UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

McIlwraith ***et al.***

(Appellants)

v.

Secretary-General of the United Nations

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The present case arises from the Secretary-General's decisions not to grant permanent appointments to the 179 Appellants in this case (*McIlwaine et al*) who are former staff members of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. The professional language staff members were denied retroactive conversion of their fixed-term appointments into permanent appointments because they lacked suitable "transferrable skills" in that they did not have the language skills needed for language positions within the Secretariat; either because they had not passed the Language Competitive Examination (LCE) and/or they only possessed skills in unneeded language combinations such as Bosnian, Croatian, Serbian (BCS). The general service Appellants were found to not be suitable for alternative positions within the Secretariat because there were no career prospects at their duty station and they lacked mobility due to their local recruitment and/or they possessed unneeded language skills. In Judgment No. UNDT/2019/022, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found the Secretary-General's decisions to be lawful and dismissed the joint application. We affirm the UNDT's Judgment.

Facts and Procedure

2. The decisions contested before the UNDT that give rise to the present appeal followed two rounds of litigation and were taken in response to Appeals Tribunal Judgment No. 2016-UNAT-684 in the case of *Adeni et al v Secretary-General of the United Nations*.

3. The 179 Appellants in this appeal were staff members on fixed-term appointments at the ICTY in The Hague.

4. The ICTY was established by Security Council resolution 827 (1993). By resolution 1503 (2003) the Security Council endorsed the ICTY completion strategy and urged the ICTY to take all possible measures to complete its work in 2010. In December 2010, in anticipation of the closure of the ICTY, the Security Council adopted resolution 1966 (2010) establishing the International Residual Mechanism for Crimin

5. In 2009, the Organization undertook an exercise within the Secretariat by which eligible staff members would be considered for conversion of their contracts to permanent appointments. To this end, on 23 June 2009 the Secretary-General promulgated 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).

6. The preamble of ST/SGB/2009/10 stated that the Bulletin was being promulgated for the purposes of implementing former Staff Rules 104.12(b)(iii) and 104.13 on consideration of staff members for permanent appointments. The scope of the Bulletin was limited to staff members who were eligible for such consideration by 30 June 2009. Section 1 of ST/SGB/2009/10, read with former Staff Rules 104.12(b)(iii) and 104.13, provided that to be eligible for consideration for conversion to a permanent appointment a staff member had to have completed five years of continuous service on fixed-term appointments under the former 100 series of the Staff Rules and be under the age of 53.

7. Section 2 of ST/SGB/2009/10 specified the criteria for granting permanent appointments. It provided that 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".

8. In May 2010, in accordance with the provisions of ST/SGB/2009/10, the ICTY submitted, to the Office of Human Resources Management (OHRM) at the United Nations Headquarters in New York, a list of staff eligible for conversion to a permanent appointment. In July and August 2010, the ICTY Registrar transmitted to the Assistant Secretary-General, OHRM (ASG/OHRM) the names of 448 eligible ICTY staff members, including *McIlwee et al*. who had been found suitable for conversion by the ICTY. Upon review, OHRM disagreed with the ICTY's recommendations and referred the cases to the New York Central Review Bodies (CR bodies), which concurred with OHRM's recommendation that none of the eligible ICTY staff members be granted permanent appointments. In September 2011, the ASG/OHRM informed the ICTY Registrar that she had decided that it was in the best interests of the Organization to accept the CR bodies' endorsement of the recommendation by OHRM on the non-suitability for conversion of ICTY staff.

9. The Appellants, together with others, challenged the decisions before the UNDT, which issued the following three judgments: *Matadin et al*, Judgment No. UNDT/2012/129; *Lauga*, Judgment No. UNDT/2012/130 and *Adeniji et al*, Judgment No. UNDT/2012/131. The UNDT found that the ASG/OHRM was not the competent authority to make the impugned decisions, as the USG had delegated such authority to the ICTY Registrar. On this ground, the UNDT rescinded the contested decisions and, considering that they concerned an appointment matter, set an alternative compensation in lieu of effective rescission per Appellant.

