UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/058/ JAB/2009/002
Judgment No.:	UNDT/2010/042
Date:	12 March 2010
Original:	English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

GOMEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Duke Danquah, OSLA

Counsel for respondent:
Steven Dietrich, ALS

Introduction

1. The applicant was selected for a temporary P-4 administrative officer post in the Office for the Coordination of Humanitarian Affairs (OCHA). The applicant's assignment ended when the incumbent of the post returned from mission. The applicant secured another temporary appointment, but was required by the Administration to take a three-day break in service before taking up her new appointment. The main issue in this case is whether the applicant was lawfully required to take a break in service between her two temporary appointments.

2. The parties consented to a consideration of this case without an oral hearing. In the circumstances several orders were issued for the purpose of verifying the respective contentions of the parties and for providing them with a sufficient opportunity of testing the other side's contentions and of preparing final submissions.

3. The applicant provided detailed particulars identifying individuals in comparable circumstances who were treated more favourably than she was. These examples were provided for the purpose of supporting her contention that there was an inconsistency in the application of the respondent's practice requiring breaks in service between one temporary contract and another. In an attempt to preserve the anonymity of these individuals, who are not directly involved in this case, their details will be omitted.

Background

4. The applicant was appointed on 12 March 2003 to the United Nations Secretariat on a three-month fixed-term appointment at the P-3 level as a human resources officer with the Department of Peacekeeping Operations (DPKO). She

continued in service with the UN on the basis of a series of temporary appointments with breaks in service between those appointments.

5. On 1 June 2006 the applicant joined OCHA as a P-4 administrative officer. This appointment was to fill a temporary vacancy which arose as a result of the incumbent being sent on a mission assignment. On 4 May 2008 the incumbent returned from mission. As a result the applicant's temporary assignment ended on that date. She was required to take a break in service before taking up another six-month temporary appointment, on 8 May 2008, as an administrative officer at the P-4 level in OCHA. On 15 August 2008 the applicant was appointed to a Galaxy regularised post of administrative officer in accordance with the recognised staff selection system ST/AI/2006/3. The applicant's temporary assignment ended on 14 August 2008 and she commenced her duties for the appointment of administrative officer on the very next day, without a break in service. In the circumstances her appointment has been continuous since 8 May 2008. The applicant considers that the requirement of a break in service ought not to have been applied to her and that her continuity of employment should be with effect from 1 June 2006.

Parties' submissions

6. The essence of the applicant's complaint is that she ought not to have been required to take a break in service between 5 to 7 May 2008 for the following reasons:

a. The break in service was not a requirement under a specific policy. If such a policy existed the respondent had failed to provide a copy of it.

b. In any event the respondent did not apply this purported policy or practice in a consistent manner. This leaves open the question as

to why it was applied to her and not to certain other individuals in similar situations whom she had identified.

c. The respondent failed to give effect to its own policy and practice of not requiring a break in service if the staff member was moving from one mission assignment to another, when she moved from a mission replacement position with DPKO to another mission replacement position with OCHA on 1 June 2006.

7. The applicant further submits that she had been unfairly disadvantaged by the delay in completing the recruitment formalities for the Galaxy post which she took up on 15 August 2008. She noted the practice within the Organization to extend a staff member's temporary appointment after they have been selected for a Galaxy post pending completion of pre-recruitment formalities. An important part of the applicant's case was what she described as the deliberate tactic of delaying the recruitment procedures on the part of the then Chief of Human Resources Section of OCHA.

8. It was the respondent's case that:

a. The mandatory break in service was required by staff rule 104.14 (Central review bodies) and the limited exception to the break in service requirement for purposes of mission replacement did not apply to the applicant in May 2008.

b. There had not been an inconsistent application of the policy and practice regarding breaks in service.

c. The issue regarding the break in service in May 2006, prior to the applicant's 1 June 2006 move to OCHA, was a separate matter and not the subject of this appeal/complaint, which focused on the May 2008 break in service.

d. The applicant's continuity rights could not be preserved retroactively once she took up the Galaxy post on 15 August 2008. At the time she was required to take the break in service between one temporary contract and another in the period of 5 to 7 May 2008 the recruitment process for the Galaxy post was ongoing.

Applicable legal principles

Former staff rule 104.14

9. The Secretary-General set up central review bodies to give advice on the appointment and promotion of staff at various levels. One such body was established to give advice on the appointment, promotion and review of staff in the professional category up to the P-4 level.

> Rule 104.14
>
> Central review bodies
>
> . . .
>
> (h) *Appointment and promotion*
>
> (i) The central review bodies shall advise the Secretary-General on all appointments of one year or longer and on the promotion of staff after such appointment except in the following cases:
>
> (a) Appointment of persons recruited specifically for service with a mission.

ST/SGB/2008/5

10. Bulletin ST/SGB/2008/5 deals with the policy on the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority. In so far as it is material to this case the following extracts are relevant:

> The Secretary-General, for the purpose of ensuring that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and responsibilities in maintaining a

> workplace free of any form of discrimination, harassment . . . and abuse of authority, promulgates the following:
>
> **Section 1**
>
> **Definitions**
>
> . . .
>
> 1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. . . .
>
> . . .
>
> 1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. . . .

Relevant factual findings

11. The applicant's lengthy period of employment within the UN has been interspersed with periods of breaks in service. For the purpose of this judgment two such breaks of service are material:

a. In May 2006, the applicant moved from a mission replacement with DPKO to another mission replacement with OCHA.

b. In May 2008, the applicant moved from a mission replacement with OCHA to a temporary appointment prior to her obtaining the Galaxy appointment.

12. The Tribunal has not been provided with a copy of any policy document which requires a compulsory break in service. It would appear however that the

procedure requiring staff members to endure a break in service is predicated by the principal function of the central review body to advise on all appointments of one year or longer. It is clear that management have decided that in order to comply with the requirements of the central review body such a break is required to avoid presenting the matter for consideration by the central review body.

13. The applicant's detailed analysis in relation to relevant comparable circumstances, which resulted in different outcomes for other staff members, has not been effectively rebutted by the respondent. Accordingly, in the absence of a convincing rebuttal, it would appear on balance that there has been an inconsistent application of the "policy" and the inconsistency of treatment in the examples provided has not been satisfactorily explained.

14. There is evidence to suggest that the then Chief of Human Resources Section, OCHA, made it clear that she did not wish to have the applicant appointed at the P-4 level. She had attempted to prevent the applicant's appointment at that grade, saying that she did not want a P-4 level appointment but would rather have an appointment at a lower P-3 grade. When she was unsuccessful in her efforts at downgrading the post she resorted to various manoeuvres and devices to delay the appointment. The Tribunal has been provided with clear documentary evidence, not rebutted by the respondent, of the Chief's overbearing and demeaning treatment of staff, including the applicant. Such conduct on the part of the Chief of the Human Resources Section is inconsistent with the Secretary-General's bulletin on harassment and abuse of authority (ST/SGB/2008/5).

15. Had there been no delay in the Galaxy appointment, the practice of OCHA not to require a break in service whilst the recruitment formalities were being completed would have operated in the applicant's favour so that she would have enjoyed continuity of employment with its associated benefits. The actions of the Chief of Human Resources Section, OCHA, in delaying the process were known

to other staff and senior management who eventually overruled the Chief. By this time the damage to the applicant had been done. Such arbitrary and high handed action motivated by personal animosity constitutes an abuse of power.

16. The applicant's retirement from service is imminent and her loss of continuity of employment rights will affect her post retirement benefits in addition to the detrimental effect she has already experienced in relation to pre-retirement benefits that she would otherwise have been entitled to.

Break in service in 2006

17. The applicant referred to a break in service in May 2006. She was ordered to provide details on the relevance of this issue to the instant case. In responding to this order, the applicant stated that this break in service occurred when she moved from DPKO to OCHA. She did not wish to go through the appeal process at the time because she was hoping for "a mutually beneficial resolution" because other members of staff were not asked to take a three-day break in service. Her concern was not addressed by OHRM. Since the applicant made a decision not to pursue a formal remedy at the time it is not open to her to seek a remedy in relation to this matter but to advance it as relevant background evidence in support of her contention of inconsistency of treatment. It has been taken into account.

Assessment

18. The respondent has failed to provide convincing explanations and evidence to rebut the extraordinarily detailed descriptions provided by the applicant in relation to the comparable examples which resulted in more favourable outcomes for other staff members. In the circumstances I find that the practice that was adopted by the respondent at the material time was inconsistent. This would suggest an element of discretion in following the practice. If the

practice was mandatory, on what basis was the discretion exercised in those cases? Why was discretion not exercised in the applicant's case?

19. I have been invited by the applicant to consider the observations of Adams J in *Castelli* UNDT/2009/075 on the policy of mandatory breaks in service. As I have indicated I have not found such a policy and certainly no document has been produced recording it. If there is a policy on mandatory breaks in service, why has it not been produced in spite of the applicant taking issue on the matter? It would appear to be a rule of practice adopted across the UN clearly in order to get round the requirements of former staff rule 104.14, particularly paragraph (h). In doing so, managers have effectively undermined the policy which was introduced for very good reasons of transparency and ensuring adherence to proper standards of recruitment and selection. The break in service forced upon staff serves as a device to avoid the application of former staff rule 104.14. I agree with Adams J that this practice has the effect of depriving the staff members of their rights and benefits accruing from continuity of employment. However, this case has been decided on its own particular facts in the context of OCHA's customary practice.

20. In this case the respondent has failed to demonstrate a consistent application of the practice of enforced breaks in service between temporary contracts. Furthermore, the respondent has failed to rebut the allegations about the attitude and actions of the then Chief of Human Resources Section at OCHA in delaying the Galaxy recruitment process. These allegations are well documented and additionally supported by a convincing witness statement. I conclude on the basis of such evidence that the then Chief of Human Resources Section behaved in a high-handed and arbitrary manner to frustrate the applicant's legitimate aspirations by delaying the Galaxy recruitment process.

Compensation

21. The respondent is ordered to compensate the applicant for all losses incurred as a result of the enforced break in service. The applicant is to be placed in the position as if there had been no such break in service in May 2008.

22. The applicant has asked for compensation for the anxiety and distress caused to her. I have no hesitation in concluding that the manner in which the applicant was treated by OCHA, aggravated by the exercise of an abuse of power by the then Chief of Human Resources Section, caused the applicant considerable distress, anxiety and uncertainty regarding her benefits upon retirement. Whilst the applicant is entitled to compensation for such distress caused, any such award should be compensatory and not punitive. I am required first to assess the degree to which she suffered injury to her feelings aggravated by the high handed behaviour and abuse of power by the Chief of Human Resources Section. Having done so, I am required to place a monetary value on this to compensate the applicant. Although the distress was considerable, it was not at the extreme top end of the scale of awards that may be made in such cases. The respondent is ordered to pay to the applicant, on or before 22 March 2010, the equivalent of two months' net base pay as compensation for distress and emotional injury.

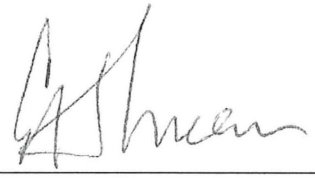
23. On the material available to me I am unable to make a precise quantification of the remainder of the compensatory award. The parties are invited to agree compensation and to file a joint submission with the Tribunal stating that the parties have reached agreement.

Judgment

24. The applicant's claim succeeds.

25. The respondent is ordered to pay to the applicant, on or before 22 March 2010, the equivalent of two months' net base salary for distress and emotional injury.

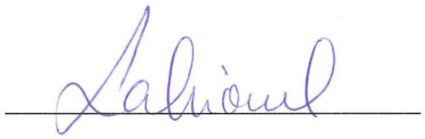
26. The parties are ordered to attempt to agree a remedy which places the applicant in the position that she would have been had she not been required to take a break in service in May 2008. On or before 26 March 2010 the parties are to file a joint submission stating whether they have reached an agreement.



Judge Goolam Meeran

Dated this 12th day of March 2010

Entered in the Register on this 12th day of March 2010



Hafida Lahiouel, Registrar, UNDT, New York