



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

FEATHERSTONE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 7 May 2017, the Applicant filed an application contesting the decision to offer her a permanent appointment limited to service with ICTY, effective retroactively on 30 June 2009, without recognizing that she “no longer [has] any contractual relationship with the United Nations or [offering] any alternative remedy to specific performance to reflect that fact”.

2. The Respondent filed his reply on 7 June 2017.

Facts¹

3. The matter of the conversion of the Applicant’s fixed-term appointment (“FTA”), and that of more than 250 staff members of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), to permanent appointments was the subject of two judgments of the Appeals Tribunal, i.e. *Ademagic et al and McIlwraith* 2013-UNAT-359 and *Featherstone* 2016-UNAT-683/Corr.1.

4. These judgments were issued after the Applicants had challenged the decisions by the then Assistant-Secretary-General, Office of Human Resources Management (“ASG/OHRM”), denying the conversion of their FTAs to permanent appointments.

5. By letter dated 17 November 2016, sent by email of 20 November 2016, the Officer-in-Charge, OHRM, informed the Applicant that in light of UNAT judgment *Featherstone* 2016-UNAT-683, remanding her case for reconsideration of her suitability for conversion to permanent appointment, the conversion of her FTA to a permanent appointment had been approved.

¹ The facts reflected in Judgment *Featherstone* UNDT/2015/117 are relevant but will not be repeated here.

6. A proposed contract was sent to the Applicant on 28 November 2016, asking her to sign and accept a contract for a permanent appointment limited to service with the ICTY and effective 30 June 2009. It is the Tribunal's understanding that the Applicant did not sign it.

7. In her request for management evaluation, dated 19 January 2017, the Applicant specified that she sought review of the following decision:

Letter dated 17 November 2016 ... reconsidering suitability for conversion to permanent appointment, approving conversion of appointment from fixed-term to permanent and offering a permanent appointment limited to service with the ICTY, together with a draft contract offered to [her] by email dated 28 November 2016.

8. In its response dated 8 February 2017, the Management Evaluation Unit found that the Applicant's request was not receivable and that the matter was *res judicata*, since it had been addressed by the Dispute and Appeals Tribunal in judgments *Featherstone* UNDT/2015/117 and *Featherstone* 2016-UNAT-683/Corr.1.

Procedure in front of the Tribunal

9. The Applicant filed the present application on 7 May 2017, and the Respondent filed his reply on 7 June 2017.

10. By Order No. 77 (GVA/2018) of 18 April 2018, the Tribunal asked the parties whether they would agree to a judgment being rendered on the papers, without an oral hearing. The Respondent informed the Tribunal that he would not object thereto. The Applicant noted that she would equally agree to a decision being rendered without an oral hearing, provided that she was allowed to comment on the Respondent's reply (with respect to the merits of part B of her application); she further noted that since the Respondent did not contest her request for information pursuant to ST/SGB/2008/5, such information should be provided to the Applicant.

11. By Order No. 91 (GVA/2018) of 4 May 2018, the Tribunal invited the Applicant to file comments on the Respondent's reply, and submissions as to the receivability and relevance of her request for information pursuant to

ST/STGB/2008/5. The Applicant filed her submission in response to Order No. 91 (GVA/2018), dated 17 May 2018, on 18 May 2018.

Parties' submissions

12. The Applicant's principal contentions are:

- a. The application is for a:
 - i. Determination of the amount of compensation to be offered as an alternative to specific performance pursuant to art. 10.5(a) of the Tribunal's Statute; and
 - ii. Separate award of compensation for harm pursuant to art. 10.5(b) of the Statute;
- b. She decided to take early retirement and ceased to be a staff member of the United Nations on 1 January 2012, in good faith, after she had been informed on 6 October 2011 by the Registrar, ICTY, on behalf of the Secretary-General that she would not be granted a permanent appointment;
- c. The decision of 17 November 2016 confirms her suitability for conversion to a permanent appointment and asks her to sign and accept a contract for a permanent appointment limited to service with the ICTY effective 30 June 2009;
- d. The decision fails to recognise that she no longer has any contractual relationship with the United Nations or to offer any alternative remedy to specific performance to reflect that;
- e. The offer in late 2016 of a permanent appointment can only be relevant for staff members who were still in service with the Organization at that time; it is not appropriate for a staff member like her, who is no longer in service, for whatever reason; for her, such an offer is impossible to implement, even if it is stated to be effective as at 30 June 2009;

f. Through the decision of 17 November 2016, the Organization acknowledges that she has been entitled to a permanent appointment ever since 30 June 2009;

g. The decision reverses the two previous reviews conducted by the ASG/OHRM, evidencing that the two previous negative decisions and actions by the Secretary-General since October 2011 were a violation of the staff members' due process rights; in her particular circumstances, an award of monetary compensation should be made to rectify the errors on the part of the Organization;

h. The Appeals Tribunal determined that this matter is one concerning appointment, promotion or termination. Hence, the appropriate remedy for a former staff member for who specific performance by way of conversion is no longer available is an offer of compensation in lieu of specific performance, pursuant to art. 10.5(a); the Tribunal is requested to determine the amount of compensation that the Respondent may elect to pay as an alternative to specific performance pursuant to art. 10.5(a), equivalent to the termination indemnity that would have been due to her upon the abolition of her post on 31 December 2013;

i. The request for an award of compensation for harm under art. 10.5(b) is separate from and independent of the request for compensation as an alternative to specific performance; it is due to her because:

i. The Secretary-General has been in breach of her contractual rights under the Staff Rules and Regulations;

ii. The Secretary-General failed to follow the guidance of the UNAT and thus delayed the administration of justice and deprived her of her fundamental right to due process for a period of more than six years, starting 19 October 2010, the date on which OHRM submitted the matter to the Central Review Board not endorsing the ICTY recommendation to grant a permanent appointment, and requiring two rounds of litigation;

iii. The Secretary-General has breached her contractual right to work in an environment free from discrimination by discriminating against her as a staff member of ICTY since 19 October 2010, and by not taking action to prevent such ongoing discrimination from the date of her first request for management evaluation until 20 November 2016;

iv. The Secretary General continues to breach those rights by failing to offer any remedy for these repeated breaches; and

v. The above breaches are fundamental in nature;

j. The denial of her permanent appointment, despite her being suitable and eligible for it, was the single most significant factor in her decision to leave the United Nations; had she been offered a permanent appointment on 6 October 2011, she would have remained in post either until mandatory retirement age or until the abolition of her post in December 2013; she lost more than five years of salary and associated benefits plus the job satisfaction and recognition, and suffered stress and anxiety since October 2011; she had joined the ICTY in January 1994; she does not claim compensation for loss of salary as that was mitigated by the release from her performance obligations; however, she suffered demonstrable harm as a loss of associated contractual benefits occasioned by the breaches by the Secretary-General, particularly five additional years of contributions to the United Nations Joint Staff Pension Fund, which cannot be compensated by specific performance as these contributions can no longer be made to the Fund; however, she can be paid the equivalent amount;

k. In light of the significant level of harm caused over a long period and the aggravating factor that it has taken the Secretary-General three attempts to recognize and make amendments for his breaches and discriminatory acts, the Tribunal should find her case to be exceptional pursuant to art. 10.5(b) and she should be granted compensation in the excess of two years' net base salary; and

1. She further requests a formal notification from the Organization of the steps taken to prevent further continuation of the proven discrimination against staff members of the ICTY and, in particular, of the steps taken to correct the actions of senior individuals involved at United Nations Headquarters pursuant to sec. 5 of ST/SGB/2008/5.

13. The Respondent's principal contentions are:

a. The Organization fully implemented judgment *Featherstone* of the Appeals Tribunal, by which it directed the ASG/OHRM to reconsider the Applicant's request for a permanent appointment; in accordance with that judgment, the matter was reconsidered by the ASG/OHRM and the Applicant was granted a permanent appointment;

b. The application is not receivable since the decision did not adversely affect the Applicant's terms of appointment and the matter is *res judicata*; the Applicant did previously litigate and received a final judgment on her claim for compensation; further, she cannot claim compensation for the circumstances surrounding her decision to retire on 31 December 2011 and any matter relating to her separation is time barred;

c. The application has no merit; it is not credible to establish a link between her separation from the Organization after 18 years and the nature of her appointment; the record shows that the Applicant had the opportunity to continue to serve the Organization but, for personal reasons, decided to retire; the decision did not result in a loss of income or moral harm to the Applicant; and

d. The application should be dismissed.

Consideration

14. The Tribunal has to examine whether the application against the decision of 17 November 2016 to offer the Applicant a permanent appointment "without recognizing that she had no longer any contractual relationship with the UN or

offering any alternative remedy to specific performance to reflect that” is receivable.

The decision did not adversely affect the Applicant

15. First of all, the Tribunal notes that the Applicant decided not to sign the permanent appointment, retroactive to 30 June 2009, when it was sent to her on 17 November 2016, hence, the Administration’s reaction had she signed it is not known to the Tribunal. The offer must be presumed to have been genuine.

16. It is relevant to recall that this Tribunal decided in Judgment *Featherstone* UNDT/2015/117 (para. 117), in light of Judgment *Ademagic et al.* 2013-UNAT-359 of the Appeals Tribunal, that:

- a. The contested decision denying the Applicant a conversion of her fixed-term appointment to a permanent appointment is hereby rescinded;
- b. The contested decision is, therefore, remanded to the ASG/OHRM for retroactive individualised consideration of the Applicant’s suitability for conversion of her appointment to a permanent one as mandated by ST/SGB/2009/10, exercising discretion in conformity with the instructions received in Judgment *Ademagic et al.* 2013-UNAT-359 and the present Judgment. Said individualised consideration must be completed within 90 days of the issuance of this Judgment;
- c. The Applicant shall also be paid moral damages in the amount of EUR3,000;
- d. The aforementioned compensation shall bear interest at the United Nations prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and
- e. All other claims are rejected.

17. By Judgment *Featherstone* 2016-UNAT-683/Corr.1, the Appeals Tribunal affirmed the UNDT judgment, upholding the rescission of the decision and the remand of the Applicant’s case to the ASG/DM for individual consideration for conversion to permanent appointment. The Appeals Tribunal, however, vacated the award of moral damages.

18. The Tribunal is satisfied that by the decision of 17 November 2016, the Organization complied with the terms of Judgment *Featherstone* UNDT/2015/117, as affirmed by *Featherstone* 2016-UNAT-683/Corr.1., in that the ASG/OHRM made a *de novo* retroactive and individualised consideration of the Applicant's suitability for conversion of her appointment to a permanent one. As a result of that consideration, and although she was no longer in the employment of the Organization, she was offered a permanent appointment, retroactively from 30 June 2009. Nothing in the remand by the Appeals Tribunal in Judgment *Featherstone* 2016-UNAT-683/Corr.1 indicated that such individualised retroactive consideration of the suitability for conversion implied taking into consideration the employment status of the staff member at the time of such reconsideration, and/or that it required the Organization to offer the Applicant an alternative remedy to specific performance, as she claims.

19. As stressed above, the Applicant was free to sign the offer of a permanent appointment, retroactively, and it is unknown to the Tribunal what would have happened if she had indeed done so.

20. The Tribunal is of the view that as such, the decision to offer the Applicant a permanent appointment, retroactively, is not a decision susceptible to adversely affect her terms of appointment, pursuant to art. 2.1(a) of the Tribunal's Statute.

The decision did not cause the Applicant any harm

21. While the Applicant accepts that she has no claim for loss of salary, as this was mitigated by the release from her performance obligations, she notes that she suffered demonstrable harm in the form of loss of associated contractual benefits resulting from breaches by the Secretary-General. She particularly claims that she lost five additional years of contributions to the United Nations Joint Staff Pension Fund ("UNJSPF") and requests compensation in the amount equivalent to the contribution that the Organization would have made to the UNJSPF for the period 1 January 2012 to 13 March 2017.

22. It is the Tribunal's view that no material damages could be or were caused by the decision of 17 November 2016 and the acceptance by the Organization that she

was, and has been, entitled to conversion to a permanent appointment from 1 July 2009 (see above). When the Applicant resigned in December 2011, she was aware of the negative decision of October 2011 not to grant her such conversion, a matter which she decided to litigate. Arguably, had she wanted to preserve her rights, pending litigation, the Applicant should have remained in the service of the Organization until the matter was determined. She cannot approbate and reprobate at the same time. The Tribunal further notes that nothing in the Applicant's resignation memorandum of 1 December 2011 indicates that the reason for her decision was related to the denial of conversion of her appointment to a permanent one, as notified to her in October 2011. In any event, as a result of her personal choice to resign from the Organization, for whatever reason, the Applicant cannot claim any benefits in respect of services which she did not render.

23. In light of the foregoing, and independently from the evidence provided by the Respondent—arguing that the decision was motivated by the Applicant's concern to have a better work-life balance—the Tribunal is satisfied that the financial impact of the Applicant's separation from service was a direct consequence of her own and free decision to resign from the Organization effective 31 December 2011, that is, prior to the proceedings in front of the Dispute Tribunal and Appeals Tribunal. The decision of 17 November 2016 which, as analysed above, was taken in compliance with Judgment *Featherstone* 2016-UNAT-683/Corr.1, was thus not susceptible to cause the Applicant compensable material harm.

The Applicant cannot re-litigate matters that have already been adjudicated (res judicata)

24. Further, the Tribunal is of the view that the application appears an attempt by the Applicant to re-litigate matters that have already been adjudicated, which are not receivable.

25. The Applicant asks the Tribunal to make an award setting an amount of compensation that the Respondent may elect to pay as an alternative to specific performance pursuant to art. 10.5(a) of its Statute, in the amount equivalent to the

termination indemnity she would have received upon the abolition of her post on 31 December 2013.

26. The Tribunal recalls that the Appeals Tribunal has in no case set an alternative compensation upon rescinding a decision related to conversion to permanent appointment. Hence, it does not view decisions on conversion to permanent appointment as ones concerning appointment for the purpose of alternative compensation under its Statute (cf. *O'Hanlon* 2013-UNAT-303, *Malmström et al.* 2013-UNAT-357, *Longone* 2013-UNAT-358, *Ademagic et al.* 2013-UNAT-259, *McIlwraith* 2013-UNAT-360, *Branche* 2013-UNAT-372). Accordingly, in *Featherstone* UNDT/2015/117, the Dispute Tribunal refrained from setting an amount that the Respondent may elect to pay as an alternative to rescission pursuant to art. 10.5(a) of its Statute. The Appeals Tribunal affirmed that ruling.

27. The same rationale applies to the Applicant's claim for compensation as an alternative to specific performance. Since decisions on conversion to permanent appointment do not concern appointment, promotion or termination, the Tribunal cannot set an amount for compensation as an alternative to specific performance under art. 10.5(a) of its Statute.

28. Accordingly, in its above referenced judgments, neither the Dispute nor the Appeals Tribunal offered such compensation as an alternative to specific performance to the Applicant. In executing judgment *Featherstone* 2016-UNAT-683/Corr.1, the Administration was thus under no obligation to consider and pay the Applicant such compensation as an alternative to specific performance.

29. For the sake of completeness, the Tribunal recalls that it found in *Featherstone* UNDT/2015/117 that compensation for material damages equal to termination indemnities could not be granted because that would imply to prejudge that the Applicant would be granted a permanent appointment, which the Dispute Tribunal was not in a position to do. Neither did that Judgment, as affirmed by the Appeals Tribunal, require the Administration to grant the Applicant termination indemnities in case of conversion or in relation to the reconsideration exercise. These matters are *res judicata* hence cannot be re-litigated.

30. In her submission of 17 May 2018, the Applicant further clarified that she is requesting compensation for harm arising from the fundamental breaches by the Organization of its contractual obligations and duties towards her, including—but not limited to—failure over a period of several years to respect her contractual rights as a staff member to due process and to the right to work in an environment free from discrimination.

31. The Tribunal notes that the stress and anxiety suffered by the Applicant as a consequence of the breach of her rights up to the decision of 17 June 2014 denying the conversion of her FTA to a permanent one was examined in Judgment *Featherstone* UNDT/2015/117. The Dispute Tribunal awarded compensation in this respect but the Appeals Tribunal vacated it. Such claim is *res judicata*.

32. Further, with respect to her claim for compensation for fundamental breaches that allegedly arose between the decision of 17 June 2014 until the day of the present application, the Tribunal observes that the Applicant failed to provide any evidence of such damages—allegedly caused by the decision of 17 November 2016 and implied acceptance that she was and had been entitled to conversion since 30 June 2009—as per the standard of evidence applied to art. 10.5(b) by the majority of the Appeals Tribunal in Judgment *Kallon* 2017-UNAT-742.

Claims under ST/SGB/2008/5

33. The Tribunal further finds that the Applicant's claims relating to ST/SGB/2008/5 are not receivable, as she failed to file a complaint and, hence, no decision was taken under the terms of that bulletin. While the Applicant claims that the two Judgments of the Appeals Tribunal in her favour clearly establish that senior staff in the Organization actively discriminated against her, the Tribunal finds that no formal finding of discrimination or abuse of authority pursuant to the bulletin was made by the Administration and could potentially have been made by the Appeals Tribunal.

34. As the Applicant correctly stated in her latest submission, it is still open to her to commence a formal process and request information, within the limits provided for under the bulletin. She cannot circumvent or otherwise shortcut that

procedure. The Tribunal is not in a position to grant her the requested remedy (cf. para. 10 and 11 above), that is, to order the Administration to inform the Applicant what action, including disciplinary action, has been taken by the Organization in relation to the alleged discrimination and what action is being taken to prevent further alleged discrimination against the Applicant.

35. Finally, the Tribunal decides to reject the Applicant's claim to delete paras. 13 and 14 of the Respondent's reply.

Conclusion

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

The application is dismissed as not receivable.

(Signed)

Judge Rowan Downing

Dated this 29th day of August 2018

Entered in the Register on this 29th day of August 2018

(Signed)

René M. Vargas M., Registrar, Geneva