



Judgment No. 2016-UNAT-682/Corr.1



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*Reissued on 1 September 2016*

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2. The Appeals Tribunal also has before it eight appeals filed by the Secretary-General against the same UNDT Judgment. The Secretary-General filed the eight appeals on 1 April 2016 (Case Nos. 2016-909 to 2016-916),<sup>1</sup> and Marcussen *et al.* answered individually on 3 June 2016.  
TD.10w16 43.

3. On 8 April 2016, the Appeals Tribunal issued Order No. 258 (2016) consolidating all 16 appeals, for all purposes. Any orders and judgment in4 7rr.8 (249 -1.7t(49 -1.att)2.a TD-.017-t(49 TD.1Tt

... In accordance with the terms of the above-mentioned delegation of authority, staff members were recruited specifically for service with ICTY. Their letters of appointment provided that their appointments were “strictly limited to service with [ICTY]”.

... In November 1995, by Secretary-General’s bulletin ST/SGB/280 (Suspension of the granting of permanent and probationary appointments), the Secretary-General announced his decision, effective 13 November 1995, to suspend the granting of permanent appointments to staff serving on 100-series fixed-term appointments in view of “the serious financial situation facing the Organization”.

... By its resolution 1503 (2003) dated 28 August 2003, the Security Council endorsed the ICTY completion strategy, and urged ICTY to take all possible measures to complete its work in 2010.

... In June 2006, by Secretary-General’s bulletin ST/SGB/2006/9 (Consideration for conversion to permanent appointment of staff members eligible to be considered in 1995), the Secretary-General partially lifted the freeze on the granting of permanent appointments, and conducted an exercise to consider for conversion to a permanent appointment those staff who were eligible as of 13 November 1995. In this exercise, six ICTY staff members were considered and one of them was granted a permanent appointment.

... In 2009, the Organization undertook a one-time Secretariat-wide comprehensive exercise by which eligible staff members under the Staff Rules in force until 30 June 2009 would be considered for conversion of their contracts to permanent appointments. In this context, the Secretary-General’s bulletin ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) was promulgated on 23 June 2009.

... On 29 January 2010, guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 (“Guidelines”) were further approved by the [Assistant Secretary-General for Office of Human Resources Management (ASG/OHRM)]. The USG for Management transmitted them on 16 February 2010 to all “Heads of Department and Office”, including to ICTY, requesting them to conduct a review of individual staff members in their department or office, to make a preliminary determination on eligibility and, subsequently, to submit recommendations to the ASG/OHRM on the suitability for conversion of staff members found preliminarily eligible.

... By letter dated 17 February 2010, the President of ICTY wrote to the Secretary-General to complain about the position taken by the USG for Management, during a townhall meeting at ICTY two weeks ea

... The USG for Management responded to the President of ICTY, by letter dated 10 March 2010, clarifying that “[i]n accordance with the old staff rules 104.12(b)(iii) and 104.13, consideration for a permanent appointment involves ‘taking into account all the interests of the Organization’”. She further noted that in 1997, the General Assembly adopted resolution 51/226, in which it decided that five years of continuing service did not confer an automatic right to conversion to a permanent appointment, and that other considerations—such as the operational realities of the Organization and the core functions of the post—should be taken into account in granting permanent appointments. Therefore, she added, “when managers and human resources officers in ICTY are considering candidacies of staff members for permanent appointments they have to keep in mind the operational realities of ... ICTY, including its finite mandate”.

... On 23 April 2010, ICTY established an online portal on staff eligibility for permanent appointments.

... On 11 May 2010, ICTY transmitted to the Office of Human Resources Management (“OHRM”), at the United Nations Secretariat Headquarters in New York, the list of staff eligible for conversion to a permanent appointment.

... At the XXXIst Session of the Staff-Management Coordination Committee



... After requesting management evaluation of the decisions not to convert their appointments to permanent, and being informed that they had been upheld by the USG for Management, 11 staff members concerned by said decisions, including the eight Applicants in the cases at bar, filed applications before the [Dispute] Tribunal on 16 and 17 April 2012.

... The [Dispute] Tribunal ruled on these applications by Judgment *Malmström et al.* UNDT/2012/129, dated 29 August 2012, finding that the ASG/OHRM was not the competent authority to make the impugned decisions, as the USG had delegated such authority to the ICTY Registrar. On this ground, the [Dispute] Tribunal rescinded the contested decisions and, considering that they concerned an appointment matter, set an alternative compensation in lieu of effective rescission of EUR 2, 000 per applicant.

... On appeal, the Appeals Tribunal vacated *Malmström et al.* UNDT/2012/129, by Judgment No. 2013-UNAT-357 issued on 19 December 2013.<sup>[3]</sup> The Appeals Tribunal held that the power to decide on the conversion of ICTY staff appointments into permanent ones had not been delegated to the ICTY Registrar and that, hence, the ASG/OHRM was the competent authority to make the decisions at stake.

