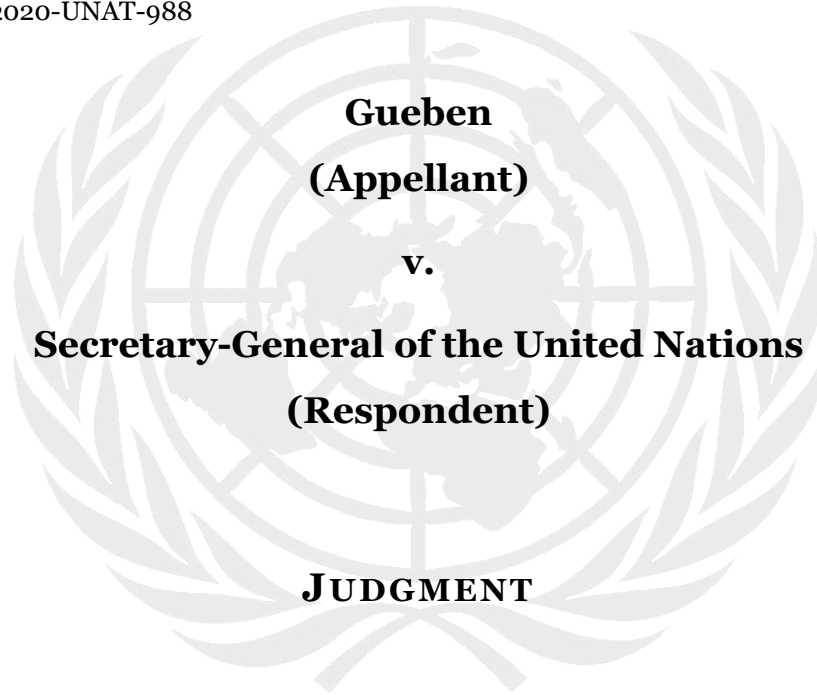




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-988



**Gueben
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Graeme Colgan Judge John Raymond Murphy
Case No.:	2019-1292
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Mr. Gueben: Robbie Leighton

Counsel for Secretary-General: Francisca Lagos-Pola

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Mr. Arnaud Gueben contested the decision not to grant him a permanent appointment after the second reconsideration of his suitability. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) rejected his application. For reasons set out below, we affirm the Dispute Tribunal's decision.

Facts and Procedure

2. Mr. Gueben joined the former International Criminal Tribunal for the former Yugoslavia (ICTY) in November 1999. He worked at the ICTY as a Translator/Meeting Interpreter/Linguist Advisor until February 2008. He then joined the United Nations Assistance to Khmer Rouge Trials (UNAKRT), a technical assistance project administered by the Capacity Development Office (CDO), Department of Economic and Social Affairs (DESA), as a Translator/Interpreter and, in February 2009, he assumed the position of Reviser in English and French at the P-4 level.

3. 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 were considered for conversion of their contracts to permanent appointments. In this context, 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.

4. On 29 January 2010, the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 (2010 Guidelines) were approved by the Assistant Secretary-General for Human Resources Management (ASG/OHRM). On 16 February 2010, the Under-Secretary-General for the Department of Management (USG/M) transmitted the 2010 Guidelines 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.

5. Having requested consideration for conversion, Mr. Gueben received, on 31 January 2012, a letter from the Chief, Human Resources Management, DESA, advising him that he would not be granted a permanent appointment.

6. On 11 June 2012, Mr. Gueben, along with seven other UNAKRT staff members who had also been denied conversion to permanent appointments in the same exercise, filed separate applications before the UNDT. On 26 August 2014, the UNDT issued Judgment No. UNDT/2014/114, *Tredici et al.*, upon the above-mentioned eight applications, 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”,¹ and awarded each of the Applicants 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*”² of the decisions that the Appeals Tribunal had rendered with respect to staff of the ICTY—having mentioned *Malmström et al.* Judgment No. 2013-UNAT-357 in particular—and stated that “[t]he pertinent facts and the legal issues in the present case [were] on all fours with the ICTY cases”.³ Furthermore, in reaching the outcome quoted above, the UNDT explicitly relied on the guidelines set out by the Appeals Tribunal in *Malmström et al.*

7. By letter dated 24 November 2014, Mr. Gueben was informed that, after reconsideration, the Officer-in-Charge, OHRM, had decided not to grant him retroactive conversion of his fixed-term appointment to a permanent one.

8. On 4 March 2015, Mr. Gueben, along with six other UNAKRT staff members who had also been denied conversion to permanent appointments after the reconsideration, filed separate applications before the Dispute Tribunal.

9. On 11 March 2016, Mr. Gueben was separated from service upon his resignation.

10. The UNDT ruled upon the seven applications by Judgment No. UNDT/2016/026 *Gueben et al.* of 29 March 2016. The UNDT held that the contested decisions denying each of the applicants a conversion of their fixed-term appointments to permanent ones were unlawful, primarily because they had not been given proper and individual consideration in

¹ *Tredici et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/114, para. 27.

² *Ibid.*, para. 20.

³ *Ibid.*

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”.⁴ The UNDT found that the Administration had failed to abide by its *Tredici et al.* Judgment and the Appeals Tribunal’s *Malmström et al.* instructions. The UNDT rescinded the contested decisions and remanded the matter to the ASG/OHRM for “retroactive individualised consideration of the Applicants’ suitability for conversion of their appointments to a permanent one” in conformity with the Appeals Tribunal’s *Malmström et al.* instructions, among others.⁵ The UNDT further awarded moral damages in the sum of EUR 3,000 to each *Gueben et al.* Applicant.

11. On 30 June 2016, the Secretary-General appealed the UNDT Judgment to the Appeals Tribunal. In its Judgment No. 2016-UNAT-692 *Gueben et al.* dated 28 October 2016, the Appeals Tribunal affirmed Judgment No. UNDT/2016/026, except for the awards of moral damages, which it vacated.

12. By letter dated 17 March 2017, the Acting Assistant Secretary-General for Human Resources Management (AASG/OHRM) informed Mr. Gueben of the decision not to grant him a permanent appointment after the second reconsideration of his suitability. The letter stated that his suitability for conversion had been reconsidered, taking into account his individual qualifications, competencies, conduct, transferrable skills and needs of the Organization. The letter further stated that Mr. Gueben had not passed the language competitive examinations (LCE) and that he did not have excellent knowledge of two official languages of the United Nations (in addition to French), both prerequisites for the employment of language staff at the Secretariat. The letter concluded that it was therefore unlikely that his services would be required by the Organization beyond the need of his services at UNAKRT and accordingly he was not a suitable candidate for conversion to a permanent appointment.

13. On 13 October 2017, Mr. Gueben filed an application before the UNDT challenging the 17 March 2017 decision.

⁴ *Gueben et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/026, para. 87(b).

⁵ *Ibid.*, para. 110(b).

14. On 5 July 2019, the UNDT issued Judgment No. UNDT/2019/124 dismissing Mr. Gueben's application.

15. The UNDT found that Mr. Gueben's situation was similar to that of *McIlwraith et al.* in respect of the requirement to pass the LCE. As previously found by the Dispute Tribunal in *McIlwraith et al.*,⁶ the LCE was a pre-requisite for employment of professional language staff in the Secretariat. The fact that Mr. Gueben did not pass the LCE was a proper consideration in assessing his suitability for a permanent appointment.

16. As to Mr. Gueben's contention that the requirement for an excellent knowledge of a third language was not contained in any rule, but seemed to be an administrative practice of the Organization, the UNDT found that an administrative practice could be considered as a reliable ground to anchor an administrative decision, provided that said practice was neither manifestly illegal nor abusive, and that it persisted over time and was consistent, uniform and commonly accepted by the majority of the stakeholders.

17. The UNDT also found no merit in Mr. Gueben's assertion that an exception to the requirement of an excellent knowledge of a third language should have been made in his case because of his specialization in law. The UNDT held that exceptions to administrative practices had to be interpreted restrictively and any deviation had to be reasonably grounded; and exceptions to this requirement had only been made when a candidate held a university degree in law or had relevant experience. Since a specialization in law was not equivalent to a university degree in law, Mr. Gueben could not claim that he should have been granted an exception on this basis. The UNDT further dismissed Mr. Gueben's claim that his intermediate/advanced level of Spanish should have been taken into consideration on the ground that the Administration required an excellent knowledge of a third official language of the United Nations and Mr. Gueben's level of Spanish was not sufficient to comply with such a requirement.

⁶ *McIlwraith et al., v. Secretary-General of the United Nations*, Judgment No. UNDT/2019/022. In *McIlwraith et al.*, which included 179 applicants, the Dispute Tribunal considered a number of arguments the Applicants had advanced. One of them was that the LCE was not a prerequisite for the employment of professional language staff in the ICTY. The Dispute Tribunal found that it fell within the ambit of the Administration's discretion to take into account the specific requirements for the professional language staff including the need to pass the LCE, and that there was no factual error in the decisions not to grant the Applicants permanent appointments, if they did not meet those requirements. On appeal, the Appeals Tribunal affirmed the Dispute Tribunal's decision. (See Judgment No. 2019-UNAT-953.)

18. Finally, the UNDT dismissed Mr. Gueben's claim that he was being discriminated in comparison with non-language professional staff members, finding that Mr. Gueben's situation was not equivalent to the situation of non-language professional staff because the latter possessed skills that were common to the broader Secretariat and were not subject to the same requirements as professional language staff, and the different nature of functions justified different recruitment requirements.

19. Turning to remedies, the UNDT dismissed the request for compensation in the form of payment of a termination indemnity on the ground that the decision not to grant Mr. Gueben a permanent appointment was lawful; and moreover, Mr. Gueben had resigned from the Organization and was therefore not entitled to a termination indemnity. The UNDT dismissed Mr. Gueben's request for moral damages on the ground that the request for moral damages had already been subject to a judicial decision by the Appeals Tribunal in *Gueben et al.*, Judgment No. 2016-UNAT-692 and was therefore *res judicata*; and that Mr. Gueben had failed to provide evidence of harm to support an award of compensation apart from his own claims.

20. On 22 July 2019, Mr. Gueben filed an appeal. The Secretary-General filed his answer on 4 October 2019.

Submissions

Mr. Gueben's Appeal

21. The UNDT erred in fact by stating that Mr. Gueben lacked qualifications and language combinations allowing him to secure the LCE and a Secretariat language post. The UNDT's finding is contrary to the position stated and agreed upon by both parties that the exception to the requirement for an excellent knowledge of a third language did apply to Mr. Gueben. This error led to a manifestly unreasonable decision since the UNDT had founded its reasoning on the basis that Mr. Gueben did not have the skills to render him eligible for employment in the Secretariat. The only bar was that he had to pass the LCE to become eligible for posts in the Secretariat, which highlights how an examination of "transferrable skills" is different from an examination of "transferability". Mr. Gueben's argument that "transferrable skills" and "transferability" were not synonymous was not addressed leading to a manifestly unreasonable decision.

22. The UNDT erred in fact, law, and procedure by misconstruing Mr. Gueben's argument regarding discriminatory treatment. Before the UNDT, Mr. Gueben had submitted that the introduction of a transferability criterion that was exclusively applied to UNAKRT and the ICTY was discriminatory as it discriminated between staff serving in downsizing entities and staff serving in the broader Secretariat. The UNDT did not address this argument. Instead, the UNDT misconstrued the argument as being that he had been discriminated in comparison with non-language professional staff members. Previous attempts by the Administration to apply the interests of the Organization as a suitability criterion have been found unlawful. The Appeals Tribunal's order was that the ICTY staff, and by extension the UNAKRT staff, should be afforded the same consideration given to other staff. The Administration chose to interpret this direction as introducing a new suitability requirement to the ICTY and UNAKRT staff members which had not been applied to other Secretariat staff. To do so was to discriminate against the ICTY and UNAKRT staff members in a manner which had already been found unlawful by the Appeals Tribunal.⁷ The Dispute Tribunal failed to address this argument.

23. The UNDT erred in law by failing to address two of the principal arguments advanced by Mr. Gueben. Mr. Gueben argued before the UNDT that the additional suitability criterion of "transferability", applied to Mr. Gueben, was arbitrary in light of the treatment of the non-language professionals. The non-language professionals were granted permanent appointments limited to service in UNAKRT. Since the Administration thereby precluded any need or obligation to transfer outside of UNAKRT those with permanent appointments, it was arbitrary to create a requirement for Mr. Gueben's potential employment outside UNAKRT. Mr. Gueben further argued that the decision maker had failed to take into account the needs of UNAKRT when considering the interests of the Organization. By framing the legal issue as being exclusively whether the decision was in conformity with directions provided in the former Appeals Tribunal jurisprudence, the UNDT effectively removed Mr. Gueben's argument from consideration.

24. The UNDT erred in law by determining Mr. Gueben's request for compensation on the basis of eligibility for a termination indemnity. Mr. Gueben did not seek to argue eligibility for a termination indemnity. Instead, he presented an argument as to how the loss that accrued from the decision not to grant him a permanent appointment in 2012 might be

⁷ *Baig et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357.

quantified. As the termination indemnity is the value the Organization places on job security for staff in receipt of a permanent appointment, it was advanced as a metric for compensation for loss. Since Mr. Gueben did not request an actual termination indemnity, the issue of eligibility is irrelevant.

25. Mr. Gueben requests rescission of the contested decision and grant of a permanent appointment. In the alternative, Mr. Gueben requests compensation.

The Secretary-General's Answer

26. The UNDT considered the contested decision in light of the ruling of the 2016 Appeals Tribunal Judgment and correctly found that the contested decision was lawful. This conclusion is in accordance with the relevant law and facts in the present case. In accordance with the Appeals Tribunal's instructions in its 2016 Judgment, the Administration considered the following qualifications and competencies of Mr. Gueben's: his degree in translation in French, English and Dutch; and his work experience both as a translator/interpreter and as a Reviser in English and French. In considering Mr. Gueben's transferrable skills, the Administration took into account whether Mr. Gueben had the required skills for employment in the Secretariat as a language staff. Specifically, the Administration considered that Mr. Gueben did not have two pre-requisites for language staff, namely the LCE and an excellent knowledge of a third language of the Organization. By considering whether Mr. Gueben could be appointed outside of UNAKRT, the Administration refrained from giving undue weight to UNAKRT's downsizing. The UNDT therefore concluded that the Administration had complied with the 2016 Appeals Tribunal Judgment.

27. Mr. Gueben has failed to demonstrate that the UNDT made any errors warranting a reversal of the Judgment. His submission that the consideration of the transferability argument amounted to discrimination is incorrect. The 2016 Appeals Tribunal Judgment expressly instructed the Organization to consider Mr. Gueben's transferrable skills when reconsidering on remand his suitability for a permanent appointment. Moreover, in considering Mr. Gueben's transferrable skills, the Organization did not discriminate against him because he was part of a downsizing entity. The Organization was required to weigh Mr. Gueben's individual qualifications while considering the operational reality that UNAKRT would close down and that its staff would need to have appointments elsewhere. Therefore, the Organization considered the translator/revisor positions that Mr. Gueben

could be appointed to outside of UNAKRT, but concluded that he did not have the required transferrable skills. While this evaluation process might not be necessary for staff from non-downsizing entities, the evaluation process is necessary for staff from downsizing entities which have more limited career prospects within the entity they are serving.

28. The Organization was clearly allowed to establish a distinction between staff members who serve in downsizing entities and those who do not. Treating staff members who are not alike in a dissimilar fashion does not amount to discrimination. In *Tabari*, the Appeals Tribunal held that different treatment becomes discriminatory when it affects negatively the rights of certain staff members or categories of them due to unlawful reasons; but there is no discrimination, when the approach is general by categories, when the difference is motivated in the pursuit of general goals and policies, and when it is not designed to treat individuals or categories of them unequally. Accordingly, the consideration of the reality that Mr. Gueben was part of an entity that would close down did not constitute discrimination. The fact that the UNDT framed the discussion on discrimination differently than the way Mr. Gueben had framed it in his application does not change the fact that the contested decision was not discriminatory. Mr. Gueben has therefore failed to demonstrate that the UNDT erred in holding that the contested decision was not discriminatory.

29. Mr. Gueben has also failed to demonstrate that the UNDT erred in finding that his specialization in law did not constitute an exception to the third language requirement. Language staff in the Secretariat are required to have passed the LCE and to have an excellent knowledge of a third language of the Organization. Mr. Gueben misconstrues the Organization's past submission when he states that the Organization had previously applied an exception to the requirement of the third language to Mr. Gueben. In its management evaluation letter as well as in its reply before the UNDT, the Administration stated that an exception to the language requirements for participating in the LCE had been allowed for Mr. Gueben so that he could take the LCE, but he had failed to pass it. By allowing Mr. Gueben to exceptionally sit an exam, the Administration did not concede that Mr. Gueben was qualified for a language position.

30. There is no merit in Mr. Gueben's claim that the UNDT should have taken into account that certain posts in UNAKRT would remain viable and justify converting Mr. Gueben's fixed-term appointment to a permanent appointment. He appears to suggest that the Administration is required to take into account the interests of UNAKRT to retain,

for the duration of its existence, staff members like Mr. Gueben. However, neither the legal framework on permanent appointments nor the 2016 Appeals Tribunal Judgment obliges the Administration to take posts in entities slated for downsizing into consideration when determining the transferability of the skills held by individual staff members being considered for permanent appointments.

31. The Appeals Tribunal should reject Mr. Gueben's request to be granted a permanent appointment. The Appeals Tribunal has previously held that it is not its role to involve itself in the decision-making process reserved to the Administration. In the alternative, should it find that the UNDT erred, the Appeals Tribunal should remand the matter to the Secretary-General for further consideration of Mr. Gueben's case.

32. Finally, the Appeals Tribunal should reject Mr. Gueben's request for compensation since the contested decision was lawful. Should it find that the contested decision was unlawful, the Appeals Tribunal should not grant compensation for moral harm as Mr. Gueben has failed to show that he had suffered harm. As to Mr. Gueben's request for a termination indemnity, the UNDT assessed Mr. Gueben's eligibility and correctly concluded that he would not have been entitled to a termination indemnity since he had resigned.

33. The Appeals Tribunal should reject Mr. Gueben's request to be granted a permanent appointment.

Considerations

34. The main issue for consideration in this appeal is whether the UNDT erred in its conclusion that the contested administrative decision not to grant Mr. Gueben a permanent appointment was lawful and reasonable. This in turn requires an examination of the legality and rationality of the Administration's conclusion that it was not in its interests to retain Mr. Gueben because he did not possess the relevant language skills.

35. Former Staff Rule 104.12(b)(ii) and (iii) applicable on 30 June 2009 provides:

(ii) The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment;

(iii) Notwithstanding subparagraph (ii) above, upon completion of five years of continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff regulation 4.2 and who is under the age of fifty-three years will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization.

36. Former Staff Rule 104.13(a) provides further:

The permanent appointment may be granted, in accordance with the needs of the Organization, to staff members who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the high standards of efficiency, competence and integrity established in the Charter, provided that: ... (iii) They have completed five years of continuous service under fixed-term appointments and have been favourably considered under the terms of rule 104.12(b)(iii).

37. Section 2 of ST/SGB/2009/10 reiterates the suitability criteria for granting permanent appointments. It provides that in accordance with former Staff Rules 104.12(b)(iii) and 104.13, a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible staff members who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the highest standards of efficiency, competence and integrity established in the United Nations Charter (Charter). Paragraph 7 of the 2010 Guidelines states that in determining the interests of the Organization for the purpose of granting a permanent appointment (as contemplated in Section 2 of ST/SGB/2009/10), the operational realities of the Organization shall be taken into account.

38. These governing provisions thus specify the following key criteria or relevant factors for consideration in the exercise of discretion to convert a fixed-term appointment to a permanent appointment: i) the interests of the Organization; ii) the operational realities of the Organization; iii) the suitability of the staff member as an international civil servant; iv) the staff member's efficiency and competence; and v) the staff member's integrity established in the Charter. The requirements of efficiency, competence and integrity are determined by consideration of the staff member's qualifications, performance and conduct. Paragraph 8 of the 2010 Guidelines provides that the determination of whether a staff member has met the high standards of efficiency and competence will be based on the five most recent performance evaluations of the staff member on record. Paragraph 9 of the 2010 Guidelines

provides that the determination of whether a staff member has demonstrated suitability as an international civil servant and has met the high standards of integrity established in the Charter must take account of any administrative or disciplinary measures taken against the staff member.

39. The terms of these provisions therefore confirm that it is not only permissible but also necessary for the Administration to take into consideration the interests, needs and operational realities of the Organization when determining the suitability of staff members for a permanent appointment. Former Staff Rules 104.12(b)(iii) and 104.13, ST/SGB/2009/10 and the 2010 Guidelines clearly provide that a permanent appointment may be granted only after consideration of all the interests, needs and operational realities of the Organization. There is thus no basis for the Appellant's submission that the interests of the Organization is not a lawful factor to be considered when determining whether to grant a permanent appointment and its application to the staff in a downsizing entity is discriminatory. Accordingly, the criteria or relevant considerations at play in this matter are the interests and operational realities of the Organization and Mr. Gueben's competence, including his transferable skills. There is no dispute about his efficiency or integrity.

40. The UNDT held that it was legal and rational for the Administration to require Mr. Gueben to demonstrate that he possessed transferable skills, in the context of the requirements for language professional staff, qualifying him for positions within the Secretariat and outside of UNAKRT. Its reasoning discloses no error. The consideration of "transferable skills" as a criterion for future permanent appointment for staff members serving in a downsizing entity is a relevant factor rightly to be taken into account, and a legitimate consideration because the finite mandate of UNAKRT meant such staff members had no realistic career prospects in that entity.

41. Moreover, the granting of permanent appointments in accordance with the interests, needs and operational realities of the Organization must take account of the underlying policy consideration, articulated in the report of the Secretary-General A/64/267 of 7 August 2009 (Implementation of continuing appointments), that there be a long-term need for the staff members' services. The policy requires a staff member seeking a permanent appointment to demonstrate that she or he has "transferable skills" with a potential to perform long-term functions that may be different from those of the post he or she occupies at the time of consideration. The staff member's skills must be required either for the

continuity of a function already being performed or be of a kind displaying the staff member's potential to execute other skilled functions within the Secretariat.

42. Consequently, it would be pointless to consider retention of Mr. Gueben within the UNAKRT. It was rational and legitimate to limit the enquiry by focusing on the long-term staffing needs of the Secretariat. The criterion of "transferable skills" for permanent appointment, by its nature, has relevance in the present situation only for weighing a staff member's skills against the long-term needs of the Secretariat outside of UNAKRT, which was slated for disestablishment in the short to medium term. Given the finite mandate of UNAKRT, the UNDT correctly concluded that it was not unreasonable for the Administration in the circumstances to exclude any positions in UNAKRT from the pool of positions when assessing Mr. Gueben's transferrable skills as a criterion of suitability for a permanent appointment. Hence, we reject, as without merit, the arguments advanced by Mr. Gueben that the UNDT erred in not finding that the Administration had failed to take into account the needs of UNAKRT when considering the interests of the Organization and that any permanent appointment that might have been granted to him would have been exclusively for service within UNAKRT and therefore it was arbitrary to deny him such on the basis that he was unsuitable for employment outside that entity.

43. There was undoubtedly a rational basis for the denial of a permanent appointment for Mr. Gueben. The purpose of the provisions empowering the Secretary-General to convert fixed-terms appointments to permanent appointments in the interests of, and in accordance with, the needs of the Organization is to retain and secure skills adding to the efficiency, *bona fide* operational requirements and high standards of performance of the Organization. With the winding down of UNAKRT, the need for language skills obviously had diminished. Accordingly, there is a rational connection between the purpose of the empowering provisions, the purpose of, and reasons for, the contested decision and the information upon which it was based.

44. Moreover, in the case at hand, Mr. Gueben lacked two pre-requisites for language staff, namely the LCE and an excellent knowledge of a third official language of the United Nations. Thus, the contested decision, with a correct and lawful two-pronged reasoning, concluded that Mr. Gueben did not have the individual qualifications and skills that made him suitable for conversion to a permanent appointment, *i.e.*, he did not possess

the required transferrable skills that would allow him to have an appointment in the translation/revision field in the Secretariat as he had not passed the LCE.

45. This decision is not arbitrary, capricious, irrational or actuated by ulterior or improper purpose. It was based on the cogent relevant consideration that going forward language skills would be less needed in the Organization and thus was in accordance with the legal prescriptions of former Staff Rules 104.12(b)(iii) and 104.13, ST/SGB/2009/10 and the 2010 Guidelines, which require a proportional balance to be struck between the operational realities of the Organization and the incentives for staff retention. In the premises, it cannot be said the decision refusing Mr. Gueben a permanent appointment was illegal or unreasonable. Therefore, we reject as baseless Mr. Gueben's assertions to the contrary that the additional suitability criterion of "transferability" applied to him was arbitrary in light of the treatment of non-language professionals.

46. With regard to the third official language requirement, Mr. Gueben had put forward to the UNDT Judge that an exception to this requirement for an excellent knowledge of a third language had been made in his case because of his specialization in law and that his intermediate/advanced level of Spanish should have been taken into consideration. The UNDT found that Mr. Gueben's level of Spanish was not sufficient to comply with the third language requirement and that his specialization in law did not constitute an exception to that requirement as it was not equivalent to a university degree in law.⁸

47. Mr. Gueben contends that the "Respondent" agreed, as stated in the outcome of the management evaluation and in his reply before the Dispute Tribunal, that an exception to the requirement for a third language "did apply and had been applied" to him, and that by making a finding that was contrary to the position of the "Respondent", the UNDT erred in fact as it "based [its] reasoning on an incorrect assertion that the Appellant did not have the skills required for a post in the broader Secretariat".

48. We do not find merit in these submissions for two reasons. First, irrespective of whether or not Mr. Gueben was proficient in a third language or whether his specialization in law constituted an exception to the third language requirement, it is undisputed that he did not possess the qualifications for a language staff in the Secretariat given that he had not passed the LCE. This consideration alone is a sufficient legal basis to support the lawfulness

⁸ Impugned Judgment, paras. 44-47.

of the impugned administrative decision to not grant him a permanent appointment due to the lack of a key competence requirement as already mentioned. Second, as per the evidence on file, in her Management Evaluation Letter, the USG/M had indicated that an exception to the language requirements for participating in the LCE had been allowed for Mr. Gueben so that he could be eligible to take the LCE exam, which he did without success. It was merely a permission granted to Mr. Gueben on an exceptional basis so that he could sit an exam, which could not and ought not be misconceived as an exception to the third language requirement, as the Secretary-General has correctly argued.

49. The UNDT did not err in finding that the contested decision was lawful. We can detect no error on the part of the UNDT. We affirm the Judgment of the Dispute Tribunal and dismiss the appeal. Because of our foregoing decision, no questions of further relief for the Appellant arise. Specifically, our conclusion that the UNDT did not make any errors of law or fact in dismissing Ms. Gueben's challenge of the decision not to grant him a permanent appointment precludes the Appeals Tribunal from awarding compensation. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".⁹

⁹ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 34, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, in turn citing *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein; see also *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420, para. 20; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095, para. 23.

Judgment

50. The appeal is dismissed and Judgment No. UNDT/2019/124 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar