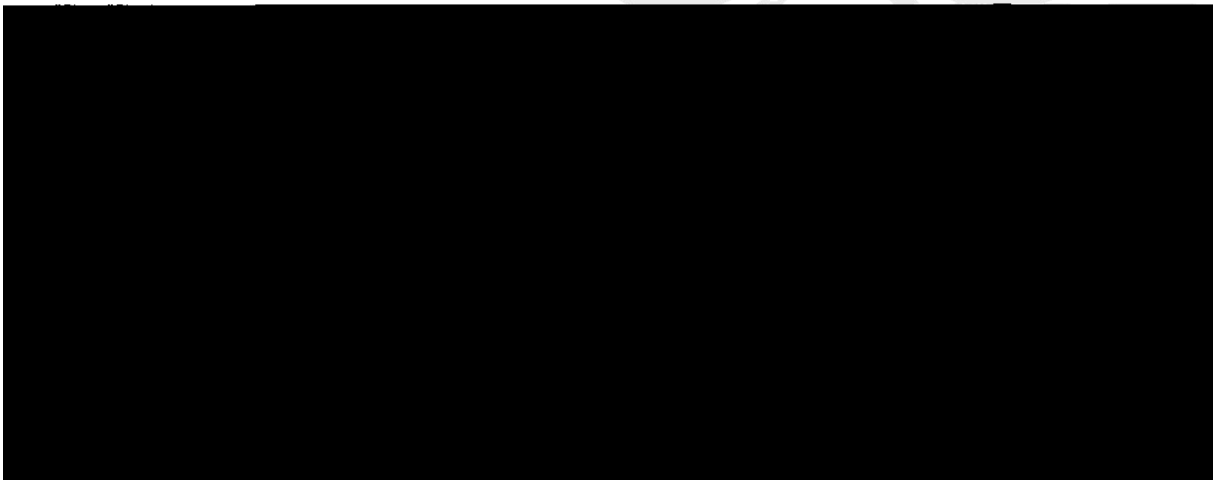


Judgment No. 2013-UNAT-375



Counsel for Mr. Schoone:

oEArduc (Case No. 2013-427)

On 21 May 2010, [Mr. Schoone] ~~was~~ offered a fixed-term appointment at the G-6 level with the United Nations Secretariat in New York. He accepted the offer on 22 June 2010.

On 1 July 2010, [Mr. Schoone] was informed that he was to resign from ICTY

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- (ii) joined the Secretariat on a transfer basis and were selected by the Secretariat following the regular staff selection process.

By letter dated 6 October 2011, the Registrar informed [Mr. Schoone] of the decision of the [ASG/OHRM] not to grant him a permanent appointment. The letter stated that:

This decision was taken after 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 Resolution 1503 (2003).

On 5 December 2011, [Mr. Schoone] requested management evaluation of the above-mentioned decision.

By letter dated 17 January 2012, which received on 19 January 2012, the Under-Secretary-General for Management informed [Mr. Schoone] that the Secretary-General had decided to uphold the decision not to grant him a permanent appointment.

On 18 April 2012, [Mr. Schoone] filed [his] application [with the UNDT].

3. The Dispute Tribunal conducted a joint hearing in this case together with several other cases filed by ICTY staff members, or staff members, against the common decision not to grant them permanent appointments.

4. The Dispute Tribunal took note of the fact that, on 20 May 1994, the Under-Secretary-General for Administration and Management granted the Acting Registrar of the ICTY the delegated authority to appoint staff, in the name of the Secretary-General, up to the D-1 level, and to terminate appointments up to the level except for terminations under article X of the Staff Regulations. In view of this discretionary authority, and in accordance with its decision in the related ICTY case, the UNDT found that the AS/OHRM was not the competent decision-maker to determine the granting of permanent contracts to ICTY staff members and, AS

substantive one and the fact that staff members eligible for conversion have no right to the granting of a permanent appointment but only that considered for conversion, which is a discretionary decision [in which] the Administration is bound to take into account all the interests of the Organization (see former Staff Rule 104.12(b) and section 2 of ST/SGB/2009/10), as well as the appeal realities of the Organization (see General Assembly resolution 51/226), UNDT set the compensation to be paid as an alternative to specific performance at 2,000 Euros.