... The Appeals Tribunal also concluded that placing reliance on the operational realities of the Organization to the exclusion of all other relevant factors amounted to discriminating against ICTY staff members because of the nature of the entity in which they served, and violated their right to be fairly, properly and transparently considered for permanent appointment. Accordingly, it rescinded the decision of the ASG/OHRM, remanded the ICTY conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of the concerned staff members within 90 days of the publication of its Judgment, and awarded to each appellant EUR 3,000 in non-pecuniary damages.

... Following the publication of Judgment No. 2013-UNAT-357, the ASG/OHRM, by email of 14 January 2014, gave the ICTY Registrar specific instructions for the “Implementation of the UNAT Judgment”. In fact, this email concerned also Judgment No. 2013-UNAT-[3]59, by which the Appeals Tribunal remanded for reconsideration also the conversion of 262 other ICTY staff members.

... In line with such instructions, each Applicant was invited, by letter of the Human Resources Section, ICTY, dated 29 January 2014, to submit within two weeks any information they deemed relevant for the new review to be undertaken. In response, six of the Applicants submitted further information on or about 13 February 2014.

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[3] *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357 (Appeals Tribunal Judgment).

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whom were four of the Applicants, be granted a permanent appointment not limited to ICTY.

... After the CR bodies' recommendation, the ASG/OHRM considered whether or not to grant the Applicants conversion to a permanent appointment. In doing so, the entire group of ICTY staff members that was re-considered for conversion pursuant to the directions of the Appeals Tribunal was divided in six groups of staff considered to be in similar situations in terms of employment status, to wit:

- a. Applicants who were active ICTY staff members as at the date of the contested decisions;
- b. Applicants who were active ICTY staff members in the General Service category as at the date of the contested decisions;
- c. Applicants who had transferred to MICT as at the date of the contested decisions;
- d. Applicants who had separated from ICTY as at the date of the contested decisions;
- e. Applicants at the P-5 level; and
- f. Applicants who had separated from ICTY due to downsizing after the contested decisions.

... By individual letters dated 17 June 2014, and received shortly thereafter, all Applicants were informed by the ASG/OHRM of the decisions not to grant any of them retroactive conversion of their respective fixed-term appointment into permanent appointment. Not only the language and structure of these individual letters were remarkably similar but[...] also, they were very much alike the letters sent to the ICTY staff members reconsidered as per Judgment No. 2013-UNAT-359, save for the personal and factual details mentioned, although the wording was adjusted depending on which of the aforementioned six categories of staff the letter's recipient belonged to. All letters stated that the respective Applicants fulfilled three out of the four required criteria and that they did not meet the fourth criteria, namely, that the granting of a permanent appointment be in accordance with the interests of the Organization. Each letter contained one paragraph setting out, in identical terms, the reasons why the last criterion was not considered to be met:

I have considered that though you may have transferable skills, your appointment is limited to service with the ICTY. Under the legal framework for the selection of staff members, I have no authority to place you in a position in another entity outside of this legal framework. As mandated by the Charter, the resolutions of the General Assembly, and the Organization's administrative issuances, staff selection is a competitive process to be undertaken in accordance with established procedures. All staff members have to apply and compete with other

staff members and external applicants in order to be selected for available positions with the Organization. Given the finite nature of the Tribunal's mandate, and the limitation of your appointment to service with the ICTY, the granting of a permanent appointment in your case

qualifications, competencies, conduct and transferrable skills and the decisions were “exclusively based on the limited mandate of ICTY, to the exclusion of all other relevant factors”.<sup>6</sup> In the UNDT’s view, the Administration disregarded the Appeals Tribunal Judgment by launching a new eligibility assessment. The Dispute Tribunal rescinded the contested decisions and remanded the matter to the ASG/OHRM for “retroactive individualized consideration of [Marcussen *et al.*’s] suitability for conversion of their appointments to a permanent one”,<sup>7</sup> in

permanent appointment. In this regard, the Secretary-General notes that the Administration requested the UNDT to call witnesses to clarify the details of how it had conducted the individualized re-consideration, but the UNDT declined that request.

12. The UNDT erred in concluding that the ASG/OHRM had authority to place Marcussen *et al.* in posts outside ICTY and to grant them permanent contracts with no limitation of service to ICTY. The UNDT misread Section 11 of ST/AI/2010/3 and paragraph 10 of the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 (Guidelines), having failed to take into account Staff Rule 9.6(c)(i). Its conclusions are therefore misplaced.

13. The Dispute Tribunal stepped into the shoes of the ASG/OHRM and usurped her discretion to grant or deny a permanent appointment by designating weight and relevance to factors that it considered to be in the interests of the Organization. The granting of a permanent appointment is a matter within the discretion of the Administration. Such exercise of discretion is subject to a limited judicial review. In exercising her discretion, the ASG/OHRM had the prerogative to take into account the relevant resolutions adopted by the General Assembly and all the interests of the Organization. It was for the ASG/OHRM to assign the due and adequate weight to each criterion she considered, including ICTY's finite mandate. If she decided that ICTY's finite mandate should be the predominant factor in her weighing process, or that it should weigh more heavily than other factors, or even that it should override certain factors, such decisions would be well within the bounds of her discretion; they would not violate the applicable legal framework or contravene the Appeals Tribunal Judgment. The UNDT lost sight of the important distinction between a criterion being assigned a certain weight in a decision and a criterion being the sole and exclusive one in a decision. ICTY's finite mandate may be the predominant factor in the ASG/OHRM's weighing process, but it was not the exclusive factor.

14. ~~While the Tribunal~~ ~~found that~~ that the ASG/OHRM was enti

Marcussen *et al.* all held an appointment with service limited to ICTY, which had a finite mandate, against other criteria.

15.

21. The Dispute Tribunal was correct to award moral damages. Marcussen *et al.* provided evidence through their submissions to substantiate the harm they suffered in the wake of the discriminatory and arbitrary denial of their conversion to a permanent appointment.

22. Marcussen *et al.* requests that the Appeals Tribunal dismiss the Secretary-General's appeals.

**Marcussen *et al.*'s Appeals**

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permanent appointments of the ICTY staff members” (emphasis added).<sup>9</sup> Similarly, it is entirely disingenuous for the Secretary-General to cite Section 2 of ST/SGB/2009/10 as authority for the Administration’s decision to review eligibility in the course of the remand. A plain reading of Section 2 shows that the focus of that section is on the “suitability” of “eligible staff members”. The presence of the word “eligible” is no more than an indicator, if a consideration under Section 2 is called for, that the staff member has reached the eligibility threshold as set out in Section 1 for consideration as to his or her suitability for conversion to a permanent appointment.

38. We find that the Administration’s willful disregard of the Appeals Tribunal Judgment is not mitigated by the fact that *almost* all of the staff members were considered to have met the eligibility requirements upon remand. As there was conflation of eligibility with suitability, the Administration did not abide by the Appeals Tribunal’s clear directive. We are constrained to opine that the Administration’s conduct in embarking on an eligibility exercise is unfortunately indicative of an institutional reluctance to follow the instructions which we so clearly gave in the Appeals Tribunal Judgment.

39. The Dispute Tribunal also found that the Administration did not comply with our instruction that the staff members were entitled to “retroactive consideration”. The UNDT determined that the remedy ordered by the Appeals Tribunal Judgment was designed to restore the staff members’ positions as of the date of the unlawful decisions of 20 September 2011. Thus, the UNDT found that the Administration improperly considered “updated” 2014 information. Accordingly, the UNDT determined that the Secretary-General also did not comply with the Appeals Tribunal Judgment in this regard.

40. We uphold the UNDT’s determination. We gave a clear directive to the Administration that, upon remand, it should consider the staff members’ suitability for conversion to permanent appointments “by reference to the relevant circumstances as they stood at the time of the first impugned refusal to convert their appointments”.<sup>10</sup> Once again, the Administration failed to comply with our directive.

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<sup>9</sup> The Central Review Panel similarly acknowledged that it was tasked “with reviewing the staff from a suitability aspect”.

<sup>10</sup> Impugned Judgment, para. 75.

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47. The Dispute Tribunal relied on Section 11.1(b) as the mechanism for the potential reassignment of the ICTY staff in case of abolition of their posts, concluding there was “no absolute legal bar for the ASG/OHRM to move any of [Marcuseen *et al.*] ... to a different entity on the basis of the above-referenced provision if their posts were to be abolished”.<sup>12</sup>

48. Paragraph 10 of the Guidelines provides:

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the focus by the Appeals Tribunal on “transferrable skills” re-enforces that the reference in paragraph 72 of the Appeals Tribunal Judgment to “Organization” is to the United Nations Secretariat beyond ICTY/MICT. The staff members also contend that the ASG/OHRM’s own policy advisors explicitly considered this issue and recommended that all of the nine P-5 ICTY/MICT staff members be granted permanent appointments not limited to ICTY/MICT, precisely because of their transferrable skills.

56. Once again, we find that the UNDT did not err in law or fact in interpreting the relevant provisions as it did. Furthermore, we find no reason to respond to arguments put forward by the Secretary-General in respect of an issue, namely the staff members’ transferrable skills, which we

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exercise of discretion in deciding whether to grant a permanent appointment to any individual staff member.

66. The Administration has 90 days from the date of the issuance of this Judgment to reevaluate and reconsider all the staff members' applications for conversion who are part of this case and the companion cases. As the UNDT notes, it should not take the Administration more than 90 days as all pertinent information is readily available.

*The UNDT's award of moral damages*

67. Both the Secretary-General and the staff members appeal the UNDT's award of moral damages.

68. The Secretary-General contends that the UNDT erred in law by awarding moral

**Judgment**

71. Judgment No. UNDT/2015/116 is affirmed, except for the awards of moral damages, which are vacated.

72. The Secretary-General's appeals of the merits are dismissed; and the Secretary-General's appeals of the awards of moral damages are granted. Marcussen *et al.*'s appeals of the UNDT's remedy of remand to the ASG/OHRM, rather than granting specific performance, and the quantum of the awards of moral damages are dismissed.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of June 2016 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Thomas-Felix

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Simón

*(Signed)*

Judge Faherty

*(Signed)*

Judge Lussick

Entered in the Register on this 24<sup>th</sup> day of August 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar