# UNITED NATIONS APPEALS TRIBUNAL
# TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-692

**Gueben *et al.***

**(Respondents/Applicants)**

**v.**

**Secretary-General of the United Nations**

**(Appellant/Respondent)**

## JUDGMENT

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| Before: | Judge Richard Lussick, Presiding<br>Judge Sabine Knierim<br>Judge Martha Halfeld |
| Case No.: | 2016-922 |
| Date: | 28 October 2016 |
| Registrar: | Weicheng Lin |

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| Counsel for Gueben *et al.:* | Robbie Leighton, OSLA |
| Counsel for Secretary-General: | Zarqaa Chohan<br>Carla Hoe<br>Rupa Mitra |

**JUDGE RICHARD LUSSICK, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations of Judgment No. UNDT/2016/026, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 29 March 2016 in the case of *Gueben, Lamb, Lobwein, Matar, Pastore Stocchi, Rexhepi, Vano v. Secretary-General of the United Nation*s. The Secretary-General filed the appeal on 30 June 2016[1] and Mr. Arnaud Gueben, Ms. Susan Lamb, Ms. Wendy Lobwein, Mr. Mokhles Matar, Mr. Paolo Pastore Stocchi, Mr. Visar Rexhepi and Mr. Lourdes Vano (Gueben *et al.*) filed an answer on 5 September 2016.

## Facts and Procedure

2. The facts established by the Dispute Tribunal in Judgment No. UNDT/2016/026 read as follows:[2]

> ... In 2001, the Cambodian authorities established the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), to try serious crimes committed during the Khmer Rouge regime in 1975-1979. [The United Nations Assistance to the Khmer Rouge Trials (UNAKRT)] is an international component of ECCC, created to assist in this endeavour pursuant to an agreement between the United Nations and the Government of Cambodia, that entered into force in 2005. UNAKRT was established as a technical assistance project administered by the Capacity Development Office ("CDO"), Department of Economic and Social Affairs ("DESA").
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> ... 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.
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> ... 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 Human Resources Management (ASG/OHRM)]. The Under[-]Secretary-General ("USG") for Management transmitted them on

[1] In Order No. 262 (2016), the Appeals Tribunal, *inter alia*, granted the Secretary-General's request for a 30-day extension of time to file an appeal, by 30 June 2016.
[2] The following facts are taken from paragraphs 3–22 of the impugned Judgment.

16 February 2010 to all "Heads of Department and Office" 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.

... Having sought to be considered for conversion, in June 2010, each of the Applicants received a letter informing them that, for the purpose of the conversion exercise launched, "[u]pon preliminary review, it appear[ed] that [each of them] could be considered as having met the eligibility requirements".

... In March 2011, CDO, DESA, submitted a list of eligible UNAKRT staff to OHRM with a negative recommendation on their conversion to permanent appointment on the basis that, although deemed eligible for consideration and having met the human resources requirements, it was not in the best interests of the Organization to convert their fixed-term appointment due to the resulting financial liability.

... Also in March 2011, OHRM similarly gave a negative recommendation, while stating that the cases would be reviewed by the corresponding Central Review Bodies ("CRBs"), and requesting additional documentation pertaining to the UNAKRT staff members' eligibility with a view to the submission of the cases to the CRBs for review.

... Upon completion of their review, and noting the recommendations "from the substantive Department and the respective Human Resources Office", as well as the fact "that UNAKRT was a downsizing entity", the CRBs recommended that, in the interests of the Organization and of the operational realities of UNAKRT, the Applicants not be deemed suitable for conversion and not be granted permanent appointments.

... On 31 January 2012, each of the Applicants received a letter from the Chief, Human Resources Management, DESA, advising them that:

> [F]ollowing the decision of the [ASG/OHRM] pursuant to ST/SGB/2009/10, you will not be granted a permanent appointment.
>
> This decision was taken after a review of your case, taking into account all the interests of the Organization and was based on the operational realities of the Organization, particularly that UNAKRT is a downsizing entity.

... After requesting management evaluation of the 31 January 2012 decisions and they being upheld, eight UNAKRT staff members who had been denied conversion to permanent appointments in the same exercise, including the seven Applicants, appealed these decisions before the [Dispute] Tribunal.

... Effective 30 June 2013, Applicant Lamb was separated from service further to her resignation.

... On 3 July 2014, one of the eight UNAKRT staff under consideration in the same exercise was transferred to the United Nations Logistics Base ("UNLB"), following his selection through the Central Review Committee for a post of Judicial Affairs Officer (P-4).

... The [Dispute] Tribunal ruled upon these cases by Judgment *Tredici et al.* UNDT/2014/114 of 26 August 2014, whereby it "rescind[ed] the decision of the ASG/OHRM and remand[ed] the UNAKRT conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of each applicant", and awarded the equivalent of EUR 3,000 in non-pecuniary damages. Said Judgment, which was not appealed, noted that both parties had "accepted the *ratio decidendi*" of the decisions that the Appeals Tribunal had rendered shortly before with respect to staff of the International Criminal Tribunal for the former Yugoslavia ("ICTY")—having mentioned *Malmström et al.* 2013-UNAT-357 in particular—and stated that "[t]he pertinent facts and the legal issues in the present cases are on all fours with the ICTY cases". Furthermore, in reaching the outcome quoted above, the [Dispute] Tribunal explicitly relied on "the guidelines set out by the Appeals Tribunal in the matter of *Malmström* 2013-UNAT-357".

... In October 2014, a Human Resources Officer, CDO, DESA, invited the Applicants to submit any information or statement that each of them wished to have considered during the re-consideration exercise. Two of them did so.

... DESA reviewed each Applicant's case file with a view to ascertain[ing] their eligibility, and to mak[ing] a recommendation to the ASG/OHRM on the granting or not of a permanent appointment.

... By memorandum of 11 November 2014, DESA recommended that none of the eight UNAKRT staff members under review receive a permanent appointment. Together with this memorandum, it sent to OHRM an individual fact sheet (containing information on the Applicants' respective contractual status, performance ratings and disciplinary record), a list of personnel actions and the additional information that two of the Applicants had provided.

... Two different reviewers in OHRM examined each Applicant's eligibility and suitability for conversion, following which they submitted to the ASG/OHRM individual recommendations on the Applicants. They did not recommend any of the Applicants for conversion, on the basis that it was not in the interests of the Organization.

... On 13 November 2014, OHRM transmitted the Applicants' cases for review by the competent CRB in New York. The Applicants were notified of the status of the re-consideration process by emails of 20 November 2014. By three different memoranda dated 18 November 2014, the Central Review Board (staff at the P-5 level and above), the Central Review Committee (staff at the P-2 to P-4 levels) and the Central Review Panel (staff below P-2 level) recommended that none of the eight

UNAKRT staff members under review be granted a permanent appointment. After that, the above-mentioned cases were forwarded to the [Officer-in-Charge (O-i-C)], ASG/OHRM, for decision.

... By letters dated 24 November 2014, each of the seven Applicants was separately advised that, after re-consideration, the O-i-C, ASG/OHRM, had decided not to retroactively convert their appointments to permanent ones. The language and structure of the respective letters were remarkably similar, save for the personal and factual details mentioned, although the wording was adjusted depending on the employment status of each Applicant. All letters stated that the respective Applicant fulfilled three out of the four required criteria and that she/he did not meet the fourth criterion, 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, namely:

> I have considered that though you may have transferable skills, your appointment is limited to service with DESA/UNAKRT. 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 UNAKRT's mandate, and the limitation of your appointment to service with DESA/UNAKRT, the granting of a permanent appointment in your case would not be in accordance with the interests or the operational realities of the Organization. Therefore, you have not satisfied the fourth criterion.

... Also by letter of 24 November 2014, the O-[i]-C, ASG/OHRM, granted a permanent appointment to the eighth staff member who was under reconsideration pursuant to Judgment *Tredici et al.* UNDT/2014/114. In her letter, the O-i-C, ASG/OHRM [...] informed that this conversion was granted "[i]n recognition of the fact that [he was then] holding an appointment with UNLB and that [he had] been selected for the post in UNLB through the standard selection process".

... On 18 December 2014, all seven Applicants requested management evaluation of the 24 November 2014 decisions, which were upheld by the USG for Management on 23 February 2015.

3. On 4 March 2015, Gueben *et al.* filed separate applications with the Dispute Tribunal to contest the decisions denying each of them conversion of their respective fixed-term appointments to permanent ones. They sought, *inter alia*, rescission of the contested decisions and retroactive grant of a permanent appointment to each of them, or alternatively, payment of an amount equal to the termination indemnity owed to each of them upon the years of service accrued at the time of their separation (other than by retirement or future resignation), or at the time of the UNDT Judgment.

4. In Judgment No. UNDT/2016/026 now under appeal, the UNDT held that the contested decisions denying each of Gueben *et al.* a conversion of their fixed-term appointments to permanent ones were unlawful, primarily because they had not been given proper and individual consideration in light of their proficiencies, qualifications, competencies, conduct and transferrable skills, and those decisions were "based on the finite mandate of UNAKRT alone, to the exclusion of all other relevant factors".[3] In the view of the UNDT, the Administration had failed to abide by UNDT's *Tredici et al.* Judgment or the Appeals Tribunal's instructions in *Malmström et al.*[4] The Dispute Tribunal rescinded the contested decisions and remanded the matter to the ASG/OHRM for "retroactive individualised consideration of [Gueben *et al.*'s] suitability for conversion of their appointments to a permanent one",[5] in conformity with the instructions in the *Malmström et al.* Judgment, among others. The Dispute Tribunal further awarded moral damages in the sum of Euros 3,000 to each of Gueben *et al.*

5. It is this decision of the UNDT which forms the basis of the instant appeal.

## Submissions

### The Secretary-General's Appeal

6. The UNDT erred in focusing its review on the contested decisions as couched in the respective notification letters and placing undue significance on the wording of those letters and the fact that the reasons given for not granting the conversion were the same for all seven of Gueben *et al.* The UNDT insisted on a level of detail and explanation in the letters that was

[3] Impugned Judgment, para. 87.
[4] *Tredici, Gueben, Lamb, Lobwein, Matar, Pastore Stocchi, Rexhepi, Vano v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/114; *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357.
[5] Impugned Judgment, para. 110.

unreasonable and impossible to provide. The mere fact that the same conclusion was reached for all of Gueben *et al.* does not demonstrate a lack of individual consideration of their conversion requests. The Dispute Tribunal should have simply examined whether the contested decisions were lawful. In this regard, the Secretary-General notes that the Administration requested the UNDT to call two material witnesses to testify to that end, but the UNDT declined that request.

7. The Dispute Tribunal erred in law because it usurped the discretion of the O-i-C/OHRM to grant or deny conversion of Gueben *et al.*'s fixed-term appointments to permanent ones by improperly assigning weight to various factors for consideration. It also usurped the O-i-C/OHRM's discretion by making a number of substantive evaluations of Gueben *et al.*'s transferrable skills, proficiencies and competencies. The granting of a permanent appointment is a long-term decision requiring the significant exercise of discretion by the O-i-C/OHRM. Such exercises of discretion are subject to only a limited judicial review. It was for the OIC/OHRM to assign the due and adequate weight to each criterion she considered, including UNAKRT's finite mandate. If she decided that UNAKRT'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 her discretion; they would not violate the applicable legal framework or contravene the *Malmström et al.* Judgment. Even if UNAKRT's finite mandate had been the predominant factor in the weighing process, it was not the exclusive factor.

8. The UNDT misconceived the facts and rulings in *Alba et al.*[6] and erred in law by conflating the source of funding for a staff member with a discretionary decision to attach a certain weight to aspects of the suitability criteria and the interests of the Organization. The Secretary-General stresses that in deciding not to convert Gueben *et al.*'s appointments into permanent ones, the O-i-C/OHRM properly exercised her discretion in weighing the fact that Gueben *et al.* all held an appointment with service limited to UNAKRT, which had a finite mandate, against other criteria.

[6] Former Administrative Tribnal Judgment No. 712, *Alba et al.* (1995).

9. It was an error for the UNDT to conclude that the O-i-C/OHRM had authority to convert Gueben *et al.*'s fixed-term appointments to permanent ones with no limitation of service to UNAKRT. The UNDT misread Section 11 of ST/AI/2010/3[7] and paragraph 10 of the Guidelines, having failed to take into account Staff Rule 9.6(c)(i). Its conclusions are therefore misplaced.

10. The Dispute Tribunal improperly shifted the burden of proof, misconceived the purpose of the permanent appointment regime, and lost sight of what the Administration was required to do: conduct an individualized and reasonable consideration, in respect of each of Gueben *et al.*, as to whether to convert their fixed-term appointments to permanent ones under Secretary-General's Bulletin ST/SGB/2009/10.

11. The Dispute Tribunal erred in granting moral damages to Gueben *et al.* in violation of the amended Article 10(5)(*b*) of the UNDT Statute, which requires evidence to support such an award. The General Assembly's amendment was in effect at the time the impugned Judgment was issued on 29 March 2016. The award of moral damages is not warranted as the UNDT has failed to show that the Administration had not complied with the UNDT's *Tredici et al.* Judgment or the Appeals Tribunal's *Malmström et al.* Judgment.

