continuation of the *status quo* of 2009 for an Organization that sustains itself from the funding of member states. Therefore, it cannot be said that the status of funding three years preceding a decision should be taken into account for an Organization whose funding has been tardy since its inception, a situation which the Applicant was well aware of.

Conclusion

35. In view of the foregoing, the Tribunal DECIDES that:

The application is rejected in its entirety.

(Signed)

Judge Thomas Laker

Dated this 22nd day of August 2013

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

(Signed)

René M. Vargas M., Registrar, Geneva