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Judgm e

JUDGE RICHARD LUSSICK , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/112, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 20 August 2014 in the case of **Couquet v. Secretary-General of the United Nations** . On 20 October 2014, the Secretary-General filed his appeal, and on 27 November 2014, Ms . Catherine Couquet filed her answer.

Facts and Procedure

2. The following facts are uncontested: ¹

The Applicant was appointed under a 100-series fixed-term appointment (FTA) as a Translator with the [International Criminal Tribunal for the Former Yugoslavia (ICTY)] on 1 October 2006. The FTA was extended several times, up to

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Administration's failure to promulgate the necessary administrative issuance establishing conditions for reinstatement should not be allowed to prejudice staff members.⁴

8. The UNDT also relied on the doctrine of *contra proferentem* (interpretation against the draftsman) to support its conclusion regarding ST/AI/2007/3.

9. The UNDT held that Ms. Couquet's eligibility for ASHI should be based on the date of her recruitment to the ICTY in October 2006, and not the date of her recruitment to UNAKRT in October 2009. Based on this conclusion, the UNDT found that Ms. Couquet was eligible for ASHI and ordered the rescission of the contested decision and Ms. Couquet's retroactive enrolment from 1 December 2013 in ASHI.

Submissions

The Secretary-General's Appeal

10. The UNDT erred in concluding that Ms. Couquet's eligibility for ASHI should be determined based on the date of her recruitment to the ICTY in October 2006. Under Staff Rule 4.17, the date of recruitment that is relevant for determining the terms of appointment of a former staff member who receives a new appointment after separating from the Organization is the date of the new appointment. In Ms. Couquet's case, her new appointment with UNAKRT was a re-employment under Staff Rule 4.17. Ms. Couquet's eligibility for ASHI was therefore properly determined by reference to the date of her recruitment to UNAKRT in October 2009. The same logic applies to the functioning of other conditions of employment that turn on the date of recruitment, such as retirement age, pursuant to Staff Regulation 9.2.

11. The UNDT erred in disregarding Staff Rule 4.17 when interpreting ST/AI/2007/3. Section 4.17(c) is intended to enumerate exclusions to the general rule, set out in subparagraphs (a) and (b), that a staff member who is reemployed is treated as having a new appointment without regard to any period of former service. Since ASHI is not one of these exclusions, the general rule established in Staff Rule 4.17 does apply to determining the date of recruitment in ST/AI/2007/3. Moreover, and contrary to Ms. Couquet's contention, the definition of recruited in ST/AI/2007/3 is not clear and recourse to Staff Rule 4.17 provides

⁴ *Ibid.*, para. 29.

guidance on the matter not addressed in the administrative instruction and is appropriate. Such guidance should be treated as authoritative since Staff Rule 4.17 is of higher order in the hierarchy of norms than the administrative instruction. The UNDT also erred in relying on the Appeals Tribunal's Eggesfield judgment to support its conclusion that Staff Rule 4.17 could not apply to the interpretation of ST/AI/2007/3, as the facts in that case can be clearly distinguished from Ms. Couquet's case.

12. The UNDT erred in relying on Section 2.2 of ST/AI/2007/3 to interpret Section 2.1. Section 2.2 only provides details on how a staff member can accumulate periods of participation in the health insurance plan. The fact that ST/AI/2007/3 allows a staff member to add up all of his or her periods of contributory participation across all periods of service for the purpose of determining the period of contributory participation does not have any bearing on how the date of recruitment is to be defined. These are two separate issues.

13. The UNDT erred in applying the doctrine of *lex specialis* to this case. There is no conflict between the requirements of Staff Rule 4.17 and those of ST/AI/2007/3 and the two sets of provisions can be read together coherently. Even if there was any inconsistency between the two sets of requirements, the hierarchy of norms would dictate that Staff Rule 4.17 applies, as it is hierarchically superior to the administrative instruction.

14. The UNDT also erred in applying the doctrine of *contra proferentem*. This rule is traditionally applicable in the context of interpreting the terms of contracts, particularly in contracts of adhesion where there is unequal bargaining power between the parties. The application of this doctrine is intended to equalize the bargaining power between the parties to a contract, by establishing a rule whereby a contractual term may be interpreted in favour of the party who did not draft the contract since that party is presumed to have less bargaining power. However, an administrative instruction such as ST/AI/2007/3 is not a contract between the Organization and an individual staff member. Thus, the doctrine of *contra proferentem* does not apply.

15. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Ms. Couquet's Answer

16. The UNDT did not err in law when it concluded that her eligibility for ASHI should be determined based on the date of her entry into the common system, i.e. her recruitment

20. The UNDT has rightfully found that Staff Rule 4.17 is not applicable in the context of ASHI. The Secretary-General erroneously invoked that the hierarchically superior rank of Staff Rule 4.17 would trump ST/AI/2007/3 as to the purported inconsistency. In order to consider the hierarchical relationship between norms, there must be normative equivalence, translated in a requirement for a rather high degree of *ratione materiae* sameness in terms of both their normative content and function. This sameness is absent in the present case. Staff Rule 4.17 deals with terms of appointment, which may differ for the same staff member and, in principle, are determined without regard to any period of former

23. The UNDT did not err in citing *Eggesfield* in support of the proposition that staff members should not be prejudiced by the Administration's failure to promulgate the necessary administrative issuance establishing conditions and procedures for reinstatement. The Administration did not act in good faith when it placed before Ms. Couquet hidden administrative hurdles. Even if the Appeals Tribunal were not to agree with the position of the UNDT regarding the interpretation of ASHI regulations, Ms. Couquet requests that the

or commutation of accrued annual leave . ⁷ The UNDT turned instead to ST/AI/2007/3

(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;

...

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. []

31. The UNDT held that: ⁸

[t]he 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. [...] [T]here 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.

32. The UNDT decided that Rule 4.17 was not relevant and that ⁹

the plain text of ST/AI/2007/3 is not specifically inconsistent with other rules set out in the same context []. The fact that service may not be considered as continuous

⁸ Ibid., para. 27 (emphasis in original).

⁹ Ibid., para. 28.

between a prior and new appointment[], 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.

Moreover,¹⁰

ST/AI/2007/3 does not contemplate continuity of employment for eligibility, but the

36. The ordinary meaning of Rule 4.17 is clear and unambiguous. It is common ground that Ms. Couquet was re-employed, not reinstated. Accordingly, pursuant to Staff Rule 4.17(a), her re-employment with UNAKRT constituted a new appointment, which commenced on 15 October 2009. Pursuant to Staff Rule 4.17 (b), the terms of such new appointment were fully applicable regardless of her period of former service, which could not be considered as continuous.

37. Section 2 of ST/AI/2007/3 sets out the eligibility criteria for enrolment in ASHI in the case of 100 series or 200 series staff members. The relevant parts of Section 2.1(b)(ii) require a minimum of five years participation in a contributory health insurance plan of the Organization in the case of staff members recruited before 1 July 2007, and, pursuant to Section 2.1(a)(ii), 10 years of similar participation in the case of staff members recruited on or after 1 July 2007.

38. We find that the UNDT erred in law in deciding that Section 2.2 of ST/AI/2007/3 applies to define the recruitment date in Section 2.1. Section 2.2 is limited to defining the meaning of participation in a contributory health insurance plan of the United Nations, which can include contributory participation accumulated during all periods of service. Nothing in the language of Section 2.2 indicates that its terms should apply to the definition

41. Finally, in her answer, Ms. Couquet alleges bad faith on the part of the Administration

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Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Simón

Entered in the Register on this 18th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar