Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

CASTELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Nicholas Christonikos

Counsel for Respondent:
Susan Maddox, ALU

The issues

6. The applicant's claim, essentially, is that his entitlements should be considered on the basis that he was employed for a continuous period of a year or more. The respondent denies this claim. He submits that the second contract was invalidly entered into because the Administration failed to comply with its rules concerning contracts having the effect of extending a term of employment to a year or more and that he was entitled, despite appearances, to treat the applicant as having taken a break-in-service.

7. If an employer enters into a contract giving more to the employee than might have been the case had the employer worked to its own internal processes, it is difficult to accept that it acts in good faith by attempting to use its overwhelming bargaining strength to wrest back from the employee that to which he or she has a legal right, hereby attempting to force the applicant to accept a break-in-service or, when it has permitted the employee to keep working, by refusing to treat his or her employment as continuous. It has not been suggested (and rightly so) that the applicant acted in bad faith in accepting the respondent's offer of a six month contract.

8. There is no evidence that, at the time that the second contract was offered, the relevant authorized person or persons did not consider all the material factors. There is no doubt that the Organization, through its agents, was fully aware of the terms of the second contract and the effect that twelve months' continuous service would have on the applicant's entitlements. If there was a procedural failure (which, as will be seen, I do not accept), it was merely about the application of the Organization's own internal processes. The notion that this failure occurred was very much an afterthought by the respondent, at least only when the applicant protested about the refusal to pay his entitlements. I might add, there is no evidence that, had the procedure now contended to be required been followed, the same contract would not have been offered. As I point out below, the CRBs are not at all concerned with

the entitlements attributable to the particular appointments in respect of which they exercise their functions and are not authorized to advert to or consider such matters.

9. The claim made by the applicant for relocation expenses depends on the interpretation of sec 11 of ST/AI/2006/6 of 24 November 2006, which provides for the payment of a "relocation grant" on "appointment or assignment for one year or longer". It is conceded on behalf of the respondent that, if the applicant's service had been for a continuous period of one year or longer, he would be entitled to the relocation grant and the mere fact that this service comprised two consecutive fixed-term contracts of less than a year would not disentitle him. Whilst one can readily accept the good sense of this interpretation of the Rule, I am not altogether sure that the term "appointment" is the same as "employment". However, since this was the practice at the time the contract was entered into, it was an implicit term that he

14. Substantial changes were effected by ST/SGB/2003/1, which came into effect on 1 January 2003, but rule 104.14 retroactively to 1 May 2002. The functions of the Promotion and Appointment Board and its related bodies were taken over by a Central Review Board, Committee and Panel (with *ad hoc* subsidiary bodies), described as "central review bodies" (CRBs) (rule 104.14 (a)), which were created (in what appears to be an unnecessarily complicated procedural minuet) by ST/SGB/2002/6, also effective on 1 May 2002. Their functions were stated as follows in rule 104.14:

candidates were evaluated accordingly and proper procedures were followed. This process did not and could not apply to the appointment of staff to fixed-term contracts of less than a year. This provision clearly lead to compliance with

innocent pleasure can be obtained by contemplating its complexities. But certainly an argument that relies on this aspect is unlikely to be attractive.

21. To put this last point more shortly, an additional reason for not accepting the "continuous service" interpretation of the phrase "appointments of one year or longer" is found in the nature of the obligation of the CRB under rule 104.14(h)(ii) to review the "process for compliance with the pre-approved selection criteria and…offer recommendations" (I think, in respect of the extent of compliance). Compliance with pre-approved selection criteria is not relevant to fixed-term contracts of less than one year duration.

22. It follows that there was no requirement that the applicant's second contract should be submitted to a CRB for review and advice.

Was the applicant appointed to a mission?

23. It will have been noted that one of the exceptions in rule 104.14(h) to the requirement for CRBs' advice to the Secretary-General operated where the staff member was "recruited specifically for service with a mission". The primary evidence for such an appointment is, of course, the contract itself. The first contract as 6(5 TD put

may well be that the funding arrangements changed, I do not accept that it follows that the applicant's appointment to UNMIN had come to an end, at least by 4 January 2008, the date upon which the contract was signed (effective 1 January 2008), let alone that his original recruitment was either changed or somehow had been superseded by a new and different recruitment. The email pleading for funds states "approved" in January 2008 (date is obscure). It was submitted by Ms Maddox that, the source of financing being GTA funds, it followed that the applicant could not be regarded as having been "recruited to a mission". It is not at all obvious that the mere change of funding varies the character of either a recruitment or an appointment. It is not for the Administration to unilaterally vary the character of the contract of employment by changing the pocket out of which an employee's remuneration is paid. Insofar as the tendered email shows anything, it shows that the applicant acquired new responsibilities in addition to UNMIN. It certainly does not support in any respect the submission that there was a "recruitment". The whole thrust of the email is the intention, apparently satisfied, to continue the old recruitment for a further six months. That, as it happened, the applicant did not actually go to Nepal does not seem to me to affect the legal position.

26. In short, the applicant was recruited to UNMIN, he continued to work for UNMIN and all that changed was the pocket out of which he was paid. The argument put on behalf of the respondent, in reference to what the applicant as a finance officer would have realized or should have known about the unpredictable and seemingly haphazard financing arrangements of the Administration, demonstrates an approach to employment contracts destructive of transparency, inconsistent with the requirements of good faith, productive of uncertainty and redolent of the pea and thimble trick: now you see it, now you don't.

27. Accordingly, even if the second contract was otherwise one on which the CRBs should have advised the Secretary-General, it fell within the exception in rule 104.14(h)(i)(a).

Was there a break-in-service?

33. The respondent contends that, as the second contract was invalid, it had a legal right to terminate the applicant's employment on 4 March 2008. Even if it had this right (which, for the reasons already stated, it is not the case), it did not in fact exercise it. The applicant declined to comply with the respondent's "requirement" and did not take any break-in-service. The respondent did nothing but expostulate. The applicant was in fact and in law employed throughout. He continued to

Conclusion

35. In respect of the relocation grant the application is upheld.

Remedy

36. The respondent is to pay to the applicant the relocation grant applicable at the time of the applicant's relocation. *Prima facie*, the respondent should pay interest from 7 days after the date on which the applicant sought payment until the date of payment at either the relevant standard 30 day bank bill rate or the rate provided by the New York Civil Procedure Rules. As this matter was not the subject of submissions, in the absence of agreement within seven days the parties are to provide written submissions to the Tribunal as to this issue.

(*Signed*)

Judge Adams

Dated this 13th day of November 2009

Entered in the Register on this 13th day of November 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York