UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2013-UNAT-357

Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland

(Respondents/Appellants)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

[redacted]

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Respondents/Appellants: Self-represented

Counsel for Secretary-Gene

- On 29 October 2012, Mr. Philip Dygeus appealed and, on 15 January 2013, the Secretary-General answered (Case No. 2012-403).

- On 29 October 2012, Ms. Ann Elizabeth Sutherland appealed and, on 15 January 2013, the Secretary-General answered (Case No. 2012-404).

Facts and Procedure

3. The facts established by the Dispute Tribunal in Judgment No. UNDT/2012/129 (which are not disputed by the parties) read as follows:[2]

six ICTY staff members were considered and one of them was granted a permanent appointment.

... On 23 June 2009, the Secretary-General issued the Secretary-General's bulletin ST/SGB/2009/10 on "Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009".

... "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as of 30 June 2009" were

... At the XXXIst Session of the Staff-Management Coordination Committee ("SMCC") held in Beirut from 10 to 16 June 2010, it was "agreed that management [would] consider eligible Tribunal staff for conversion to a permanent appointment on a priority basis".

... On 12 July and 16 August 2010, the ICTY Registrar transmitted to the [ASG/OHRM] the names of 448 eligible staff members who had been found suitable for conversion by ICTY and who were therefore "jointly recommended by the Acting Chief of Human Resources Section" and the Registrar of ICTY.

... On 31 August 2010, the Deputy Secretary-General, on behalf of the Secretary-General, approved the recommendations contained in the Report of the SMCC XXXIst Session (...), including the recommendation that eligible ICTY staff would be considered for conversion to permanent appointments on a priority basis.

... Based on its review of the ICTY submissions of 12 July and 16 August 2010, OHRM disagreed with the ICTY recommendations and on 19 October 2010, it submitted the matter for review to the New York Central Review bodies ("CR bodies") — namely, the Central Review Board for P-5 and D-1 staff, the Central Review Committee for P-2 to P-4 staff, and the Central Review Panel for General Service staff - stating that "taking into consideration all the interests of the Organization and the operational reality of ICTY, OHRM [was] not in the position to endorse ICTY's recommendation for the granting of permanent appointment", as ICTY was "a downsizing entity and [was] expected to close by 2014 as set out in the latest report on the completion strategy of the Tribunal (A/65/5/Add.12) following the Security Council [R]esolution 1503 (2003)".

... In November and December 2010, the New York CR bodies reviewed the recommendations made for ICTY staff and concurred with the OHRM recommendation that the staff members not be granted permanent appointments.

... On 22 December 2010, in anticipation of the closure of ICTY, the Security Council adopted resolution 1966 (2010), establishing the International Residual Mechanisms for Criminal Tribunals, which is to start functioning on 1 July 2013 for ICTY, and should be "a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions". The [R]esolution also requested ICTY to complete its remaining work no later than 31 December 2014.

Secretary-General, up to the D-1 level, and to terminate appointments up to that level except for terminations under article X of the Staff Regulations". The UNDT held that "the authority 'to appoint staff', which was expressly delegated to the ICTY Registrar, necessarily included, absent a clear exception, the authority to grant permanent appointments", and that "in line with 'the desire of the Security Council to establish a fully independent judicial body' recalnS.in the

United Nations, Judgment No. UNDT/2012/130, *Longone v. Secretary-General of the United Nations*, and Judgment No. UNDT/2012/131, *Ademagic et al. v. Secretary-General of the United Nations*, each of which had been appealed by the Secretary-General (Secretary-General's appeals)[3] as well as by the affected individuals (individual appeals).[4]

11. The Appeals Tribunal further noted that all sixteen cases were related and that the panels assigned thereto had referred the cases to the full bench for consideration, having determined that they raised "a significant question of law" that warranted consideration by the Appeals Tribunal as a whole pursuant to Article 10(2) of the Statute of the Appeals Tribunal. Accordingly, the Appeals Tribunal decided to hold one oral hearing in all of the cases.

12. In Order No. 158 (2013), the Appeals Tribunal noted that as Judge Weinberg de Roca had recused herself from the cases and Judge Courtial would not attend the Fall session, the Appeals Tribunal "as a whole" would comprise five Judges for the purposes of these cases. In view of the time difference between New York and The Hague, the Appeals Tribunal scheduled the oral hearing as follows: the Secretary-General's appeals on the morning of 9 October 2013; and the individual appeals on the morning of 10 October 2013.