6. The Dispute Tribunal indicated that it was aware of differences between [the other ICTY] cases and [that of Mr. Schoone, but saw] no reason to depart from [its consistent] findings :

While it is true that [Mr. Schoone] joined the United Nations Secretariat in New York on 2 September 2010, he was still in employ of ICTY at the time when his situation was reviewed to ascertain whether or not he met the criteria for conversion. Indeed, the ICTY Registrar and the Acting Chief of Human Resources recommended to the [ASG/OHRM] that [he] be granted a permanent appointment on 12 August 2010. The [ASG/OHRM] informed the ICTY Registrar of her decision not to grant [him] a permanent appointment on 20 September 2011 and [Mr. Schoone] was so informed on 6 October 2011.

ST/SGB/2009/10 does not provide for transitional measures in situations, such as the instant case, where an eligible staff member is assigned to a different department or office between the time when he or she is reviewed to ascertain whether he or she meets the criteria for the granting of a permanent appointment and the time when a final decision is taken by the relevant authority. However, legal certainty requires that ST/SGB/2009/10 be applied in a predictable manner and that, once the procedure foreseen in the Secretary-General's bulletin is initiated, it should be followed through.

Submissions

Mr. Schoone's Appeal

7. Mr. Schoone submits that the UNDT erred in determining that it was required to order alternative compensation to specific performance pursuant to Article 10(5)(a) of its Statute,

8. In the alternative, he contends that the amount of compensation set was inadequate, given the injury suffered, and that the UNDT erred in fact and in law in establishing compensation solely on the basis of procedural law. He argues that appropriate compensation would be equal to the termination indemnity which he would have been entitled at the projected end date of his ICTY service (which amounts at eight months gross salary); that failing, the Organization is given the opportunity to buy [its] way out of a contractual breach at a discounted rate .

9. On the merits of his case, Mr. Schoone states that the downsizing of the ICTY was irrelevant to his personal situation, as he had already moved to the United Nations Secretariat in New York at the time of the impugned decision. He submits that this move did not constitute a break in service , thereby interrupting his continuity of United Nations service, as he only resigned from the ICTY on the misleading advice of OHRM, which told him he was required to do so in order to be hired in New York. Moreover, there were only two days between his last day at the ICTY and his first day in New York.

10. Mr. Schoone avers that the ASG/OHRM orally introduced a policy of general application with her memorandum of 20 September 2011 and that, as such, her memorandum was not legally valid. In the alternative, he states that, as a locally recruited General Service staff member, he was not excluded from her decision regarding permanent appointments to those eligible ICTY staff who have been recommended for conversion by the Tribunal and have already been recruited to established posts in the Secretariat prior to and including 31 December 2010, and joined the Secretariat transfer basis and were selected by the Secretariat following the regular staff selection process. He contends that his move to New York amounted to a transfer .

11. Mr. Schoone requests the Appeals Tribunal to overturn the UNDT Judgment to the extent it provides the Secretary-General with the authority to pay compensation and to order the conversion process to proceed under the authority of the Registrar, as well as to find that he did not incur a break in service in moving to New York. In the alternative, he requests that the Appeals Tribunal reverse the UNDT award as insufficient and increase it to the applicable termination indemnity. Finally, he seeks an order of compensation in the amount of 20,000 Euros for pecuniary and non-pecuniary damages.

The Secretary-General's Answer

12. The Secretary-General submits that Mr. ~~Sob~~ had no foreseeable chance of being granted a permanent appointment, as the ~~Organization's~~ operational realities precluded it; as such, the UNDT erred in rescinding the decision and ordering compensation.

13. In the alternative, if the Appeals Tribunal ~~upholds~~ the UNDT's decision to rescind the impugned decision, then the Secretary-General ~~maintains~~ that the Dispute Tribunal was correct in concluding that, under Article ~~10(5)~~ of the UNDT Statute, it was bound to order compensation as an alternative to specific performance. ~~Mr. Schoone's~~ arguments on this ground are not sustainable.

14. However, the Secretary-General argues ~~that~~ compensation so ordered was overly generous, and Mr. Schoone's argument ~~that~~ ~~he~~ ~~received~~ more is not sustainable. In fact, he overstates his chance of being converted ~~into~~, voluntarily resigned from the ICTY; the likelihood of his conversion ~~on~~ ~~it~~ was negligible at best.

15. The Secretary-General contends that the UNDT was correct in not ordering other compensation, for pecuniary or non-pecuniary ~~under~~ ~~Article~~ ~~16~~ () ~~TJ~~285.5(g from tko6.7(76 Tc .1862 Tw [(Ho

The Secretary-General's Appeal

18. The Secretary-General submits that the UNDT erred in law and in fact, and reached an unreasonable result in Judgment No. UNDT/2012/162.

19. He explains that the delegation of authority 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 made reference to the ICTY's restricted

Mr. Schoone's Answer

23. Mr. Schoone submits that the Secretary-General has failed to show any error in the UNDT's finding that the Registrar had (non-revoked) delegated authority to grant permanent contracts to ICTY staff members. The Tribunal was correct in its conclusion: the 1994 memorandum stated that the Registrar delegated authority to appoint staff and this must be read in the context of the Staff Rules and Rules applicable at the time, which specified two Types of Appointment, namely temporary and permanent. No restriction on the granting of permanent appointments was included in the memorandum and it followed the practise in other parts of the United Nations. If the text is unclear, the *proferentum*, it should be interpreted in favour of the staff.

24. Mr. Schoone argues that the Secretary-General should be estopped from claiming that ICTY staff members were never intended for permanent appointment, in view of his own practise in considering ICTY staff members for and even granting at least one permanent appointment. Mr. Schoone notes that ICTY staff members were specifically excluded from consideration for the newly-introduced continuing appointments for the first time in August 2012, which would not have been so had they always been so excluded.

25. Mr. Schoone contends that, in implementing an online portal for ICTY staff members eligibility for conversion to permanent appointment, either the ICTY Registrar was acting pursuant to his delegated authority, or he was acting under the instruction of OHRM and a legitimate expectation was created that ICTY staff members would be considered.

26. Mr. Schoone asserts that his resignation and *break* are irrelevant to this case: the letter advising him he was not eligible for conversion to a permanent appointment made no reference to these events and he resigned only because the Organization required him to do so in order to take up his position in New York. Under the circumstances, his resignation (under duress) was for the administrative convenience of the United Nations and cannot be used to deny him a permanent appointment.

27. Mr. Schoone requests the Appeals Tribunal to dismiss the appeal, without costs.

Considerations

28. The Appeals Tribunal did not consider it necessary to hold an oral hearing in these cases and, accordingly, denies Mr. Schoone's request for same.

29. The instant matter is *prima facie*, similar to the related cases disposed of by the Appeals Tribunal at this same Fall 2013 session: *Marriström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357; *Zongone v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-358; and *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359.

32. Where Mr. Schoone's situation differs, ~~how~~ with respect to remedy. In Malmström et al., Longone and Ademagic et al., the Appeals Tribunal rescinded the impugned decisions and remanded the matter to the ASG/OHRM ~~to~~ consider each of the staff members and provide written, reasoned, individual and ~~timely~~ decision[s]. Mr. Schoone is not entitled to such remedy: although he had initially been ~~eligible~~, and suitable, for conversion by the ICTY Registrar, by resigning mid-process, he ~~rendered~~ himself ineligible for further review. His resignation in order to take up functions ~~in a~~ duty station which he did not protest in any timely fashion effectively ended his rights ~~to~~ consideration for a permanent appointment.

33. Nor is Mr. Schoone entitled to compensation ~~for~~ non-pecuniary damages, as awarded to the litigants ~~in~~ Malmström et al., Longone and Ademagic et al. Not only did he not request moral damages before the Dispute Tribunal, ~~but~~ he claim to have so suffered, given his voluntary departure from the ICTY.

34. Insofar as Mr. Schoone's claims regarding ~~his~~ resignation and break in service, and his submission that his move to New York amounted ~~to~~ a transfer, are concerned, these issues are not properly before the Appeals Tribunal, not having been the ~~subject~~ of a timely request for management evaluation.

35. For the foregoing reasons, Mr. Schoone's ~~appeal~~ Case No. 2013-427 is dismissed.

Judgment

36. The Appeals Tribunal upholds the appeal ~~of~~ the Secretary-General and vacates the UNDT Judgment. Mr. Schoone's appeal is rejected in its entirety.

⁷ See Servas v. Secretary-General of the United Nations, Judgment No. 2013-UNAT-349.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 15th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar