

Introduction

1. The Applicant contests the Respondent's refusal to reinstate him to service following his separation from the United Nations Mission in Côte d'Ivoire ("UNOCI") and his re-appointment to the United Nations Assistance to the Khmer Rouge Tribunals ("UNAKRT"). Pursuant to staff rule 4.18 (Reinstatement), on reinstatement the staff member's services

isolation from my family for what has now been 19 years, coupled with several personal tragedies, has prompted me to make this decision”.

9. On 29 June 2011, the Applicant completed all the required check-out procedures with UNOCI and, on 30 June 2011, left Côte d'Ivoire for Brisbane, Australia, to make the necessary arrangements for his and his family's travel to UNAKRT, designated as a family duty station. Ten days later, on 10 July 2011, he was appointed with UNAKRT and departed Brisbane for Phnom Penh, Cambodia.
10. Based on the record, including the management eval

13. On 28 November 2011, the Applicant requested a management evaluation of the decision not to reinstate him. On 16 January 2012, the Applicant was informed that the Under-Secretary-General, Department of Management, had decided to accept

Purpose of staff rule 4.18

18. The purpose of staff rule 4.18 is to confer continuity of employment on former staff members with fixed-term or continuing appointments who have been re-employed, and who may then be reinstated under staff rule 4.18, on the same type of contract within 12 months of their separation. Generally speaking, continuity of employment ensures that an employee is not disentitled of benefits that normally accrue through continuous service. Reinstatement through re-employment is subject to the following conditions under staff rule 4.18: (i) a staff member holding a fixed-term or a continuing appointment has to be re-employed under either a fixed-term or a continuing appointment; (ii) the staff member concerned may not be separated from service for more than 12 months; (iii) the reinstatement would be in accordance with conditions established by the Secretary-General.

19. Below is the text of the relevant provisions of the Staff Rules:

Rule 4.17

Re-employment

(a) A former staff member who is re-employed under conditions established by the Secretary-General shall be given a new appointment unless he or she is reinstated under staff rule 4.18.

(b) The terms of the new appointment shall be fully applicable without regard to any period of former service. When a staff member is re-employed under the present rule, the service shall not be considered as continuous between the prior and new appointments.

(c) When a staff member receives a new appointment in the United Nations common system of salaries and allowances less than twelve months after separation, the amount of any payment on account of termination indemnity, gratuity or commutation of accrued annual leave shall be adjusted

...

Rule 4.18

Reinstatement

(a) A former staff member who held a fixed-term or continuing appointment and who is re-employed under a fixed-term or

4.18 to apply. The Respondent also argued that UNAKRT is separate from the United Nations Secretariat, but the Applicant's letter of appointment with UNAKRT was "for a fixed-term appointment in the Secretariat of the United Nations" and was signed by an official of OHRM "on behalf of the Secretary-General". Accordingly, the Tribunal finds that the explanation and reasons given to the Applicant at the time were based on restrictions that were not in staff rule 4.18 and, as admitted in the reply, had not been "set by the Secretary-General".

26. The Respondent contends that the Applicant freely entered into his terms of appointment with the Organization and is bound by these terms. Although the Respondent did not elaborate further on this, it could be argued that because the offer for UNAKRT and the Applicant's acceptance of the offer, as well as the letter of appointment, did not include provision on reinstatement, the Applicant should be precluded from raising the point. The Tribunal notes in this regard, that staff rule 4.18(c) states that "[i]f the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment". In its 4 November 2011 letter, in response to the Applicant's initial request for reinstatement on 3 October 2011, OHRM reviewed the issue substantively and did not claim that it was too late for the Applicant to make the request. It follows from the conduct of the parties and the circumstances of this case, including the exchange of October and November 2011, that neither party viewed the issue of reinstatement as an essential or conditional term of the contract that had to be agreed upon for the new appointment to go into effect (*Agundes* UNDT/2012/056). It is clear that, had the Applicant's October 2011 request been granted, appropriate administrative arrangements could have been and would have been made to record the reinstatement in service, and to address the return of any monies received on separation, including repatriation grant and payment for accrued annual leave, and adjusting and charging the interval between separation and reinstatement to annual leave or to special leave without pay. As stated above, the Respondent at the time of the events did not claim that

reinstatement had to be agreed upon before his appointment with UNAKRT (see the letter of 4 November 2011).

Manifest unreasonableness of the contested decision

27. The findings above are sufficient to declare the contested decision unlawful.

28. The Tribunal further finds that the contested decision was arbitrary and manifestly unreasonable, which, in itself, is a separate basis for the finding of unlawfulness. Having served the Organization since 1986, including in some of the most challenging places, and having accepted an offer of appointment with the same Organization while still in service and having arrived at the new duty station only 10 days later, the Applicant had to resort to litigation in order to be reinstated despite satisfying the criteria stipulated and established in staff rule 4.18 and the lack of any additional criteria promulgated by the Secretary-General.

29. It is to be remembered that clarity in the promulgation and application of Staff Rules and other issuances facilitates proper managerial discretion and proper legal analysis, and avoids costly litigation.

Delegation of authority

30. Although this was not raised by the parties, it is unclear whether the author of the letter of 4 November 2011 had properly delegated authority to make the contested decision. Specifically, ST/234/Rev.1 (Administration of the staff regulations and rules) provides that the decision on whether to reinstate a staff member is delegated by the Secretary-General to the Assistant Secretary-General, OHRM. The letter of 4 November 2011 was authored by the Chief of Section III, HRS, LDSD, OHRM. There are no records in this case demonstrating that, at the time, the Chief of Section III had the proper authority to make the contested decision. However, in view of the findings above, the Tribunal did not deem it

necessary to seek further submissions from the parties on this point to reach a determinative conclusion.

Arguments at the management evaluation

31. For the sake of completeness, the Tribunal will deal with other matters which, although not pleaded in the Respondent's reply, arise from the record before it. In particular, at the management evaluation stage the Administration endorsed the findings and recommendations of the Management Evaluation Unit that reinstatement can only be granted where a staff member is re-employed in the same office on the same conditions of service, in line with the established practice, which consists of three cases in which reinstatement had been granted on these terms. In his application the Applicant contended in rebuttal that, not having set any special conditions for granting reinstatement, the Respondent cannot rely on criteria generated from an allegedly existing practice. Indeed, an established practice can hardly be derived from three cases, particularly if their application was not in line with staff rule 4.18. In any case, the Respondent has not clarified the point of the established practice in his reply and has acknowledged that there were no additional conditions established by the Secretary-General under staff rule 4.18.

Note on repatriation entitlements

32. In his reply, the Respondent stated that the Applicant did not request reinstatement when he "accepted his re-appointment to UNAKRT" and received all repatriation entitlements. The submissions odds with the Applicant's assertion that he received no repatriation entitlements. It is therefore unclear whether these were paid to him. If he was not paid at the time, this may be an indication that his employment was considered to be temporary. In any event, staff rule 4.18 contemplates that necessary adjustments to entitlements would be made upon reinstatement.

Conclusion

33. The Tribunal finds that, in view of the circumstances of this case, the contested decision was based on improperly imposed conditions not stipulated under staff rule 4.18 and thus lacked proper legal basis. Further, it was arbitrary, capricious, and manifestly unreasonable. Therefore, the contested decision was unlawful and stands to be rescinded.

34. In view of the rescission of the decision, and on the particular facts of this case, the Tribunal finds that, had the discretion been properly exercised on the stipulated conditions, the Applicant would have been reinstated in service and shall be treated as such.

Order

35. The contested decision is rescinded. The Applicant shall be deemed as reinstated in service. Proper adjustments shall be made to the Applicant's entitlements and benefits in line with this Judgment and staff rule 4.18.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of December 2012

Entered in the Register on this 31st day of December 2012

(Signed)

Hafida Lahiouel, Registrar, New York