10. The UNDT's judgments were subsequently appealed to the Appeals Tribunal which issued several judgments including *Adeniji et al and McIlwain*, Judgment No. 2013-UNAT-359 (the 2013 Judgment). The Appeals Tribunal found that the power to decide on the conversion of ICTY staff appointments into permanent appointments had not been delegated to the ICTY Registrar and that, hence, the ASG/OHRM was the competent authority to make the decisions at stake. However, the Appeals Tribunal also concluded that placing too great a reliance on the operational realities of the Organization to the exclusion of all other relevant factors amounted to discrimination against ICTY staff members and violated their right to be fairly, properly and transparently considered for permanent appointment. The Appeals Tribunal thus was not persuaded that the staff members received appropriate individual consideration in the assessment of "suitability". The candidatures for permanent appointment were not reviewed by OHRM against the criteria of performance, qualifications and conduct. A blanket policy of denial of permanent appointments to ICTY staff members was adopted simply because the ICTY was a downsizing entity with a finite mandate. The Appeals Tribunal thus held that the ASG/OHRM had unlawfully fettered her discretion by her reliance, to the exclusion of all other relevant factors, on the ICTY's finite mandate. Accordingly, it rescinded the decision of the ASG/OHRM, remanded the ICTY conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of the concerned staff members within 90 days of the publication of its Judgment, and awarded to each Appellant EUR 3,000 in non-pecuniary damages.[1]

[1] In March 2014, the Secretary-General submitted to the Appeals Tribunal a motion for extension of time to execute its judgment's order to consider ICTY staff members for permanent appointments, arguing that, due to the complexity of the review and the high volume of staff members involved, it was not feasible to complete such consideration 90 days of the issuance of the judgment. After seeking and obtaining further information on the implementation steps undertaken thus far, the Appeals Tribunal, by Order No. 178 (2014) of 2 April 2014, extended until 19 June 2014 the Secretary-General's deadline for completion of the conversion process.

11. After further consideration by OHRM and review by the CR bodies, the ASG/OHRM in June 2014 wrote to all the staff members concerned and informed them of the decisions not to grant any of them retroactive conversion of their respective fixed-term appointments into permanent appointments. All the letters stated that the respective staff members fulfilled the performance, conduct and qualifications criteria but did not meet the criterion that the granting of a permanent appointment be in accordance with the interests of the Organization.

12. On 4 July 2014, the staff members filed a motion with the Appeals Tribunal seeking execution of the 2013 Judgment. The motion was dismissed by the Appeals Tribunal in Judgment No. 2014-UNAT-494. The Appeals Tribunal held that the orders in the 2013 Judgment had been executed since payment of moral damages had been effected, and a new conversion process had been completed. The Appeals Tribunal held further that recourse for complaints regarding the conversion process undertaken after the 2013 Judgment was "***n*** to be found in an application for execution but rather in former Staff Rule 11.2 ... [that] provides the mechanism whereby the complained-of decisions of the ASG/OHRM [could] be challenged by the affected staff members".[2]

13. Accordingly, the staff members returned to the UNDT to challenge the second round of the Administration's review. In Judgment No. UNDT/2015/115 dated 17 December 2015, the UNDT held that the contested decisions denying conversion of the staff members' fixed-term appointments to permanent ones were unlawful, primarily because once again there had not been individual consideration of their proficiencies, qualifications, competencies, conduct and transferrable skills. The decisions were "exclusively based on the limited mandate of ICTY, to the exclusion of all other relevant factors".[3] The UNDT rescinded the contested decisions and remanded the matter to the ASG/OHRM for retroactive individualized considee l8.2022 6rar6d3.9(e l

14. On 30 June 2016, the Appeals Tribunal issued *Adeniji et al*, Judgment No. 2016-UNAT-684 (the 2016 Judgment) partially affirming the UNDT Judgment. It remanded the matter to the ASG/OHRM "for retroactive individualized consideration" of the concerned staff members' suitability for conversion of their appointments to permanent appointments as mandated by ST/SGB/2009/10 within 90 days from the publication of the 2016 Judgment. The ASG/OHRM was directed to consider, on an individual and separate basis, each staff member's respective qualifications, competencies, conduct and transferrable skills and not to give predominance or overwhelming weight to the consideration of the finite mandate of the ICTY/MICT so as to fetter or limit the exercise of discretion in deciding whether to grant a permanent appointment to any individual staff member. The Appeals Tribunal vacated the award of moral damages.

15. Following a third round of the conversion exercise reconsidering 255 former ICTY staff members for permanent appointments as at 2011, the ASG/OHRM granted permanent appointments limited to the ICTY to 45 professional staff members. 35 professional staff and 175 general service staff, including the 179 Appellants in the present case, were denied permanent appointments.

16. Of the 179 Appellants, 27 held appointments in the professional category. However, they were all language staff. They were denied retroactive conversion of their fixed-term appointments into permanent appointments because they lacked suitable "transferrable skills" in that they did not have the language skills needed for language positions within the Secretariat as at September 2011; either because they had not passed the Language Competitive Examination (LCE) and/or they only possessed skills in unneeded language combinations such as Bosnian, Croatian, Serbian

18. Although the 129 general service non-language Appellants were found to have the qualifications and background that would possibly have made them suitable for positions in duty stations outside The Hague as at September 2011, they were denied permanent appointments because in terms of the relevant Staff Rules they were not entitled to be transferred to positions outside The Hague since they were locally recruited.

19. The 23 general service language Appellants were found to not be suitable for alternative positions within the Secretariat because in addition to lacking mobility due to their local recruitment they too possessed unneeded language skills.

20. The 179 Appellants filed their joint application before the UNDT on 11 May 2017.

21. On 20 February 2019, the UNDT issued Judgment No. UNDT/2019/022, dismissing the application. The UNDT held that that the Appellants had been given individualized full and fair consideration for permanent appointments and that the contested decisions were lawful and in accordance with the directions of the 2016 Judgment.

22. The UNDT found that the Administration's tying of the Appellants' suitability for permanent appointments to future service exclusively within the Secretariat was not unreasonable or discriminatory and that the Administration had not abused its discretion in limiting its examination of the Appellants' transferrable skills to existing positions outside the ICTY and the MICT. It was not in the interests of the Organization to grant the general service appellants permanent appointments considering their lack of career prospects at their duty station, which in the context amounted to a lack of transferrable skills. While the UNDT acknowledged that the Staff Rules did not bar the possibility of transferring a locally recruited staff member to another duty station, their application is discretionary and bears important financial implications for the Organization. The consideration of the general service Appellants' mobility did not amount to the addition of a new criterion for assessing their suitability for permanent appointments, but was an element taken into consideration in assessing their transferrable skills. While the Appellants challenged the assertion that the MICT was not part of the Secretariat, the UNDT found that the authority of the ASG/OHRM to transfer the appellants to the MICT was not material, as the MICT did not offer long-term career opportunities to the Appellants.

23. Finally, the UNDT found that the Administration did not commit any errors in the consideration of identified individual cases by misstating the facts or not taking into account relevant facts.

24. The UNDT concluded that the Appellants had been given individual "full and fair" consideration of their suitability for conversion to permanent appointment and there was no evidence that their rights had been violated in the 2016 reconsideration exercise. The UNDT accordingly rejected the joint application.

25. *McIlwraith et al.* filed their appeal on 18 April 2019, and the Secretary-General filed his answer on 21 June 2019.

Submissions

McIlwraith et al.'s Appeal

26. The Appellants submit that the UNDT erred in failing to apply the established procedures for the determination of suitability. The suitability of the Appellants should have been assessed under the established procedures used to assess all staff members considered in the one-time exercise pursuant to ST/SGB/2009/10. Pursuant to these procedures, there were two checkboxes to affirm that the staff member had met or exceeded his or her performance goals9 Tc.0056m913 0

eligible to be considered in 1995) which applied two suitability criteria which it listed in its guidelines and a checkbox assessment form: the staff member had to meet or exceed his or her performance goals in the relevant time period and had no administrative or disciplinary measure taken against him or her. These criteria were applied to ICTY staff members whereby a permanent appointment for an ICTY staff member followed three years after downsizing had been announced and only three years before the anticipated closure date. The 2009 exercise was controlled by Secretary-General's Bulletin ST/SGB/2009/5 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) which is virtually identical to ST/SGB/2006/9. While the two Secretary-General Bulletins are identical and consistent with former Staff Rule 104.13, the Administration added the interests of the Organization as an individual criterion in 2010 through internal memoranda.

28. The General Assembly has never adopted a rule change which altered the suitability criteria. Thus, a suitability determination based on the established checkbox procedure does not require consideration of the interests of the Organization.

29. Should the Appeals Tribunal find that its bespoke test for ICTY staff members is the appropriate measure for suitability, the UNDT erred in law and fact when finding that the Appellants' suitability could be tied exclusively to future service outside of the ICTY and MICT. Tying suitability not to the individual qualities of the Appellants but to a future position outside of the ICTY based on the staffing needs of the Organization in autumn 2011 is no more than a repackaged exclusive reliance on downsizing. This system makes any and all qualifications, competencies, conduct and transferrable skills moot and is a discriminatory exercise. The UNDT erred in law when allowing for no consideration to be given to the needs of the ICTY and MICT.

30. The Appellants have for a third time been discriminated against because of the nature of the entity in which they were employed. The impugned decisions are tainted by arbitrariness and violate the Appellants' due process rights. They are therefore legally void. The Appellants should be granted an effective remedy which should be specific performance of the conversion of their appointments to permanent and/or compensation for the discrimination to which they have been subjected. The Appeals Tribunal now has sufficient factual information demonstrating that the established procedures for consideration of the Appellants is the use of the two checkbox suitability criteria found in the Administration's guidelines for the ST/SGB/2009/10 conversion

exercise. As the Administration found the Appellants individually eligible and suitable under the checkboxes, the sole legal outcome must be conversion to permanent appointment.

31. Were the Appeals Tribunal to find that its bespoke test must be maintained, the Appellants request compensation on the ground that the Administration failed to conduct a non-discriminatory assessment as required by the Appeals Tribunal. Accordingly, the Appellants request compensation in the amount of each Appellant's termination indemnity.

32. Finally, as discrimination is a separate and distinct cause of action from the breach of a staff member's due process rights, the Appeals Tribunal should compensate the Appellants with both specific performance/termination indemnity and additional monies related to the discrimination itself.

The Secretary-General's Answer

33. The UNDT correctly found that the contested decisions were lawful. The UNDT's conclusion is in accordance with General Assembly resolution 51/226, former Staff Rule 104.13, and ST/SGB/2009/10.

34. The Secretary-General considered all relevant staff members eligible for a permanent appointment and limited the review to these staff members' suitability for conversion. The Secretary-General reviewed the case file of each individual staff member, considering each staff member's proficiencies, competencies, and the transferability of their skills and refrained from giving undue weight to the downsizing of the ICTY or the MICT's limited mandate.

35. The UNDT did not err in finding that the Secretary-General had properly taken into consideration the interests of the Organization when determining the suitability of the Appellants for permanent appointment. Contrary to the appellants' claim, ST/SGB/2006/9 clearly provides in Section 2 that "[i]n 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". The "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered in 1995" (the 2006 Guidelines) refer directly to the requirement that the interests of the Organization be taken into consideration in ST/SGB/2006/9, repeating the provisions of Section 2 verbatim. ST/SGB/2009/10 contains the same provision.

36. Contrary to the Appellants' contention, the sample review form attached to the 2006 Guidelines and to the "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as of 1 July 2009" (2009 Guidelines) does not reveal that the procedure used to determine the suitability of staff members solely included reviewing whether each staff member had met his or her performance requirements and whether disciplinary measures had been imposed on such staff member. That form attached is only intended for the managers of individual staff members. Such managers are best positioned to opine on the personal history of each staff member, the quality of each staff member's work and his or her disciplinary history but are ill-situated to determine whether the interests of the Organization would be served by the grant of a permanent appointment to the individual staff members under their supervision. The interests of the Organization were taken into consideration by OHRM at an organizational level upon receipt of the managers' recommendations regardnee

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performance and conduct. Guideline 3 of the 2009 Guidelines provides that the determination of whether a staff member has met the high standards of competence and efficiency will be based on the five most recent performance evaluations of the staff member on record. Guideline 4 of the 2009 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.

46. The terms of these provisions therefore confirm the correctness of the submission of the Secretary-General that it is not only permissible but necessary to take into consideration the interests, needs and operational realities of the Organization when determining the suitability of staff members for permanent appointment. Former Staff Rules 104.12(b)(iii) and 104.13, ST/SGB/2009/10 and the 2009 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 submission of the Appellants that the interests of the Organization are irrelevant or should be given lesser weight than the other factors. Accordingly, the criteria or relevant considerations at play in this matter are the interests and operational realities of the Organization and the competence of the Appellants, including their transferable skills. There is no dispute about their efficiency or integrity.

47. The UNDT held that it was legal and rational for the ASG/OHRM to require the Appellants to demonstrate that they possessed transferable skills qualifyi

50. As for the staff members denied permanent appointments due to their local recruitment, the rules of the Organization dictate a distinct approach to the appointment and retention of locally recruited staff. The General Service category consists of functions undertaken by persons recruited from local labour markets. Appendix B to the former 100 Series Staff Rules provides in pertinent part:

> Conditions governing local recruitment
>
> Pursuant to rule 104.6:
>
> (i) Staff members who have been recruited to serve in posts classified in ... the General Service cateo

53. Appendix B to the former 100 Series Staff Rules provides three scenarios in which locally recruited staff may be considered internationally recruited. But this will have significant financial implications. Former Staff Rule 104.6(b) provides that a staff member subject to local recruitment shall not be eligible for the allowances or benefits applicable to staff in posts subject to international recruitment in

Judgment

55. The appeal is dismissed and Judgment No. UNDT/2019/022 is affirmed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding	Judge Raikos	Judge Colgan

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar