



Judgment No. 2020-UNAT-988

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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, filed an appeal with the Tribunal on 11 June 2012.

light of their proficiencies, qualifications, competencies, conduct and

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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

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 la

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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 Administration's decision to reassign him to UNAKRT was arbitrary, capricious or manifestly unreasonable. The UNDT therefore found in favor of the Administration's decision to reassign Mr. Gueben to UNAKRT.

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

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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

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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.² (ha)4ab7 (en)3s-1 (n l)3.7 (w)-1.7 (as)-0 (n)-5.9-6 (an)-6 (e 6T)0.5 (h)-9.2 (e)-4.3 (-4.h)

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 SOFEMC /Artifant KASAD (Pd) (8) (B) (93) (927) (a) (55-314;