[3] Cases No. 2012-383, *Malmström et al. v. Secretary-General of the United Nations*, No. 2012-384, *Longone v. Secretary-General of the United Nations* and No. 2012-385, *Ademagic et al. v. Secretary-General of the United Nations.*

[4] Against Judgment No. UNDT/2012/129, *Malmström et al. v. Secretary-General of the United Nations*, the instant cases, namely:
Case No. 2012-394, Baig
Case No. 2012-395, Malmström
Case No. 2012-396, Jarvis
Case No. 2012-398, Goy
Case No. 2012-399, Nicholls
Case No. 2012-400, Marcussen
Case No. 2012-401, Reid
Case No. 2012-402, Edgerton
Case No. 2012-403, Dygeus
Case No. 2012-404, Sutherland

Against Judgment No. UNDT/2012/130, *Longone v. Secretary-General of the United Nations*:
Case No. 2012-397, Longone

Against Judgment No. UNDT/2012/131, *Ademagic et al. v. Secretary-General of the United Nations*:
Case No. 2012-393, Ademagic et al.
Case No. 2012-408, McIlwraith

Submissions

The Secretary-General's Appeal

13. The Secretary-General submits that the UNDT erred in law and in fact, and reached an unreasonable result in Judgment No. UNDT/2012/129.

14. He contends that the delegation of authority granted to the ICTY Registrar in 1994 did not include the authority to grant permanent appointments. The memorandum in question was an inter-office memorandum, to be construed as such, and made reference to the ICTY's restricted mandate and lifespan. No express exclusion of permanent appointments was required, because the authority granted was already limited in term, function and level. Moreover, the delegation of authority was never expanded to include granting permanent appointments and could not have been, given the "freeze" on permanent appointments then in force. Furthermore, ICTY staff were never intended to be offered permanent appointments, in view of the non-continuing nature of their functions.

15. The Secretary-General argues that the UNDT relied on obsolete rules, which had been revised in 2004 to make express mention of the "executive head" of programmes, funds and subsidiary organs having the authority to grant permanent appointments within such programme, fund or subsidiary organ. As the ICTY Registrar did not have the status of

The Respondents/Appellants' Answer to the Secretary-General's Appeal

17. The Respondents/Appellants submit that the Secretary-General has failed to show any error in the UNDT's finding that the ICTY Registrar had the delegated authority to grant

which requires alternative compensation to be set where the impugned decision concerns "appointment, promotion or termination".

24. In the alternative, the Respondents/Appellant

29. With respect to the quantum of the alternative compensation, however, the Secretary-General contends that it was "overly generous", that the argument that the Respondents/Appellants deserved more is not sustainable, and that, in fact, it should be vacated or reduced.

30. Furthermore, he argues that the UNDT was correct in not ordering compensation for pecuniary or non-pecuniary losses resulting from the impugned decision.

31.

> (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).

39. Invariably, with regard to the staff members in this appeal, their respective successive letters of appointment stated, *inter alia*: "You are hereby offered a Fixed-Term Appointment in the Secretariat of the United Nations, in accordance with the terms and conditions specified below and subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules."

40. Having made provision in the Staff Rules following A/RES/37/126 for the conversion

Section 1

Eligibility

To be eligible for consideration for conversion to a permanent appointment under the present bulletin, a staff member must by 30 June 2009:

(a) Have completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules; and

(b) Be under the age of 53 years on the date such staff member has completed or completes the five years of qualifying service.

Section 2

Criteria for granting permanent appointments

In accordance with 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 Charter.

Section 3

The ICTY exercise

45. On 11 May 2010, the ICTY Chief of Administration sent OHRM a list of the ICTY staff members deemed eligible for conversion to permanent appointment pursuant to Section 1 of ST/SGB/2009/10. Thereafter, the ICTY conducted ASG/ OHR,S

to establish practical and flexible personnel arrangements, compatible with United Nations rules and personnel policies, to give effect to the Statute.

2. Staff of [the ICTY], selected in accordance with the provisions of Article 101, paragraph 3, of the Charter after an appropriate selection procedure, shall have the status of officials of the United Nations under Articles V and VII of the Convention on the Privileges and Immunities of the United Nations. The Rules and Regulations of the United Nations, and the administrative issuances promulgated by the

the Secretariat", or that the Staff Rules in force as at 30 June 2009 encompass the criteria for conversion from fixed-term appointment to permanent appointment, does not, in the view of this Tribunal, militate against our finding that the ICTY Registrar was not conferred with the authority to grant permanent appointments. The purpose of former Staff Rule 104.12(b)(ii) and (iii) was to vest in *staff members* the opportunity of a permanent appointment, once eligibility and suitability criteria were met.

55. While the Dispute Tribunal placed reliance on the provisions of former Staff Rule 104.13(c) and 104.14(a)(i) in that they "expressly provide for permanent appointments to be granted by heads of 'subsidiary organs'" (and the ICTY is a subsidiary organ of the Security Council), the Appeals Tribunal nonetheless finds that even if it could be argued that as the "head" of a subsidiary organ, the ICTY Registrar could convert fixed-term contracts to permanent appointments, it remains the case that the authority delegated to the ICTY Registrar in 1994 was that "appointments should initially be on a short or fixed-term basis, not exceeding

The substance of the staff members' applications before the Dispute Tribunal

58. The Dispute Tribunal rescinded the contested decisions "without prejudice to the merits or substance of these decisions", and opined that "[s]ince the decision to grant a permanent appointment clearly involves the exercise of a discretion, it is not for the [Dispute] Tribunal to substitute its own assessment for that of the Secretary-General". It went on to state: "The rescission of the decisions therefore does not mean that the Applicants should have been granted permanent appointments, but that a new conversion procedure should be carried out."

59. Having determined that the ASG/OHRM (and not the ICTY Registrar) was the competent decision maker, the Appeals Tribunal considered whether the matter should be remanded to the UNDT on its merits, or whether the Appeals Tribunal itself should assess the merits of the impugned decision. Indeed, as an alternative to remanding the matter to the UNDT, both the Secretary-General (in his written and oral submissions) and the staff members (in their oral submissions) invite the Appeals Tribunal to deal with the merits.

60. The Secretary-General requests that we find that the staff members had no foreseeable chance of obtaining permanent appointments and that, accordingly, the ASG/OHRM reasonably exercised her discretion in refusing their conversion. He asks the Appeals Tribunal to dismiss the staff members' claims in their entirety.

61. The staff members argue that there is sufficient information before the Appeals Tribunal to make a determination in their favour, and order the granting of permanent appointments,

The ASG/OHRM's decision

64. The ICTY Registrar's recommendation of the staff members for conversion, pursuant to ST/SGB/2009/10, followed the determinations of the ICTY Registrar, and the ICTY HR department, that they were both eligible and suitable. There can be no dispute that the ICTY staff members were permitted to be so considered, notwithstanding some dissent in this regard at an early stage of the process. The question before the Appeals Tribunal is not whether the ICTY staff members were *eligible* for conversion but, rather, whether the determination of the ASG/OHRM that they were *not suitable* for conversion can withstand judicial scrutiny.

65. Each of the staff members who are the subject of the present Judgment received a letter, in identical terms, from the ICTY Registrar informing him or her of the decision taken by the ASG/OHRM to deny conversion. By way of example, the letter issued to Ms. Malmström on 6 October 2011 read as follows:

> Dear Susanne MALMSTROM,
>
> I wish to inform you that following 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 the downsizing of ICTY following the Security Council [R]esolution 1503 (2003).

66. ICTY staff members - like any other staff member – are entitled to individual, "full and fair" (in the lexicon of promotion cases) consideration of their suitability for conversion to permanent appointment. The established procedures, as well as thstaff mo18int1Ni.1n following ttaff [(fai)3(tta

conduct; their proven, or not proven, as the case may be, suitability as international civil servants; or the highest standards of efficiency, competence and integrity, as established in the United Nations Charter. Each candidate for permanent appointment was lawfully entitled to an individual and a considered assessment on the above basis before a permanent appointment could be granted or denied. This was their statutory entitlement and cannot be overridden or disregarded merely because they are employed by the ICTY.

68. It is patently obvious that a blanket policy of denial of permanent appointments to ICTY staff members was adopted by the ASG/OHRM

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> entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
>
> (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.[13]

82. We find that the substantive due process breaches in the ASG/OHRM's decision-making meet the fundamental nature test established in *Asariotis* and, as such, *of themselves* merit an award of moral damages. In assessing the quantum of such damages, the Tribunal takes into consideration the satisfaction being granted to the staff members, namely, that a new "suitability exercise" shall be conducted, with retroactive effect. This remedy – to a considerable extent – corrects the harm sustained by the staff members. Nevertheless, the Appeals Tribunal is persuaded that an award of damages is merited for the breach which occurred and, in all the circumstances, awards compensation in the amount of 3,000 Euros to each of the Respondents/Appellants. The Appeals Tribunal further holds that payment of compensation shall be executed within 60 days from the date of issuance of this Judgment to the parties. That failing, interest shall be applied, calculated as follows: five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment.

Judgment

83. The Appeals Tribunal vacates the Judgment of the Dispute Tribunal; rescinds the decision of the ASG/OHRM; remands the ICTY conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of each Respondent/Appellant within 90 days of the date of publication of this Judgment in accordance with the guidelines set out by the Appeals Tribunal herein; and awards each eace8Tuats.6(o)-2.3(5 l82 heA)409.g Tc 0.008 Tw 4.137 0 0 1 72.024 [illegible]