12. The Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment.

**Gueben *et al.*'s Answer**

13. The UNDT was correct in finding that the decision maker did not provide individualized consideration. The notification letters expressly stated that the ASG/OHRM found individual factors irrelevant as a result of the institutional factors which were relied on.

14. The Dispute Tribunal did not usurp any discretion of the O-i-C/OHRM. The UNDT did not evaluate transferrable skills. Instead, it commented on the record of the process drawing out how it relied at all times on institutional, rather than individual, considerations. The Secretary-General's pleadings indicate that at all times the Administration approached the issue of transferrable skills on the basis that transfer outside of UNAKRT was impossible.

[7] Administrative Instruction ST/AI/2010/3, entitled "Staff selection system".

15. The Dispute Tribunal did not err in awarding moral damages. The present case is distinguishable from *Ademagic et al.*,[8] in that it has been sufficiently substantiated with specifics that Gueben *et al.* had suffered moral harm resulting from the non-conversion decisions. The Secretary-General did not contest the fact that these harms had been suffered, and he should be estopped from now arguing that Gueben *et al.* failed to provide sufficient evidence of harm. If the Appeals Tribunal agrees to the arguments made by the Secretary-General regarding the insufficiency of the evidence for the award of moral damages, the only appropriate course of action is to remand the present case to the Dispute Tribunal for a hearing regarding this discrete issue.

16. Gueben *et al.* request an expedited review of their cases in light of *Ademagic et al.*, which is dispositive of the appeal. They also request that the Appeals Tribunal uphold Judgment No. UNDT/2016/026 in full.

## Considerations

17. The crux of this appeal is whether the Administration's purported *de novo* consideration of the suitability of the applicant staff members for permanent appointments constituted an individual review giving every reasonable consideration to the staff members' proficiencies, competencies and transferrable skills.

18. On appeal, the Secretary-General contends that the UNDT erred:

- In placing undue significance on the wording of the respective notification letters;
- In usurping the discretion of the O-i-C/OHRM;
- In concluding that the O-i-C/OHRM had authority to convert Gueben *et al.*'s fixed-term appointments to permanent ones with no limitation of service to UNAKRT;
- In improperly shifting the burden of proof; and
- In awarding moral damages.

[8] *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684 (full bench).

19. The UNDT based its decision on the guidelines prescribed by the Appeals Tribunal in *Malmström et al.*,[9] namely:

a. Each staff member was entitled to receive a "written, reasoned, individual and timely decision, setting out the ASG/OHRM's determination on his or her suitability for retroactive conversion from fixed-term to permanent contract";[10]
b. Staff members were entitled to full and fair consideration of their *suitability* for conversion to permanent appointment;
c. The conversion exercise was remanded for *retroactive* consideration of the suitability of the staff members concerned;
d. Each candidate to be reviewed for a permanent appointment was lawfully entitled to an *individual* and considered assessment, or to individual full and fair consideration, and in doing so, "every reasonable consideration"[11] had to be given to staff members demonstrating the *proficiencies, competencies and transferable skills* rendering them suitable for career positions within the Organization; and
e. "The ASG/OHRM was not entitled to rely solely on the finite mandate of the ICTY ... [Her] discretion was fettered by her reliance, to the exclusion of all other relevant factors, on the ICTY's finite mandate." "Thus, the ASG/OHRM was not entitled to place reliance on the 'operational realities of the Organization' *to the exclusion of all other relevant criteria* set out in Resolution 51/226."[12]

20. The UNDT correctly determined that *Tredici et al.* gave, by reference to *Malmström et al.* "a detailed legal framework concerning how to perform the ordered re-consideration" and that "[t]he legality of the contested decisions must therefore be appraised against the above-cited instructions".[13]

21. The UNDT found that, although *Malmström et al.* explicitly stated that the remand to the ASG/OHRM was only for consideration of the "suitability" of the staff members for conversion, the Administration proceeded to a new eligibility assessment. In doing so, the Administration disregarded the specific instructions from the Appeals and Dispute Tribunals.

[9] *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357.
[10] *Ibid*., para. 73.
[11] *Ibid*., para. 67.
[12] *Ibid*., paras. 68 and 69 (emphasis in original).
[13] Impugned Judgment, para. 34.

22. The UNDT also found that, although *Tredici et al.* clearly stated that it remanded the UNAKRT conversion exercise to the ASG/OHRM for "retroactive consideration", and although *Malmström et al.* in its key passage unambiguously ordered the "retroactive consideration"[14] of the staff members' suitability, the Administration failed to comply with the Tribunals' direction.

