UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2014/015
Judgment No.:	UNDT/2014/112
Date:	20 August 2014
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

COUQUET

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM
Sarahi Lim Baró, ALS/OHRM

Procedural history

1. On 15 March 2014, the Applicant, a former translator at the P-3 level in the Interpretation and Translation Unit ("ITU"), United Nations Assistance to Khmer Rouge Trials ("UNAKRT"), in Phnom Penh, Cambodia, filed an application contesting the decision of 29 November 2013 finding her ineligible for the United Nations after-service health insurance ("ASHI"), following her mandatory retirement in November 2013, on the grounds that she did not have 10 years of service with the United Nations. She requests rescission of the decision deeming her ineligible for ASHI and an order directing that she be granted ASHI retroactively from 1 December 2013.

2. On 28 March 2014, the New York Registry transmitted the application to the Respondent, informing him that his reply was due on 28 April 2014. The Respondent duly filed the reply on said date, contending, *inter-alia*, that the Applicant's claim is without merit as she failed to meet the minimum 10 year threshold in terms of the relevant provisions due to her separation by resignation from a United Nations entity, the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), and subsequent reemployment with another United Nations entity, UNAKRT.

3. On 8 July 2014, the Tribunal issued Order No. 182 (NY/2014), stating that "[t]he primary facts appearing to be common cause, it is the Tribunal's tentative view that this matter may be decided on the papers" and consequently ordered the Applicant to file "a submission addressing the issues raised in the Respondent's reply, including with particular reference, to the applicability and construction of sect. 2.2(b) of ST/AI/2007/3". The parties were also requested to inform the Tribunal "whether a hearing, upon the merits or the legal issues, is required, failing which, the Tribunal will proceed to consider the matter on the papers, unless otherwise further directed by the Tribunal".

4. On 22 July 2014, the Applicant filed a submission addressing the issues raised in the Respondent's reply and stating that she did not require a hearing on the merits or the legal issues. The Respondent also filed a submission consenting to the matter being determined on the papers, noting and denying some factual allegations for which it was contended the Applicant placed no evidence before the Dispute Tribunal. For the purposes of this judgment, the Tribunal places no reliance on these factual allegations.

Facts

5. The primary facts of the case are not in contention. The following facts are from the written record.

6. The Applicant was appointed under a 100-series fixed-term appointment ("FTA") as a Translator with the ICTY on 1 October 2006. The FTA was extended several times, up to 31 March 2010.

7. On 6 July 2009, the Applicant resigned from the ICTY, effective 8 August 2009, citing "personal reasons". The Respondent produced several documents illustrating that the Applicant resigned, was repatriated and completed the full checkout process for her separation. The Applicant argued that these documents were unnecessarily produced as she did not deny the circumstances of her resignation effective 8 August 2009.

8. On 15 October 2009, the Applicant was appointed on a one year FTA with UNAKRT. The FTA was extended until her mandatory retirement from service at age 62, on 30 November 2013.

9. On 30 October 2013, the Applicant submitted a request for enrolment in the ASHI programme, which was received by the Health and Life Insurance Section ("Insurance Section") of the United Nations Secretariat on 4 November 2013.

10. On 29 November 2013, the Applicant received an e-mail stating that she was ineligible for enrolment in the ASHI programme as her separation Personnel Action

form ("PA") showed an entry on duty date ("EOD") of 15 October 2009. The Applicant thereafter filed for management evaluation of the decision.

11. On 17 January 2014, the administration upheld the decision following management evaluation noting that: whilst the administration agreed that the Applicant had a total qualifying participation period of 86 months, or approximately 7.2 years, as a consequence of the application of staff rule 4.17(a), her 15 October 2009 EOD with UNAKRT was the applicable EOD for purposes of determining her eligibility to ASHI and the Applicant was therefore ineligible for ASHI as she did not meet the 10 year threshold.

Considerations

12. The principal issue in this case is the determination of the applicable date of recruitment in the United Nations under sec. 2.1 of ST/AI/2007/3 on After-service health insurance in order to ascertain whether the Applicant qualifies for ASHI.

13. Pursuant to sec. 2.1 of ST/AI/2007/3, if the Applicant is deemed to have been recruited before 1 July 2007 she would only need to have been a participant in the contributory health insurance plan of the common system of the United Nations for a minimum of five years in order to qualify for ASHI, while if recruited on or after this date the requisite period of time would be a minimum of 10 years. In this regard, the Respondent concedes that the Applicant has a total qualifying participation period in the relevant health insurance plan of 86 months, or approximately 7.2 years. The parties further agree: (a) that the Applicant has been employed with the United Nations on two different FTA's – one with the ICTY from 1 October 2006 to 8 August 2009, and the other with UNAKRT from 15 October 2009 to 30 November 2013; and (b) that her employment was interrupted by a two-month voluntary break-in-service. Therefore, the Respondent contends that the Applicant's recruitment date for determination of her eligibility for ASI is 15 October 2009, in which case she requires 10 years of contributory participation.

14. The crisp question therefore is whether to apply: (a) the starting date of the Applicant's initial FTA with ICTY (1 October 2006) in which case the Applicant qualifies for ASHI; or (b) the starting date of her subsequent FTA with UNAKRT (15 October 2009) in which case she does not qualify for ASHI.

Determining the relevant starting date under ST/AI/2007/3

Sec. 2.1 of ST/AI/2007/3

15. Section 2.1 of ST/AI/2007/3, which determines eligibility to enroll for ASHI, states as follows:

> **Section 2**
> **Eligibility for after-service health insurance coverage**
>
> 2.1 Individuals in the following categories are eligible to enrol in the after-service health insurance programme:
>
> (a) A 100 series or 200 series staff member who was **recruited on or after 1 July 2007**, who while a contributing participant in a United Nations contributory health insurance plan as defined in section 1.2 above, was separated from service, other than by summary dismissal:
>
> …
>
> (ii) At 55 years of age or later, provided that he or she had been a participant in a contributory health insurance plan of the United Nations for a **minimum of ten years** and is eligible and elects to receive a retirement, early retirement or deferred retirement benefit under the Regulations of UNJSPF;
>
> …
>
> (b) A 100 series or 200 series staff member who was **recruited before 1 July 2007**, who while a contributing participant in a United Nations contributory health insurance plan as defined in section 1.2 above, was separated from service, other than by summary dismissal:
>
> …
>
> (ii) At 55 years of age or later, provided that he or she had been a participant in a contributory health insurance plan of the United Nations for a **minimum of five years** and is eligible and elects to receive a retirement, early retirement or deferred retirement benefit under the Regulations of UNJSPF;

…

16. However, ST/AI/2007/3 is silent on the situation where the staff member has been employed by the United Nations before 1 July 2007, and again subsequently after this date, with a voluntary break-in-service in between.

Sec. 5.1(c) of ST/AI/2007/3

17. The only provision of ST/AI/2007/3 that covers the issue of reemployment appears to be sec. 5.1(c) regarding cessation of coverage, which states that,

> 5.1 Eligibility for after-service health insurance coverage shall cease:
>
> …
>
> (c) When the former staff member re-enters the United Nations Joint Staff Pension Fund as a participant following re-employment. In this case, participation in after-service coverage will be suspended and the staff member will contribute to the health insurance plan as an active participant. After-service health insurance coverage will resume upon separation from service and reapplication within 31 days of such separation;

18. However, sec. 5.1(c) does not directly cover the issue of the Applicant's applicable recruitment date in relation to sec. 2.1(a) and (b), and it is not clear what importance is to be attached to sec. 5.1(c) in this context although it is instructive that ASHI is suspended, and not cancelled, on re-entry into the UNJSPF following re-employment. In any event, in light of the Respondent's admission that she had approximately 7.2 years of qualifying contributory participation, it cannot be said, and indeed it is not submitted, that the Applicant's eligibility or years of participation ceased or were irredeemably suspended, the only contention being whether she requires five or 10 years of service, depending on the applicable date of her recruitment.

Sec. 2.2(b) of ST/AI/2007/3

19. The Respondent submits that as the Applicant's continuous employment was interrupted when she was reemployed with UNAKRT on 15 October 2009, two

months and seven days after she had voluntarily separated from the ICTY, during which period she had no contractual relationship with the Organization, her effective recruitment date must be that of her most recent re-employment with UNAKRT. The Applicant, on the other hand, submits that her two-month break-in-service does not affect her eligibility for ASHI as, under sec. 2.2(b) of ST/AI/2007/3, there is no requirement that her employment has to be continuous. Therefore, the starting date for purposes of ASHI should therefore be her first FTA with the ICTY. Section 2.2(b) provides that (emphasis added):

> 2.2 For the purpose of determining eligibility in accordance with paragraph 2.1 above and cost sharing in accordance with paragraph 3.2 (b) below, participation in a contributory health insurance plan of the United Nations is defined to include:
>
> (a) Participation in a contributory health insurance plan of other organizations in the common system under which staff members may be covered by special arrangement between the United Nations and those organizations;
>
> (b) The *cumulative contributory participation* during *all periods of service* under 100 or 200 series appointments, *continuous or otherwise*.

Staff rule 4.17 of ST/SGB/2013/3

20. In his reply, the Respondent contends that, when a staff member who has resigned and separated from the Organization, is then reemployed, pursuant to staff rule 4.17(b), "[t]he terms of the new appointment shall be fully applicable without regard to any period of former service". Therefore, the starting date of the Applicant's latest FTA with UNAKRT should be applied. However, the provision regarding re-employment (staff rule 4.17) states in its entirety as follows (emphasis added):

> (a) 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.
>
> (b) The terms of the new appointment shall be fully applicable without regard to any period of former service. When a staff member

> is re-employed under the present rule, the service shall not be considered as continuous between the prior and new appointments.
>
> (c) When a staff member receives a new appointment in the United Nations common system of salaries and allowances less than 12 months after separation, *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.

21. In her response to the reply, the Applicant submits that the Respondent is being unduly selective in citing an extremely truncated portion of the modified staff rule effective from 1 January 2013. She submits that the relevant staff rule is found in ST/SGB/2009/7, dated 16 June 2009 and effective from 1 July 2009, and which was applicable at the time of her re-employment (now abolished and replaced by ST/SGB/2014/1). This staff rule 4.17 reads as follows (emphasis added):

> (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.

22. In any event, the Applicant submits that staff rule 4.17 is not relevant, and that staff rule 4.17(c) clearly restricts its scope of application to questions regarding "the amount of any payment on account of termination indemnity, repatriation grant or commutation of accrued annual leave". She contends that its purpose is to regulate

only certain allowances exhaustively listed such as termination indemnity, repatriation grant, or commutation of accrued annual leave, for staff members receiving a new appointment less than 12 months after separation. In essence, the Applicant is relying on the doctrine of *expressio unius est exclusio altrerius*, which in common parlance means that the express mention of one thing excludes all others—when one or more things of a class are expressly mentioned others of the same class which are not mentioned are excluded. In this instance, the primary purpose of staff rule 4.17 is to regulate the entitlements listed therein, to the exclusion of others.

23. Furthermore, the Applicant also pleads the doctrine of *lex specialis*: that a law governing a specific subject matter overrides a law which only governs general matters (*lex generalis*). The Applicant contends that the *lex specialis* for ASHI is ST/AI/2007/3 which contemplates employment at different duty stations and does not require continuity in service except between in-service and retirement status. She explains the rationale of ST/AI/2007/3, secs. 2, 2.1(a) et 2.1.(b), whose purpose is to differentiate between staff members recruited before 1 July 2007 and after 1 July 2007: for those recruited before 1 July 2007, the minimum number of years of participation is 5 years and the cost of participation to ASHI is fully borne by the participant, while for staff members recruited after 1 July 2007 the minimum number of years of participation in a contributory health insurance plan is 10 years, but participants are entitled to subsidized ASHI.

24. The Applicant submits that in order to be eligible for ASHI, the required criteria are: type of contract (100 or 200 series), number of years of enrolment (cumulative but not continuous) in a contributory health plan, age at the time of separation, separation other than by way of summary dismissal, and involvement in an insurance plan at the date of retirement without interruption between active service and retirement status. She says that a PA shows two dates of EOD, the EOD in the United Nations and EOD in the respective duty station. Her recruitment PA with the ICTY indicates her recruitment date as 1 October 2006 which is the starting

date of her eligibility for participation in the staff pension fund. Therefore she has been a United Nations staff member with the requisite type of contract and enrolled in the requisite United Nations contributory health insurance plan starting from 1 October 2006, and the Respondent is improperly imposing a requirement of continuity between contracts, not stipulated in ST/AI/2007/3, which expressly provides for contributory participation during *all* periods of service "*continuous or otherwise*".

Interpreting the relevant provisions of ST/AI/2007/3

25. The literal theory of interpretation holds that, where the language is plain, courts should not invoke external aids to construction. In *Scott* 2012-UNAT-225, the Appeals Tribunal said at para. 28:

> The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

26. This case is best resolved by the literal or plain meaning rule of construction, i.e., by "establishing the plain meaning of the words in the context of the document as a whole. Only if the wording is ambiguous should the Tribunal have recourse to other documents or external sources to aid in the interpretation" (*Scott* UNDT/2011/108).

27. The intended consequence of ST/AI/2007/3 is so apparent from the face of it that there can be no question as to its meaning. Section 2.1 of ST/AI/2007/3 describes the two categories of individuals eligible to *enroll* in the ASHI programme (recruited pre or post-1 July 2007); whilst sec. 2.2 applies for the *purpose of determining eligibility* in accordance with sec. 2.1. For purposes of determining eligibility, a staff

member requires *cumulative* contributory participation *during all periods of service* under 100 or 200 series appointments *continuous or otherwise*, nothing more, nothing less. The meaning of "cumulative" simply being "tending to accumulate, increasing in force etc. by successive additions" (*Concise Oxford English Dictionary*, 7th Edition (1982)), and there is no ambiguity regarding the meaning of *all periods of service … continuous or otherwise*. Furthermore, the requirement is for *cumulative contributory participation*, and not for continuous service or continuous contributory participation.

28. The Tribunal finds that the plain text of ST/AI/2007/3 is "not specifically inconsistent with other rules set out in the same context" (*Scott* 2012-UNAT-225) and agrees with the Applicant's submission that the Respondent's reliance on staff rule 4.17 is misguided as, by its specificity and its exclusivity, it is clearly not set out in the same context and is therefore not applicable to the question of ASHI. The fact that service may not be considered as continuous between a prior and new appointments, does not affect one's EOD into the common system of the United Nations and the commensurate eligibility for participation in the United Nations Joint Staff Pension Fund and contributory health insurance plan, these being fundamental and essential terms of the conditions of employment, capable of protection by the doctrine of acquired rights.

29. The Respondent has furthermore placed reliance on *Dunda* UNDT/2013/034 and *Schoone* 2013-UNAT-375, contending that former staff members who resign and separate from service have no contractual relationship with the Organization during the time of the break-in-service, thus interrupting their continuous employment. The Respondent's submissions regarding these cases is misleading, as these two cases are clearly distinguishable in that they concern the conversion of fixed-term appointments to permanent status, which in terms of the applicable rules, very clearly and expressly requires a minimum of "five years of *continuous service*" in the United Nations for consideration for conversion. In that particular context, the distinction between reinstatement and reemployment is necessary for the determination of the required number of years of continuous service before conversion to permanent

status, whilst under ASHI, the only requirement for continuity of service is of that between in-service and retirement status. In any event, the administration's failure to promulgate the necessary administrative issuance establishing "conditions" for reinstatement should not be allowed to prejudice staff members (*Egglesfield* 2014-UNAT-399).

30. If staff rule 4.17 is at all applicable, which, in the Tribunal's view, it is not, and if there is any conflict in the application of the staff rule and the administrative issuance, which, in the Tribunal's view, there is not, preference must nevertheless be given to the doctrine of *lex specialis*.

31. Finally, in cases of ambiguity in the terms of an Applicant's employment contract, which under art. 2.1(a) of the Dispute Tribunal's Statute includes "all pertinent regulations and rules and all relevant administrative issuances", the Dispute Tribunal has in several cases endorsed the principle of *contra proferentem*, i.e., interpretation against the draftsman, and, if applied to the present case, would mean that the Applicant's construction of ST/AI/2007/3 prevails. In *Simmons* UNDT/2012/167, the Dispute Tribunal stated:

> 15. The Tribunal does not consider that there is any ambiguity in the wording of art. 17 of Appendix D. However, it would appear from the different interpretation given by the Respondent that it may well be of assistance to the parties for the Tribunal to deal with this submission. The Tribunal would rule in favour of adopting the interpretation that gives rise to least injustice by applying the internationally recognized principle of interpretation that an ambiguous term of a contract is to be construed against the interests of the party which proposed or drafted the contract or clause, particularly when dealing with a provision such as art. 17 that has been unilaterally imposed by the Respondent. This principle, also known as *contra proferentem*, was affirmed by the Dispute Tribunal in *Tolstopiatov* UNDT/2010/147, para. 66.

32. The Tribunal finds, therefore, that since the Applicant's EOD into the common system of the United Nations is 1 October 2006, she has satisfied the eligibility criteria hereinbefore mentioned, and that ST/AI/2007/3 does not contemplate continuity of employment for eligibility, but the requisite continuation of

cover, the latter of which is not in dispute. The Tribunal finds that to give any other construction would give rise to disparity and absurdity. It must also be borne in mind that there is no apparent prejudice that is suffered by the Respondent in finding the Applicant eligible for ASHI as she alone will bear the burden of the insurance contributions pursuant to sec. 3.2(b) and (c) because she has not reached "a total period of contributory participation of at least 10 years".

33. The application therefore succeeds. Consequently, it is not necessary for the Tribunal to consider the Applicant's submissions regarding legitimate expectations.

Conclusion

34. The administrative decision declaring the Applicant ineligible for ASHI is rescinded.

35. The Administration is to enroll the Applicant in the ASHI retroactively from 1 December 2013.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 20th day of August 2014

Entered in the Register on this 20th day of August 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York