



Introduction

1. The Applicant, an S-2 level Security Officer currently serving with the Department of Safety and Security (“DSS”) of the United Nations Secretariat in New York, contests the decision of 4 October 2011 “denying [him] the opportunity to write the Young Professionals Programme [“YPP”] examination in [the areas of] Admi

the event no hearing is requested, the Tribunal [would] proceed with rendering its judgment, subject to any orders that may be issued”.

5.

Article 2

Request for services

1. ... UN/DSS shall request UNDP, through a formal, written document, to provide such Services as are required for the appointment of FSCOs.
2. UN/DSS shall:
...
 - (c) [m]aintain the oversight of FSCO programme ...;
 - (d) ... provide technical oversight on the ground,
...

Article 3

UNDP Services

- ...
- 3.3(b) ... Letters of Appointments signed before assignment to UN/DSS will stipulate that the staff member will be loaned to UN/DSS, and as such is not a UN/DSS staff member.
...
 - 3.3(e) ... individuals hired by UNDP shall work under the supervision of the person designated by UN/DSS ... in accordance with overall directives laid down by UN/DSS in consultation with UNDP. UNDP shall provide such individuals with appropriate guidance and support on administrative and managerial issues as UNDP may deem necessary
...

Article 6

Liability and Insurance

- ...
- 6.2 UNDP shall be responsible for handling any dispute or claim arising from or in connection with the provision of Services, including disputes or claims from third parties.
8. From 18 February 2003 to 31 May 2007, the Applicant was employed by

for Asia and the Pacific (“ESCAP”),

signed by an official of the Office of Human Resources Management (“OHRM”) on behalf of the Secretary-General.

12. By letter dated 22 November 2010, signed by the Assistant Secretary-General for Human Resources Management, the Applicant was informed that his contract would be converted to a permanent appointment, with retroactive effect from 30 June 2009. He accepted the permanent appointment, effective 30 June 2009, on 3 December 2010.

13. In 2011, the Applicant applied to take the YPP examination in two areas, “Administration” and “Humanitarian Affairs”. He was notified on 4 October 2011, by two separate letters, that his application to take the YPP examination in both areas was rejected by the Central Examination Board because he “did not have a minimum of five years of continuous service in the Secretariat to qualify for admission to the examination”. The Applicant appealed the decision of the Central Examination Board on 14 October 2011. On 25 October 2011, the Examinations and Tests Section of the Office of Human Resources Management (“OHRM”) informed him that because his service was with UNDP, it could not be counted towards service with the Secretariat.

14. On 21 November 2011, the Applicant re

the Administration to exercise its discretion to rectify the unfairness through the operation of staff rule 12.3(b)”.

15. Given the impending examination, on 23 November 2011, the Applicant sought a suspension of action from the Tribunal. This application was rejected in *Jitsamruay* UNDT/2011/206, dated 1 December 2011, the Tribunal having determined that the requirement of urgency was not satisfied as the urgency was self-created. The Tribunal did not rule on the question of the *prima facie* unlawfulness of the decision.

16. Pending the outcome of the request for management evaluation, the Administration allowed the Applicant to sit the examination, which he did not pass. In his submission of 29 July 2013, the Applicant refers to para. 13 of the Respondent’s reply which states that “in light of the fact that the Applicant’s management evaluation [of 21 November 2011] request was outstanding, on a without prejudice basis, the Administration admitted the Applicant to the [2011 YPP] examination pending the outcome of his management evaluation”. In his submission of 29 July 2013, the Applicant “confirms that he did not pass the original sitting of the [2011 YPP] test” referred to by the Respondent in para. 13 of the reply.

17. On 1 March 2012, the Management Evaluation Unit (“MEU”) upheld the original decision. The report explained that:

[d]ue to the urgency of the matter and the fact that the examination in question was scheduled to take place on 7 December 2011, and pursuant to a request from your counsel, the MEU suggested to the Examinations and Tests Section to allow you to sit in for the 2011 YPP examination without prejudice, subject to MEU’s final decision on your eligibility ... In light of the foregoing considerations of your case, the Secretary-General has decided that the decision to deem you ineligible to participate in the 2011 YPP examination was taken in

accordance with the applicable rules and thus upholds it. Accordingly, the 2011 YPP exam that you wrote will not be evaluated.

or programmes, except as otherwise provided in section 3.2 below
[concerning short breaks in service];

(b) Has a rating of at least “fully meets performance

programmes (sec. 3.1(a)).

24. ST/AI/2010/7 (on YPP) contains an explicit clause excluding service in separately administered funds or programmes in the computation of continuous service.

25. The Tribunal will examine the meaning of the relevant provision in ST/SGB/2009/10 (on conversion). Firstly, it must be stated at the outset that this document is a Secretary-General's bulletin that applies to the staff members of the United Nations Secretariat, as explicitly stated in its title ("Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009"). Section 1(a) of ST/SGB/2009/10 specifically refers to five years of continuous service under the former 100 series of the Staff Rules, which apply to the staff members of the United Nations Secretariat. Therefore, the requirement of a minimum of five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules (ST/SGB/2009/10, sec. 1(a)) is another way of saying that the appointment was continuously with *the United Nations Secretariat* for at least five years on fixed-term contracts. (See sec. 1(a) of ST/SGB/2009/10; former Staff Regulations (see, e.g., ST/SGB/2009/6; ST/SGB/2012/1), section entitled "Scope and purpose"; and former Staff Rules, sec. 1, stating that the Staff Rules apply to staff members of the United Nations Secretariat).

26. Secondly, it has been established by the Dispute and Appeals Tribunals that this requirement of "five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules" (ST/SGB/2009/10, sec. 1(a)) is satisfied in two situations:

Option (a): the staff member had five years of continuous service on fixed-term appointments with the United Nations Secretariat, or

Option (b): the staff member's service outside of the United Nations Secretariat during any part of the relevant time period was subject to an inter-agency agreement that provided that service in one organization "will be counted for all purposes" as service in a counterpart organization (see *O'Hanlon* 2013-UNAT-303).

27. It is common cause that the Applicant was not subject to an *O'Hanlon*-type inter-agency agreement, i.e., one which provided that service in one organization would be counted "for all purposes" as service in the second organization. Thus, option (b) above could not have applied when the Applicant was considered for conversion in November 2010. From this it must necessarily follow that, when deciding to convert the Applicant to a permanent contract, the Organization treated him as falling under option (a), namely that he was a staff member who, by 30 June 2009, had completed five years of continuous service on fixed-term 100 series appointments with the United Nations Secretariat.

28. It follows from the above that by converting the Applicant to a permanent appointment under ST/SGB/2009/10—which explicitly concerns "Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009"—the Organization explicitly declared and accepted that he had five years of continuous service with the United Nations Secretariat.

29. Having made this finding upon considering the Applicant for conversion, it would be absurd for the Organization to find him ineligible to sit the YPP examination under ST/AI/2010/7 on the basis that he had *not* reached five years of service with the United Nations Secretariat. The Organization is estopped from going back on its previous declaration of continuity of service with the Secretariat. It would defy not only law and logic, but also common sense.

Permanent appointments are the most enduring and secure type of employment relationship that the Organization can

a permanent contract status in 2010. In particular, his letter of appointment of May 2007, prepared on the United Nations letterhead, stated that his appointment was limited to “service with the United Nations Department of Safety & Security”. His letter of appointment did not stipulate, as required by art. 3.3(b) of the MoU that he “will be loaned to the UN/DSS and as such is not a UN/DSS staff member”. The Applicant apparently worked under the direct supervision of two DSS staff members, and throughout his service with DSS had a United Nations Security pass that identified DSS as his employer office. Under general principles, the fact that an employer has the right of supervision and control over the employee is a strong indicator that the relationship is one of a contract of service. Upon examining the relationship as a whole and taking into account the various factors above, the dominant impression may be created that the relationship is a contract of service between the Applicant and DSS.

33. The Applicant also referred to a number of Secretary-General’s reports for the period of 2009 to 2012, which indicate that, from 2010, when reporting to the General Assembly on matters of staff demographics, the Secretary-General includes UNDP-administered staff of the United Nations Secretariat as part of the staff population of the United Nations Secretariat, referring to them as “UNDP-administered staff of the Secretariat”.¹ This is apparently done pursuant to the General Assembly’s request in para. 18 of resolution 63/250 (Human resources management) of 24 December 2008, asking the Secretary-General to “gradually incorporate within his report on the composition of the Secretariat the overall number of staff, regardless of sources of funding, on contracts of one year or more”.

¹ See A/65/350 (Composition of the Secretariat: staff demographics) (8 September 2010), pp. 18–19; A/66/347 (Composition of the Secretariat: staff demographics) (8 September 2011), pp. 12, 39; A/67/329 (Composition of the Secretariat: staff demographics) (28 August 2012), pp. 12, 39; and A/68/356 (Composition of the Secretariat: staff demographics) (30 August 2013), pp. 12, 14, 40.

34. Whatever the legal construction UNDP and United Nations Secretariat attempted to establish, the facts of this case speak for themselves. The Applicant was deemed to have completed five years of continuous service as a staff member of the Secretariat for the purposes of conversion to a permanent appointment. He was treated at his work place as a staff member of the United Nations, was previously invited to sit the 2009 YPP examination under the same conditions, and was allowed to sit the 2011 YPP examination, albeit “on a without prejudice basis”. On the facts alone, it is disingenuous and manifestly unreasonable to suggest that the Applicant’s service in the period June 2007 to February 2009 should be disregarded.

35. All of the above considered, the Tribunal finds that, in addition to the legal effect of the Applicant’s conversion to a permanent status in 2010, it was manifestly unreasonable for the Administration to completely disregard the Applicant’s service for the period June 2007 to February 2009, when determining his eligibility to take the YPP examination in 2011.

Request for exception

36. The Applicant submits that he made a proper request for an exception under staff rule 12.3(b) (Amendments of and exceptions to the Staff Rules), which was not properly considered. The Applicant made such request for an exception to sec. 3.1 ST/AI/2010/07 (Competitive examination for recruitment to the Professional category of staff members from other categories) for the very first time in the narrative attached to his MEU application. He submits that the MEU in its report did not address his request for an exception.

37. The Applicant did not follow the normal process for requesting an exception from the Secretary General (see, e.g., *Rockcliffe* UNDT/2012/033). If indeed the request for an exception filed through the MEU could be viewed as

properly made, the Secretary-General's lack of response to this request would constitute an administrative decision (of an implicit nature) refusing to grant the exception.

38. It is important to articulate that when the Applicant included his request for an exception in his letter to the MEU, he did not do so by way of seeking a management evaluation of some prior refusal to grant an exception. The letter to the MEU contained the *original* request for an exception. However, the purpose of the MEU is to review the lawfulness of already *existing* administrative decisions. Any response (or lack thereof) from the Secretary-General to the request for an exception made in the Applicant's letter to the MEU would necessarily result in the first administrative decision that the Applicant could then contest by filing a management evaluation request.

39. According to staff rule 11.2(a), "[a] staff member wishing to formally contest an administrative decision ... shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision". Thus, it would be required of the Applicant, prior to raising the issue before the Tribunal, to submit a request for management evaluation of the implicit refusal by the Secretary-General to grant the exception.

40. Therefore, even if the Tribunal were to accept that the MEU is an appropriate forum to request for an exception, since the Applicant failed to seek management evaluation of the implicit refusal of the Secretary-General to grant his request for an exception, made for the first time in his letter to the MEU, his claims regarding this request are not properly before the Tribunal.

Relief

41. The Applicant seeks rescission of the contested decision and a declaration that he served in the United Nations Secretariat, which service contributes to his

part of the present case, their possible outcome would be too speculative to take into account. The Tribunal finds that the Applicant, despite being given an opportunity to file additional submissions by 29 July 2013, has not substantiated that he suffered pecuniary or non-pecuniary harm such as to warrant compensation.

43. As the United Nations Appeals Tribunal stated in *Antaki* 2010-UNAT-095, “[n]ot every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages”. In view of the circumstances of this case, the only relief that the Tribunal finds appropriate to order in this case is the rescission of the decision not to allow the Applicant to sit the 2011 YPP examination.

Observations

44. The Tribunal finds it appropriate to comment on the Respondent’s

The Applicant's claims in this case were clearly not moot, contrary to the Respondent's assertions.

45. The Tribunal regrettably notes that this matter has resulted in wasted resources and needless costs due to unnecessary litigation. This case could have, and should have, been resolved by the parties through informal discussions.

Conclusion

46. The contested decision not to allow the Applicant to sit the 2011 YPP examination is rescinded. All other pleas and claims for relief are rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 8th