23. We find no fault in these findings.

24. On the question of whether the Administration's purported *de novo* consideration constituted an individual review giving every reasonable consideration to the staff members' proficiencies, competencies and transferrable skills, the UNDT determined:[15]

> ... ... [T]he reasons given for not granting the conversion were identical for all seven Applicants. As a matter of fact, they were also identical for the nearly 260 ICTY staff members assessed in a parallel re-consideration exercise conducted further to the remand of their cases to the Administration by order of the Appeals Tribunal ... Not only were the reasons put forward the same, but they were also formulated in exactly the same terms in every decision letter, and, importantly, such reasons were in no way related to the Applicants' respective merits, competencies or record of service.
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> ... The only time when the expression "transferrable skills" appears in said letters is in the sentence "I have also considered that though you may have transferrable skills, your appointment is limited to service with DESA/UNAKRT". Otherwise said, the O-i-C, ASG/OHRM, did not address, and even less pronounce herself on, the question of whether the respective Applicants possessed such skills, let alone which ones they possessed and to what extent.
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> ... From their plain reading, the decision letters do not reflect any meaningful level of individual consideration of the Applicants' transferrable skills.
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> ... Even if the Tribunal were to follow the Respondent's submission that the individualisation transpires from the record of the process, i.e., the Applicants' individual files, the Tribunal is not satisfied that these records show a substantive and appropriate individual consideration, either."

25. The UNDT was aware that the staff members' individual files did make reference to certain personalised factors, but noted that "even the factors that could be considered as individual-specific ... revolved mostly around purely institutional factors (e.g., the move towards

[14] *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, para. 83.
[15] *Ibid*., paras. 54 to 57.

the nationalization of posts), instead of relating to their individual capabilities and service record".[16]

26. We agree with the UNDT's determination that the actual consideration afforded to the staff members' transferrable skills was minimal and inadequate and was not a meaningful consideration of their skills in keeping with *Tredici et al.* and *Malmström et al.*

27. The major reason for the remand of the cases was for the ASG/OHRM to specifically take into account each staff member's transferrable skills when considering his or her suitability for a permanent appointment. In our view, the failure of the Administration to do this, and to give any meaningful consideration to this criterion, is, of itself, sufficient to vitiate the contested decisions.

28. We find no fault with the UNDT's conclusion that:[17]

> [W]hile minimal consideration of some individual circumstances could be found, the qualifications, skills, competencies, experience and performance of the various Applicants were not adequately examined. At any rate, the consideration of factors specific to each Applicant appears partial and selective and, therefore, insufficient to fulfil the requirement of offering each Applicant an "individual full and fair consideration", and giving them "every reasonable consideration" based on proficiencies, competencies and transferrable skills rendering them suitable for career positions with the Organization, as instructed by the Tribunal.

*Reasons relied upon in making the contested decisions*

29. The reason given in the 24 November 2014 decision letters for not granting permanent appointments was the limitation of the staff members' appointments to UNAKRT, and the finite nature of UNAKRT's mandate.

30. The UNDT recognised that there was no question that, according to their respective letters of appointment, the staff members' service was limited to UNAKRT. Nevertheless, the UNDT found that the Administration could have elected to grant the staff members permanent contracts not limited to service with UNAKRT and would then have been free to reassign them without impediment. In coming to this conclusion, the UNDT considered the relevant

[16] *Ibid*., para. 63.
[17] *Ibid*., para. 67.

administrative issuances regarding the staff selection system, namely ST/AI/2010/3 and the Guidelines.

31. The UNDT relied on Section 11.1(b) of ST/AI/2010/3 as the mechanism for the potential reassignment of UNAKRT staff in case of abolition of their posts, concluding that there was "no absolute legal bar for the ASG/OHRM to move any of the Applicants, who held appointments limited to UNAKRT, to a different entity on the basis of the above-referenced provision if their posts were to be abolished".[18]

32. Section 11.1 of ST/AI/2010/3 provides:[19]

> The Assistant Secretary-General for Human Resources Management shall have the authority to place in a suitable position the following staff members when in need of placement outside the normal process:
>
> ...
>
> (b) Staff, other than staff members holding a temporary appointment, affected by abolition of posts or funding cutbacks, in accordance with Staff Rule 9.6(c)(i).

33. Paragraph 10 of the Guidelines provides:

> Where the appointment of a staff member is limited to a particular department/office, the staff member may be granted a permanent appointment similarly limited to that department/office. If the staff member is subsequently recruited under established procedures including review by a central review body for positions elsewhere in the United Nations Secretariat, the limitation is removed.

34. The UNDT construed the word "may" as allowing the possibility for a staff member who previously held a fixed-term appointment limited to a certain office/department to receive a permanent appointment not subject to the same limitation. In this regard, the UNDT stated: "If it were mandatory to equally limit the permanent appointment to said department/office upon conversion, the Guidelines would and should have explicitly stated it."[20]

[18] *Ibid*., para. 72.
[19] Emphasis added.
[20] *Ibid*., para. 76.

35. The UNDT therefore concluded that the limitation of service to UNAKRT was incorrectly asserted to be an obstacle to the staff members' reassignment and, ultimately, to the conversion of their appointments to permanent.

36. The UNDT thus found that of the two grounds put forward by the Administration, the limitation of the staff members' fixed-term appointments to service in UNAKRT had been established to carry little weight.

37. The Secretary-General contends that the UNDT erred in law and misconstrued Section 11.1(b) of ST/AI/2010/3. He argues that Section 11.1(b) does not specify that the ASG/OHRM's exceptional authority extends to the placement of staff members outside of their particular department. Rather, it provides only that the ASG/OHRM would have authority to place staff members outside the normal staff selection process.

38. The Secretary-General further contends that the UNDT erred by failing to take into account Staff Rule 9.6(c)(i), which states:

> (c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:
>
> (i) Abolition of posts or reduction of staff[.]

In other words, the Secretary-General submits that the UNAKRT staff members, who were on fixed-term appointments with end dates, did not fall into the category of those whose "appointments [were] slated to be *terminated* due to abolition of posts, reduction of staff, funding cutbacks, or on any other grounds". Accordingly, the Secretary-General submits that the ASG/OHRM could have properly concluded that she could not place the staff members in another entity outside of UNAKRT.

39. Insofar as the UNDT relied on the contents of paragraph 10 of the Guidelines in determining that the ASG/OHRM could have given some UNAKRT staff members permanent appointments limited to service within UNAKRT and given other UNAKRT staff members permanent appointments with no service limitations, the Secretary-General argues that the Dispute Tribunal misread paragraph 10. He contends that the word "may" in paragraph 10 of the Guidelines is no more than a reiteration of the language in Section 2 of ST/SGB/2009/10, that "a

permanent appointment may be granted" to staff who meet the criteria for such appointments. Furthermore, the Secretary-General relies on the second sentence of paragraph 10 of the Guidelines, which states "[i]f the staff member is subsequently recruited under established procedures including review by a central review body for positions elsewhere in the United Nations Secretariat, the limitation is removed".

40. The staff members submit that the Secretary-General's arguments purporting to support his claim that the UNDT erred in ruling that the O-i-C/OHRM could have converted their fixed-term appointments to permanent ones without a limitation of service to UNAKRT have already been advanced to the Appeals Tribunal in *Ademagic et al.*[21] The UNDT's reasoning in this case conforms exactly to that relied on in the ICTY cases and was endorsed by the Appeals Tribunal, as was the finding that the ASG/OHRM would have the power to transfer such staff members to a suitable post within the wider United Nations.

41. We find that the UNDT did not err in law or fact in its interpretation of the relevant provisions.

*Did the Dispute Tribunal improperly substitute its discretion for that of the ASG/OHRM?*

42. The Secretary-General contends that the UNDT usurped the discretion of the O-i-C/OHRM to grant or deny conversion of the staff members' fixed-term appointments to permanent ones. In particular, the UNDT erred in improperly deciding on the weight to be assigned to certain criteria in the consideration process. The UNDT further erred by making its own factual assessments of the staff members' candidacies, including their transferrable skills. The UNDT thus stepped into the shoes of the O-i-C/OHRM and substituted its own substantive opinions for those of the O-i-C/OHRM.

43. We find no merit in this argument. First, we note that the Dispute Tribunal recognised that the ASG/OHRM was entitled to take into consideration the finite mandate and downsizing situation of a certain entity in reaching a determination on the conversion of its staff. It appropriately referenced former Staff Rule 104.13 and Section 2 of ST/SGB/2009/10 as the legal bases for giving due weight to "all the interests of the Organization". It also had regard to General Assembly resolution 51/226, which clearly states that the "operational realities of the organizations" are considerations the Administration may legitimately consider when making

[21] *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684.

administrative decisions such as conversion to permanent appointments. In adherence to classic principles of judicial review, the UNDT scrutinized the conduct of the O-i-C/OHRM to determine whether she properly arrived at her decisions. It did so not only from the perspective of the appropriate statutory provisions but, more particularly, through the prism of the Appeals Tribunal Judgments[22] and the UNDT's directives in *Tredici et al.* upon remand to the ASG/OHRM.

44. In this regard, the Dispute Tribunal properly concluded (for the reasons already set out in this Judgment) that each staff member's competencies and skills were not meaningfully considered, and other circumstances specific to each individual were only inadequately assessed. The predominant factor behind the impugned decisions was, yet again, the finite mandate of UNAKRT, in direct contravention of the Appeals Tribunal Judgment directives. We are of the view that the Administration's unrelenting reliance on UNAKRT's finite mandate constitutes, once again, an unlawful fettering of the ASG/OHRM's discretion such that none of the impugned decisions can be allowed to stand. We note with considerable concern that the manner in which the remand for reconsideration was undertaken demonstrates an almost complete disregard of *Tredici et al.* and the Appeals Tribunal Judgment. The Administration's reluctance to comply with our clear directives has unduly delayed the administration of justice for the staff members concerned, as well as for the interests of the Organization itself.

45. Notwithstanding that the Administration is entitled to consider "all the interests of the Organization" under Section 2 of ST/SGB/2009/10, when considering staff members' suitability for permanent appointments, the UNAKRT staff members are entitled to "full and fair" consideration of their respective qualifications, competencies, conduct and transferrable skills when determining their suitability for conversion to permanent appointments.

46. Lastly, we reject the Secretary-General's submission that the UNDT shifted the burden of proof. The example given in support of this submission was simply an observation by the UNDT of a personalised factor contained in a staff member's file. It was stated in the file that there was "no demonstrated need for his expertise". The UNDT merely opined, in respect of the statement, that "this vague statement falls short to establish that there is no continuing need for his services.

[22] *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357; see also *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359; *Longone v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-358; and *McIlwraith v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-360.

Nor does it show any accrued difficulty for him to be placed against another post".[23] No decision turned on this observation and there is no substance to the Secretary-General's submission that it reversed the burden of proof.

47. Accordingly, the Appeals Tribunal upholds the Dispute Tribunal's finding that the Administration's decisions not to grant permanent appointments to the staff members were flawed and we uphold the UNDT's rescission of the flawed decisions.

*Remand*

48. Although we have determined that the Administration failed to afford the staff members the full and fair consideration that the UNDT directed in *Tredici et al.*, by reference to the Appeals Tribunal Judgment in *Malmström et al.*, we do not find that the Dispute Tribunal erred in again remanding the cases to the ASG/OHRM. We find a remand to be the most effective and equitable of the remedies, although we can understand the staff members' frustration with another remand. Accordingly, we uphold the UNDT's remand of the staff members' applications for conversion to permanent appointments to the ASG/OHRM. Upon remand, we expect the Administration to strictly adhere to our directives in the Appeals Tribunal Judgment and to our further instructions herein, where we explicitly instruct the ASG/OHRM to consider, on an individual and separate basis, each staff member's respective qualifications, competencies, conduct and transferrable skills when determining each of their applications for conversion to a permanent appointment and not to give predominance or such overwhelming weight to the consideration of the finite mandate of UNAKRT so as to fetter or limit the exercise of discretion in deciding whether to grant a permanent appointment to any individual staff member.

49. 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. As the UNDT notes, it should not take the Administration more than 90 days as all pertinent information is readily available.

[23] Impugned Judgment, para. 61(d).

*The UNDT's awards of moral damages*

50. The UNDT awarded moral damages of Euros 3,000 to each of the staff members. Although the General Assembly's amendment to Article 10(5)(*b*) of the UNDT Statute was in force when the UNDT delivered the impugned Judgment, the UNDT opined that, since the cause of action (the decision letters of 24 November 2014) arose before the amendment came into effect, the amendment did not apply to their claims since it did not operate retrospectively. Pursuant to the amendment, compensation for harm can only be awarded when supported by evidence.

51. The UNDT decided that, in any event, irrespective of the amendment, an award of moral damages was warranted on the basis of the staff members' submissions.

52. We hold that the UNDT erred in law by not applying the UNDT Statute as it existed at the time the Dispute Tribunal rendered its Judgment. As an award of damages takes place at the time the award is made, applying the amended statutory provision is not the retroactive application of law. Rather, it is applying existing law.

53. Moreover, pursuant to the amended Statute, a mere assertion of distress by a staff member is not sufficient evidence to support an award of moral damages.

54. Accordingly, we vacate the awards of moral damages.

## Judgment

55. The appeal is partly successful in that the appeal of the awards of moral damages is allowed. The remainder of the appeal is dismissed. Judgment No. UNDT/2016/026 is affirmed, except for the awards of moral damages, which are vacated.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

| | |
|---|---|
| *(Signed)* | *(Signed)* |
| Judge Lussick, Presiding | Judge Halfeld |

Judge Knierim appends a dissenting opinion.

Entered in the Register on this 20th day of December 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

## Judge Knierim's Dissenting Opinion

1. While I agree with my colleagues on the outcome of the case that we uphold the UNDT Judgment and dismiss the Secretary-General's appeal (except for the awards of moral damages), I have sincere objections to certain parts of the reasoning of this Judgment, which, in my opinion, justify these dissenting remarks.

2. I do not agree with my colleagues, who think "a remand to be the most effective and equitable of the remedies". In my view, by deciding to remand, the Dispute Tribunal exceeded its competence and committed errors of law on several grounds.

3. Under Article 10(5) of the UNDT Statute, as part of its Judgment, the Dispute Tribunal may only order one or both of the following:

> (*a*) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ...
>
> (*b*) Compensation for moral harm, supported by evidence ...

4. Article 10(4) of the UNDT Statute provides that, "[p]rior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months".

5. In my view, the UNDT violated these statutory provisions by:

> (i) Ordering rescission without offering in-lieu compensation as an alternative to rescission;
>
> (ii) Remanding the matter to the Administration in its Judgment on the merits without the concurrence of the Secretary-General; and
>
> (iii) Ordering retroactive and individualised consideration.

6. The wording of Article 10(4) and 10(5) of the UNDT Statute is plain and clear. A remand of the matter to the Administration is only allowed under certain narrow criteria which are not met here. The UNDT may order rescission/specific performance and compensation for moral harm but nothing else. Also, when ordering rescission of a decision concerning appointment, promotion or termination, the UNDT has to offer in-lieu compensation. In the impugned Judgment, however, the UNDT ordered rescission of the denial of converting a fixed-term into a permanent appointment (an administrative decision clearly related to appointment, in my view) without offering such alternative compensation.

7. The purpose of these statutory provisions is also obvious. The Administration should have the possibility to pay compensation in exchange for the right to uphold a decision which the Dispute Tribunal has declared to be unlawful. In cases like the present one, where the Administration would, after a rescission, again have to exercise its discretion as to whether or not to grant conversion, this can also be a very quick and efficient way to end litigations.

8. The UNDT's order of rescission and remand for reconsideration without in-lieu compensation would force the Administration to render a lawful administrative decision (either specific performance/conversion or a rightful denial of the conversion requests by giving each of the staff members concerned a full and fair consideration of his or her individual situation). This is tantamount to depriving the Administration of the option to "buy out" established under Article 10(5) of the UNDT Statute. At the same time, the interests of the staff members are not well protected either, in the absence of any in-lieu compensation. Instead of receiving the in-lieu compensation at an early stage, they would have to wait again for an extended period of time, as this Judgment has given them no final answer. If the Administration does not comply with the UNDT's orders, all that the UNDT would be able to do would be to order specific performance in another (the third!) litigation. By then, it would have to offer an in-lieu compensation. As Article 10(7) of the UNDT Statute forbids exemplary and punitive damages, the UNDT would not even be allowed to take the non-compliance of the Administration into account.

9. The fact that the UNDT's orders have their basis and origin in the case law of this Tribunal does not, in my opinion, change the matter. The Statutes and Rules of Procedure have been established by the General Assembly, and the Tribunals must apply them. Although we may interpret and develop the Statutes if they are unclear, we have no authority to change a Statute when its wording is unambiguous and its purpose clear.

10. However, as the staff members have not appealed the UNDT's decision and the Secretary-General does not assert that, by ordering rescission without in-lieu compensation and by remanding the matter for retroactive consideration without the concurrence of the Secretary-General, the Dispute Tribunal exceeded its competence or committed an error of law in violation of Article 2(1) of our Statute, I agree with my colleagues that the outcome of the case is correct and the Secretary-General's appeal has to be dismissed, except for the awards of moral damages.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

*(Signed)*

Judge Knierim

Entered in the Register on this 20th day of December 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar