



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D APPEL DES NATIONS UNIES

JdgentNo. 2016-UNAT-696



Benser

(Respondent/Applicant)

v.

Secretary-General of the United Nations

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/016, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 8 March 2016 in the case of *Benser v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 9 May 2016, and Ms Aina Benser filed an answer on 10 June 2016.

Facts and Procedure

2. The facts found by the Dispute Tribunal read as follows: ¹

... The Applicant is a staff member in the General Service category [in the Department for General Assembly and Conference Management (DGACM)]. On 2 September 2008, the Applicant joined the Organization at the G-3 level on a ~~temporary~~ appointment in the Department of Management.

... In 2009 the Applicant ~~was~~ when an Administrative Assistant at the G-3 level, applied to sit a competitive examination for language reference assistants. This application was in response to [ST/IC/2009/27] the 2009 competitive examination for language reference assistants. That Information Circular informed staff members that the examination was being conducted under the framework of ST/AI/1998/4 [(Competitive examinations for the placement of general service) and related categories in particular occupational groups]... ²

... The Applicant successfully completed the competitive examination for language reference assistants and was placed on a list of successful candidates.

... On 1 May 2011, the Applicant was promoted to the G-4 level as an

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(Special Conditions for Recruitment or Competence Examination for Positioning Special definition, could not have been referring to

Placement of Candidates Scored in a 1 Language Skills. These positions by staff in the General Service category

6. The Dispute Tribunal erred in law in finding referred to in Staff Rule 4.16(b) are prohibited pursuant to successful completion of an Particular Occupational Group Examination AI is unrelated to the appointment of special language positions that are in the Professional (Competence Examinations for Recruitment Language Skills in the Professional Category) the Particular Occupational Group Examination examinations administered for the first time in a large variety of General Service competencies including bookkeeping to language assistance services

that positioning special language skills which staff in the General Service category are examination administered according to the . However, that Administrative Instruction age positions and has nothing to do with special al category. In contrast to ST/AI/1998/7 and Placement in Positioning Specific in the Special Language Examination AI), ion AI has a different purpose and goes orders to create lists of eligible candidates

7. The UNDT erred on two points in determining that the administrative instance comparable to ST/AI/2000/1, for staff in the General Service category as Information Circular ST/IC/2009/27. First, it is an error to equate an information circular in an administrative instance, as the former holds a lower position in the non-hierarchy of the Organization. Secondly, while ST/AI/2000/1 lists the positions that can be filled exclusively by the competence examinations administered according to ST/AI/1998/7 and provides explicit reference to the conditions for conversion to permanent appointment ST/IC/2009/27, on the other hand, applied only to one examination scheduled on 9 October 2009 and did not mention conversion of fixed-term appointments to continuing appointments

8. In the present case, Ms Bensrafiachieved pursuant to an examination administered according to the Particular Occupational Group Examination AI; he was not tied to a position which falls under the exception set forth in Staff Rule 4.16(b). Consequently, he is not eligible for conversion to a continuing appointment after two years of service.

9. The Secretary-General requests that the Appeals Tribunal accept Judgment No. UNDT/2016/016.

Ms. Benser's Answer

10. The Secretary-General sought to litigate the case by relying on new evidence and arguments not cited to the Dispute Tribunal. Before the UNDT, he did not address the 2006 Report as evidence, nor did he argue that the relevant General Assembly resolutions should be interpreted by reference to that report. For this reason alone, his appeal should be dismissed.

11. The General Assembly's reliance on the definition of language posted in the 2006 Report. Yet its resolutions made no reference to language posted as defined by the Secretary-General. They referred to staff for language services. Indeed, none of the proposed reasons concerning appointments in the terminology language posted or make reference to the 2006 Report's definition. The Secretary-General's reliance on the 2006 Report's definition is therefore an illegal basis.

12. The use of different terminology by the General Assembly indicates that its resolutions were referring to something different than language posted. In contrast to language posted, language services is a reference to an organizational unit rather than specific posts.

13. The UNDT's finding that Ms. Benser's work in language services is not covered by the Secretary-General and therefore does not form part of her present appeal. Since her work in language services is the relevant General Assembly's resolutions clearly apply to her.

14. The prevailing practice until Ms. Benser refused a continuing appointment was to grant language reference assignments a continuing appointment after two years probationary period, such as in the case of her two language reference assignment colleagues. The Secretary-General does not contest the UNDT's finding in his regard. Consequently, he cannot challenge his finding on appeal.

15. The Dispute Tribunal correctly found that the coparticipation examination by which Ms. Benser was cited fell under the provisions of Staff Rule 4.16(b).

16. The Secretary-General has failed to identify any proposed issue that establishes the differentiation between General Secretariat and Professional Staff. The differentiation does not exist in law.

17.

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Secretary-General contends that the 2006 Report, which includes a section on the definition

Do Staff Rules 4.14(b) and 4.16(b) apply to staff at the General Service level?

36. Staff Rules 4.14 and 4.16 operate in implementation of General Assembly resolutions 63/250 and 65/247.

37. Staff Rule 4.14 on continuing appointments provides

- (a) A continuing appointment is an open-ended appointment
- (b) Staff members cited upon the completion of a competitive examination pursuant to Staff Rule 4.16 shall be granted a continuing appointment after a year on a fixed-term appointment subject to satisfactory service.
- (c) The Secretary-General shall prescribe the criteria determining staff members' eligibility for consideration for continuing appointments

38. Staff Rule 4.16 on competitive examinations sets

- (a) Boards of examinations established by the Secretary-General shall ensure the equality of the competitive examinations administered in accordance with the conditions established by the Secretary-General.
- (b) Boards of examinations shall make recommendations to the Secretary-General in respect of the following:

- (i) Appointment
appointments to P-1 and P-2 posts shall be subject to the most desirable ranges and to possessing special language competence at the United Nations Secretariat shall be made exclusively through competitive examination. Appointments to posts at the P-3 level in the United Nations Secretariat shall be made normally through competitive examination;

- (ii) Recruitment at the Professional category of staff from the General Service and related categories in the United Nations Secretariat
recruitment to the Professional category at the United Nations Secretariat of staff from the General Service and related categories shall be made in the appropriate competitive examinations shall be made in the lists established by the General Assembly. Recruitment shall be made exclusively through competitive examination.

- (c) Staff members appointed to the Professional category after a competitive examination shall be subject to mandatory resignation under conditions established by the Secretary-General.

39. Staff Rule 4.14(b) does not make any distinction between General Service level and Professional level staff recruited on the basis of a competitive examination.

40. Pursuant to Staff Rule 4.14 (b), a staff member in the language services needs to satisfy the following mandatory conditions to be granted a continuing appointment (a) he/she in the United Nations Secretariat is recruited on the basis of a competitive examination pursuant to Staff Rule 4.16; (b) he/she is appointed on a fixed-term appointment and (c) he/she has been satisfactory.

41. We therefore agree with the UNDT's finding that Staff Rule 4.14(b) applies to all appointments possessing special language competence in the United Nations Secretariat including appointments to posts such as Ms Bensipos.

42. Staff Rule 4.16(b)(i) applies to (a) the appointment of P-1 and P-2 level posts that are subject to the normal recruitment process at the United Nations Secretariat and to (b) the appointment to posts possessing special language competence in the United Nations Secretariat.

43. Staff Rule 4.16(b)(i) makes no distinction between posts possessing special language competence at the General Service level and posts possessing special language competence at the Professional level. It follows that Staff Rule 4.16(b)(i) is applicable to all appointments possessing special language competence in the United Nations Secretariat including posts at the General Service level.

44. We find no error in the following reasoning of the UNDT in this regard: ¹¹

... Moreover according to the general legal principle of interpretation, *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish, the interpreter of the law cannot distinguish where the law does not distinguish and cannot create and/or add an exception to an established rule in a general applicability and hereby limit its area of application. The [Dispute] Tribunal considered that for Staff Rule 4.16 to apply only to P-level posts the first part of Staff Rule 4.16(b)(i) would have had a different content such as for instance: Appointments to P-1 and P-2 level posts that are subject

¹¹ *Ibid.*, para. 49.

to be a proof of deliberate bias and to P-level posing special language competence at the United Nations Secretariat shall be made exclusively through a comparative examination.”

45. The UNDT concluded, in ST/IC/2009/27, that the Information Circulars establishing the comparative examination taken by Ms Bensouda in that language assessment special language competences is found as a fact that the post to which Ms Bensouda was appointed as one posing special language competence.¹² The UNDT also made a finding that Ms Bensouda was working in language services.¹³ This is not disputed by the Secretary-General. Both General Assembly resolutions refer to staff from language services which applies to Ms Bensouda. We see no error in these findings.

46. We find that the following conclusions by the UNDT are factual and legally correct.¹⁴

... It is that [Ms Bensouda] was a staff member in the United Nations Secretariat (a) successfully completed a comparative examination pursuant to [Staff Rule] 4.16 ; (b) was appointed on a post which requires special language skills (c) successfully completed a two-year probationary period on a fixed-term contract as a Language Reference Assistant in DGACM; and (d) had provided satisfactory service. Pursuant to Staff Rule 4.14(b), he was therefore entitled to be granted a continuing appointment.

...

... The Tribunal concludes that after two years on a fixed-term contract in the language services of DGACM and a satisfactory service during his period, [Ms Bensouda] had the right to be granted a continuing appointment based on the standards provisions for para. 23 of General Assembly resolution 63/250 and para. 50 of General Assembly resolution 65/247.

47. It follows from the foregoing paragraphs that we find that the Secretary-General has failed to demonstrate any proof of bias by the United Nations Secretariat in its decision.

Original and ~~Authentic~~ Version: English

Dated ~~his~~ 28th day of October 2016 in New York, United States

(Signed)

Judge ~~Lin~~, ~~Priding~~

(Signed)

Judge ~~Thomas~~ Felix

(Signed)

Judge Knieim

Entered in the Register ~~his~~ 20th day of December 2016 in New York, United States

(Signed)

Weicheng Lin, Registrar