



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

SMITH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Alan Gutman, AAS/ALD/OHR, UN Secretariat

Introduction

1. On 13 September 2019, the Applicant, a staff member of the International Residual Mechanism for Criminal Tribunals (“IRMCT”), filed an application contesting the decision not to grant him a continuing appointment.
2. On the same day, the application was served on the Respondent, who was granted until 14 October 2019 to submit his reply.
3. On 27 September 2019, the Respondent filed a motion requesting that receivability be addressed as a preliminary matter and that the deadline for filing of the reply be suspended pending determination of his motion.
4. On 4 October 2019, pursuant to the Tribunal’s Practice Direction No. 5, the Applicant filed his response to the motion requesting that it be denied and that the deadline for the reply be maintained.
5. By Order No. 77 (GVA/2019) of 11 October 2019, the Tribunal rejected the Respondent’s motion for leave to file a reply limited to receivability and ordered him to file his full reply to the application by 28 October 2019.
6. On 28 October 2019, the Respondent filed his reply.
7. By Order No. 36 (GVA/2021) of 11 February 2021, the Tribunal informed the parties of its finding that the matter could be determined without holding a hearing and ordered them to file closing submissions by 25 February 2021.
8. On 25 February 2021, the Respondent filed his closing submission.
9. By motion dated 26 February 2021, the Applicant requested that the deadline for filing his closing submission be waived on the ground that he had completed it on 24 February 2021 but he had not submitted it on time due to an oversight.
10. Considering that the Respondent would not suffer prejudice, the Tribunal granted the Applicant’s motion on 26 February 2021 and admitted his closing submission filed on the same day.

Facts

11. On 1 June 2005, the Applicant began service with the International Criminal Tribunal for the former Yugoslavia (“ICTY”) as a G-5 Administrative Assistant on a fixed-term appointment limited to service with ICTY. On 1 September 2006, the Applicant was promoted to the G-6 level as Research Assistant in the Office of the Prosecutor.

12. On 10 September 2010, the Applicant applied for the G to P examination for recruitment to the Professional Category from other categories in the legal affairs area. On 28 October 2010, the Applicant was convoked for G to P examination.

13. By letter dated 3 August 2011, the Office of Human Resources Management informed the Applicant that he would be placed on a roster of qualified candidates for positions within ICTY only.

14. On 1 October 2011, the Applicant was selected from that roster for the P-2 level position of Contracts Compliance Officer with ICTY.

15. On 15 October 2015, the Applicant was promoted to the P-3 level position of Special Assistant to the Chief Administrative Officer.

16. On 1 January 2018, the Applicant was transferred to IRMCT following the closure of ICTY on 31 December 2017.

17. On 6 December 2018, the Applicant wrote to the Chief of the Human Resources Section (“CHRS”), IRMCT, advising that his fixed-term contract should have been converted to a continuing appointment on 1 October 2013 and requesting that this error be rectified.

18. By email dated 18 February 2019, the CHRS, IRMCT, rejected the Applicant’s request.

19. On 18 April 2019, the Applicant requested management evaluation of the CHRS’ decision.

20. By letter dated 17 June 2019, the Applicant was informed of the outcome of his request for management evaluation, which upheld the contested decision not to grant him a continuing appointment.

Parties' submissions

21. The Applicant's principal contentions are:

- a. The application is receivable because the Applicant was only informed of the contested decision on 18 February 2019 and he timely challenged this decision;
- b. The Applicant is entitled to a continuing appointment pursuant to staff rule 4.14(b) as he was successful in the 2010 G to P competitive examination; and
- c. Whether IRMCT forms part of the Secretariat is irrelevant.

22. The Respondent's principal contentions are:

- a. The application is not receivable because the Applicant failed to submit his application within the three-year statutory time limit under art. 8.4 of the Tribunal's Statute; and
- b. Should the Tribunal find the application receivable, it has no merits because:
 - i. IRMCT has no authority to grant the Applicant a continuing appointment;
 - ii. The Applicant is ineligible for a continuing appointment; and
 - iii. The Applicant cannot now claim a right to a continuing appointment since he has acquiesced to a fixed-term appointment without demur.

Consideration

Contested decision and scope of judicial review

23. It is trite law that the applicant must “identify an administrative decision capable of being reviewed” (see, e.g., *Haydar* 2018-UNAT-821, para. 13; *Farzin* 2019-UNAT-917, para. 36). In the present case, the Applicant identified his correspondence with the CHRS of 18 February 2019 rejecting his request to convert his fixed-term appointment to a continuing appointment as the contested decision.

24. The Tribunal has “the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”, and “may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed” (see *Fasanella* 2017-UNAT-765, para. 20). Having considered the application in its entirety, the Tribunal is of the view that the Applicant has met his obligation to identify the contested decision.

25. The Tribunal recalls that its role when examining the validity of the Secretary-General’s exercise of discretion in administrative matters is to assess whether the decision is legal, rational, procedurally correct and whether the decision is absurd or perverse. It is not to consider the correctness of the choice made by the decision-maker exercising discretion nor to substitute its judgment for that of the decision-maker (see *Kule Kongba* 2018-UNAT-849, para. 27 and *Kellie* 2018-UNAT-875, para. 43).

26. Having reviewed the parties’ submissions and the evidence on record, the Tribunal defines the issues of the present case as follows:

- a. Whether the application is receivable in its entirety; and
- b. Whether the Applicant is eligible to be granted a continuing appointment.

Whether the application is receivable in its entirety

27. The Respondent avers that the application is not receivable because the Applicant failed to submit his application within the three-year statutory time limit under art. 8.4 of the Tribunal's Statute. In this respect, the Respondent argues *inter alia* that the three-year statute of limitation commenced on 1 October 2013 when the Applicant's cause of action arose; and that the 18 February 2019 correspondence between the Applicant and the CHRS, IRMCT, did not reset it.

28. Art. 8.4 of the Tribunal's Statute provides that "an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision".

29. In determining the date when the three-year statutory period should run from, the Tribunal recalls that "a written decision is necessary if the time limits are to be correctly, and strictly, calculated. Where the Administration chooses not to provide a written decision, it cannot lightly argue receivability, *ratione temporis*" (see *Manco* 2013-UNAT-342, para. 20). The Tribunal thus considers that without receiving a notification of a decision in writing, it would not be possible to determine when the period of three years for contesting the decision under art. 8.4 of its Statute would start.

30. In the present case, the evidence on record shows that the Applicant did not receive any written decision regarding his eligibility to a continuing appointment until 18 February 2019 when the CHRS, IRMCT, rejected his request for a continuing appointment in writing. Thus, the Tribunal finds that there is no merit in the Respondent's argument that the three-year statute of limitation commenced on 1 October 2013 when the Applicant's cause of action arose.

31. Even if the Tribunal were to entertain that there had been an implied decision in 2013 that the Applicant's appointment would not be converted to a continuing appointment, the Tribunal considers that the subsequent express decision is "not a mere confirmation of the previous implied administrative decision, but a new appealable decision" (see *Kerby* 2020-UNAT-1064, para. 32). Therefore, "a later negative decision to an administrative request already denied by an implied

administrative decision effectively re-set the clock” for a staff member to submit his or her application (see *Kerby* 2020-UNAT-1064, para. 32; *Ruyffelaere* 2020-UNAT-993, para. 21). Accordingly, assuming there had been an implied decision in 2013, the decision of 18 February 2019 containing the rejection of the Applicant’s request for a continuing appointment and the reason thereof would have reset the three-year statute of limitation.

32. It is thus the Tribunal’s view that the three-year statutory period under art. 8.4 of its Statute started to run from 18 February 2019 in this case.

33. The Tribunal notes that the Applicant filed his application on 13 September 2019, i.e., around seven months later after his receipt of the contested decision, thereby respecting the three-year statutory time limit under art. 8.4 of its Statute.

34. Accordingly, the Tribunal finds that the application is receivable.

Whether the Applicant is eligible to be granted a continuing appointment

35. In the present case, the Applicant joined ICTY in 2005 as a General Service staff and was appointed as a Professional staff on 1 October 2011. Following the closure of ICTY on 31 December 2017, the Applicant was transferred to IRMCT.

36. The Tribunal notes that both ICTY and IRMCT were created by the Security Council under Chapter VII of the United Nations Charter as an instrument for the exercise of its own principal function of maintenance of peace and security. They thus do not form part of “the Secretariat” within the meaning of Chapter XV of the Charter. The non-Secretariat status of both ICTY and IRMCT has been further confirmed by, *inter alia*, section 3.2 of the Secretary-General’s Bulletin on Organization of the Secretariat of the United Nations (ST/SGB/2015/3), which excludes both ICTY and IRMCT from the list of Secretariat organizational units, and section 2.5(j) of the Administrative instruction on Staff selection and managed mobility system (ST/AI/2016/1), which explicitly characterizes International Tribunals and IRMCT as “non-Secretariat organizational units” administered by the United Nations Secretariat. In addition, the United Nations Appeals Tribunal has

reaffirmed that neither ICTY nor IRMCT is a Secretariat entity (see *Colati* 2020-UNAT-980).

37. However, the Tribunal recalls that staff members of non-Secretariat entities may nevertheless have the status of Secretariat staff (see *Zervos* UNDT/2020/069, para. 28). In this respect, art. 101(2) of the United Nations Charter clarifies that United Nations staff may be assigned “as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat”. This is confirmed by the United Nations Appeals Tribunal’s finding that ICTY staff members are eligible for permanent appointments under ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) (see, e.g., *Malmström et al.* 2013-UNAT-357; *Ademagic et al.* 2016-UNAT-684). Thus, the Tribunal considers that the Applicant has the status of Secretariat staff.

The applicable legal framework

38. Paragraph 49 of General Assembly resolution 65/247 adopted on 24 December 2010 approves the granting of continuing contracts as at 1 January 2011 to eligible staff members based on the continuing needs of the Organization. This resolution provides in its relevant part that:

50. *Recalls* paragraph 23 of section II of its resolution 63/250,¹ and decides that successful candidates from **national competitive recruitment examinations and staff from language services after two years of probationary service** will be granted continuing contracts, notwithstanding the provisions contained in paragraphs 51 to 61 of the present resolution; (footnote and emphasis added)

[...]

53. *Further decides* that staff members must satisfy the following criteria in order to be eligible for consideration for the granting of continuing contracts:

¹ Paragraph 23 of section II of General Assembly resolution 63/250 reaffirms that, “while continuing appointments are not implemented, successful candidates from national competitive recruitment examinations and staff from language services after two years of probationary service will continue to be granted open-ended appointments according to the current practice”.

(a) They must have completed a minimum of five years of continuing service under the Staff Regulations and Rules of the United Nations:

[...]

(b) They must not be national staff recruited for field missions;

(c) They must **not** be international or locally recruited staff recruited for service in **the International Criminal Tribunal for Rwanda or the International Tribunal for the Former Yugoslavia**; (emphasis added)

(d) They must have received a performance rating of at least “Meets expectations” or equivalent in the four most recent performance appraisal reports, and must not have been subject to any disciplinary measure during the five years prior to their consideration for the granting of a continuing contract;

(e) They must have at least seven years of service remaining before reaching the mandatory age of separation[.]

39. Staff regulation 4.5(d) provides that “[t]he Secretary-General shall prescribe which staff members are eligible for consideration for continuing appointments”.

40. Staff rule 4.14 governing continuing appointments provides that:

(a) A continuing appointment is an open-ended appointment.

(b) Staff members recruited in the Professional category upon successful completion of a competitive examination pursuant to staff rule 4.16 shall be granted a continuing appointment after two years on a fixed-term appointment, subject to satisfactory service.

(c) The Secretary-General shall prescribe the criteria determining staff members’ eligibility for consideration for continuing appointments.

41. For the purpose of implementing section VI of General Assembly resolution 65/247 of 24 December 2010 and staff rule 4.14 on continuing appointments, the Secretary-General promulgated bulletin ST/SGB/2011/9 (Continuing appointments) that provides the following in its relevant part (emphasis added):

Section 1

General provisions

1.1 A continuing appointment is an open-ended appointment granted through established procedures in accordance with the Staff Regulations and Rules of the United Nations as well as the provisions of the present bulletin.

1.2 Continuing appointments may be granted to eligible staff members on the basis of **the continuing needs of the Organization** and in accordance with the provisions of section VI of General Assembly resolution 65/247 of [24] December 2010.

1.3 In accordance with paragraph 23 of section II of General Assembly resolution 63/250 and staff rule 4.14 (b), staff members recruited upon successful completion of a competitive examination pursuant to staff rule 4.16 shall be granted a continuing appointment after two years under a fixed-term appointment, subject to satisfactory service. **The other sections of the present bulletin do not apply to these staff members.**

Section 2

Eligibility

2.1 In order to be eligible for consideration for the granting of a continuing appointment, staff members who have been selected for a position through a competitive process which includes **a review by a Secretariat review body** in accordance with staff rule 4.15, and are serving with **the United Nations Secretariat** under a fixed-term appointment, must satisfy the following criteria:

[...]

(e) They must **not be** international or locally recruited **staff serving in the International Criminal Tribunal for Rwanda or the International Tribunal for the Former Yugoslavia[.]**

42. In accordance with ST/SGB/2011/9 and for the purpose of implementing staff rule 4.14 on continuing appointments, the Under-Secretary-General for Management promulgated an administrative instruction on administration of continuing appointments (ST/AI/2012/3), which provides in its relevant part that:

Section 2 Eligibility

[...]

2.4 In accordance with section 2.1(e) of ST/SGB/2011/9, staff members must not, at the eligibility date, be internationally or locally recruited for service in the International Criminal Tribunal for Rwanda or the International Tribunal for the Former Yugoslavia.

[...]

2.6 For the granting of a continuing appointment, eligible staff members must be in **active service in the Secretariat** under a fixed-term appointment throughout the period of consideration. (emphasis added)

43. It follows that staff members recruited upon successful completion of a competitive examination pursuant to staff rule 4.16 are eligible for a continuing appointment after two years under a fixed-term appointment, subject to satisfactory service. Moreover, General Assembly resolution 65/247 explicitly excludes the international or locally recruited staff recruited for service in the International Criminal Tribunal for Rwanda (“ICTR”) or in ICTY, unless they are “successful candidates from national competitive recruitment examinations [or] staff from language services after two years of probationary service”.

Whether the Applicant is entitled to a continuing appointment pursuant to staff rule 4.14

44. In the present case, the Applicant argues that his right to a continuing appointment accrues from his recruitment following a competitive examination under staff rule 4.14(b).

45. The Respondent contends that the Applicant was ineligible for a continuing appointment because (i) he was excluded from the category of staff eligible for consideration for a continuing appointment under section 2.1(e) of ST/SGB/2011/9; (ii) he did not serve in the United Nations Secretariat after his service at ICTY but at IRMCT; and (iii) he has not been selected for a position through a competitive

process, which includes a review by a Secretariat review body, as required by section 2.2(a)(ii) of ST/SGB/2011/9.

46. Relying on the carve-out contained in section 1.3 of ST/SGB/2011/9 that “[t]he other sections of the present bulletin do not apply to these staff members”, the Applicant in his closing submission replies that sections 2.1(e) and 2.2(a)(ii) of ST/SGB/2011/9 do not apply to him.

47. The core issue before the Tribunal is thus whether the Applicant is a staff member “recruited in the Professional category upon successful completion of a competitive examination pursuant to staff rule 4.16”. Staff rule 4.16(b)(ii) provides the following:

Recruitment to the Professional category of staff from the General Service and related categories in the **United Nations Secretariat**: recruitment to the **Professional category at the United Nations Secretariat** of staff from the General Service and related categories having successfully passed **the appropriate competitive examinations** shall be made **within the limits established by the General Assembly**. Such recruitment shall be made exclusively through competitive examination.” (emphasis added)

48. This provision is clearly limited to recruitment to the Professional category of staff from the General Service and related categories in “the United Nations Secretariat.”

49. The Tribunal recalls that ICTY, like its successor, IRMCT, is a subsidiary organ of the Security Council and thus a non-Secretariat entity. Therefore, the Applicant was not working at the United Nations Secretariat as required by staff rule 4.16(b)(ii) when he participated in the 2010 ICTY G to P competitive examination, nor was he recruited to the Professional category at the United Nations Secretariat pursuant to staff rule 4.16 after the 2010 examination.

50. Indeed, the evidence on record shows that the competitive examination that the Applicant sat was exclusively for placement with ICTY. Thus, said competitive examination does not fall within the scope of staff rule 4.16. Accordingly, the Tribunal finds that the Applicant is not a staff member recruited upon successful

completion of a competitive examination pursuant to staff rule 4.16 and, consequently, he had no right to a continuing appointment under staff rule 4.14(b).

51. In any event, General Assembly resolution 65/247 explicitly excludes international or locally recruited staff recruited for service in ICTR or in ICTY from being eligible for a continuing appointment, unless they are “successful candidates from national competitive recruitment examinations and staff from language services after two years of probationary service”. The Tribunal notes that the resolution regarding the eligibility requirements and its scope of application is unambiguous and leaves no room for interpretation or any exercise of discretion by the Secretary-General.

52. Therefore, the Applicant was not eligible for consideration for a continuing appointment at least until 31 December 2017 when he left ICTY for IRMCT. Thus, the Tribunal considers that the Applicant has failed to establish that the requirement excluding ICTY staff members from eligibility for continuing appointment does not apply to him.

53. Accordingly, the Tribunal finds no merit in the Applicant’s claim that he is entitled to a continuing appointment pursuant to staff rule 4.14.

54. The Tribunal recalls that as a general principle, a staff member bears the burden of proof to show that a decision was defective (see *Obdeijn* 2012-UNAT-201, paras. 5 and 38). The Tribunal finds that the Applicant has not met the burden of proving that the contested decision is unlawful.

Conclusion

55. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 23rd day of April 2021

Entered in the Register on this 23rd day of April 2021

(Signed)

René M. Vargas M., Registrar, Geneva