UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-692

Gueben et al.
(Respondents/Applicants)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Counsel for Gueben et al.: Robbie Leighton, OSLA

Counsel for Secretary-General: Zarqaa Chohan
Carla Hoe
Rupa Mitra

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations of Judgment No. UNDT/2016/026, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Genev2 UIn

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unreasonable and impossible to provide. The merefact that the same conclusion was reached for all of Gueben et al. does not demonstrate a lack of individual consideration of their conversion requests. The Dispute Tribunal should have simply examined whether the contested decisions were lawful. In this regard, the Secretary-General notes that the Administration requested the UNDT to call two material witnesses to testify to th at end, but the UNDT declined that request.

7. The Dispute Tribunal erred in law because it usurped the discretion of the O-i-C/OHRM to grant or deny conversion of Gueben et al.'s fixed-term appointments to permanent ones by improperly assigning weight to various factor s for consideration. It also usurped the O-i-C/OHRM's discretion by making a number of substantive evaluations of Gueben et al.'s transferrable skills, proficiencies and competencies. The granting of a permanent appointment is a long-term decision requiring the significant exer cise of discretion by the O-i-C/OHRM. Such exercises of discretion are subject to only a limited judicial review. It was for the OIC/OHRM to assign the due and adequate weight to each criterion she considered, including UNAKRT's finite mandate. If she decided that UNAKRT's finite mandate should be the predominant factor in her weighing process, or that it should weigh more heavily than other factors, or even that it should override certain factors, such decisions would be well within her discretion; they would not violate the applicable legal framework or contravene the Malmström et al. Judgment. Even if UNAKRT's finite mandate had been the predominant factor in the weighing process, it was not the exclusive factor.

8. The UNDT misconceived the facts and rulings in Alba et al.[6] and erred in law by conflating the source of funding for a staff member with a discretionary decision to attach a certain weight to aspects of the suitability criter ia and the interests of the Organization. The Secretary-General stresses that in deciding not to convert Gueben et al.'s appointments into permanent ones, the O-i-C/OHRM properly exercised her discretion in weighing the fact that Gueben et al. all held an appointment with service limited to UNAK RT, which had a finite mandate, against other criteria.

[6] Former Administrative Tribnal Judgment No. 712, Alba et al. (1995).

9. It was an error for the UNDT to conclude that the O-i-C/OHRM had authority to convert Gueben et al.'s fixed-term appointments to permanent ones with no limitation of service to UNAKRT. The UNDT misread Section 11 of ST/AI/2010/3[7] and paragraph 10 of the Guidelines, having failed to take into account Staff Rule 9.6(c)(i). Its conclusions are therefore misplaced.

10. The Dispute Tribunal improperly shifted the burden of proof, misconceived the purpose of the permanent appointment regime, and lost sight of what the Administration was required to do: conduct an individualized and reasonable consideration, in respect of each of Gueben et al., as to whether to convert their fixed-term appointments to permanent ones under Secretary-General's Bulletin ST/SGB/2009/10.

11. The Dispute Tribunal erred in granting moral A3bunal moraletRIBUI

15. The Dispute Tribunal did not err in awarding moral damages. The present case is distinguishable from Ademagic et al.,[8] in that it has been sufficiently substantiated with specifics that Gueben et al. had suffered moral harm resulting from the non-conversion decisions. The Secretary-General did not contest the fact that these harms had been suffered, and he should be estopped from now arguing that Gueben et al. failed to provide sufficient evidence of harm. If the Appeals Tribunal agrees to the arguments made by the Secretary-General regarding the insufficiency of the evidence for the award of moral damages, the only appropriate course of action is to remand the present case to the Dispute Tribunal for a hearing regarding this discrete issue.

16. Gueben et al. request an expedited review of their cases in light of Ademagic et al., which is dispositive of the appeal. They also request that the Appeals Tribunal uphold Judgment No. UNDT/2016/026 in full.

Considerations

17. The crux of this appeal is whether the Administration's purported de novo consideration of the suitability of the applicant staff members for permanent appointments constituted an individual review giving every reasonable consideration to the staff members' proficiencies, competencies and transferrable skills.

18. On appeal, the Secretary-General contends that the UNDT erred:

In placing undue significance on the wording of the respective notification letters;
In usurping the discretion of the O-i-C/OHRM;
In concluding that the O-i-C/OHRM had authority to convert Gueben et al.'s fixed-term appointments to permanent ones with no limitation of service to UNAKRT;
In improperly shifting the burden of proof; and
In awarding moral damages.

[8] Ademagic et al. v. Secretary-General of the United Nations, Judgment No. 2016-UNAT-684 (full bench).

19. The UNDT based its decision on the guidelines prescribed by the Appeals Tribunal in *Malmström et al.*,[9] namely:

a. Each staff member was entitled to receive a "written, reasoned, individual and timely decision, setting out the ASG/OHRM's determination on his or her suitability for retroactive conversion from fixed-term to permanent contract";[10]

b. Staff members were entitled to full and fair consideration of their suitability for conversion to permanent appointment;

c. The conversion exercise was remanded for retroactive consideration of the suitability of the staff members concerned;

d. Each candidate to be reviewed for a permanent appointment was lawfully entitled to an individual and considered assessment, or to individual full and fair consideration, and in doing so, "every reasonable consideration"[11] had to be given to staff members demonstrating the proficiencies, competencies and transferable skills rendering them suitable for career positions within the Organization; and

e. "The ASG/OHRM was not entitled to rely solely on the finite mandate of the ICTY … [Her] discretion was fettered by her reliance, to the exclusion of all other relevant factors, on the ICTY's finite mandate." "Thus, the ASG/OHRM was not entitled to place reliance on the 'operational realities of the Organization' to the exclusion of all other relevant criteria set out in Resolution 51/226."[12]

20. The UNDT correctly determined that *Tredici et al.* gave, by reference to *Malmström et al.* "a detailed legal framework concerning how to perform the ordered re-consideration" and that "[t]he legality of the contested decisions must therefore be appraised against the above-cited instructions".[13]

21. The UNDT found that, although *Malmström et al.* explicitly stTj 7 0.98 20. Tw [((l)12.2(x)12.3(ds)10.6(l)1

the nationalization of posts), instead of relating to their individual capabilities and service record".[16]

26. We agree with the UNDT's determination that the actual consideration afforded to the staff members' transferrable skills was minimal and inadequate and was not a meaningful consideration of their skills in keeping with *Tredici et al.* and *Malmström et al.*

27. The major reason for the remand of the cases was for the ASG/OHRM to specifically take into account each staff member's transferrable skills when considering his or her suitability for a permanent appointment. In our view, the failure of the Administration to do this, and to give any meaningful consideration to this criterion, is, of itself, sufficient to vitiate the contested decisions.

28. We find no fault with the UNDT's conclusion that:[17]

> [W]hile minimal consideration of some individual circumstances could be found, the qualifications, skills, competencies, experience and performance of the various Applicants were not adequately examined. At any rate, the consideration of factors specific to each Applicant appears partial and selective and, therefore, insufficient to fulfil the requirement of offering each Applicant an "individual full and fair consideration", and giving them "every reasonable consideration" based on proficiencies, competencies and transferrable skills rendering them suitable for career positions with the Organization, as instructed by the Tribunal.

Reasons relied upon in making the contested decisions

29. The reason given in the 24 November 2014 decision letters for not granting permanent appointments was the limitation of the staff members' appointments to UNAKRT, and the finite nature of UNAKRT's mandate.

30. The UNDT recognised that there was no question that, according to their respective letters of appointment, the staff members' service was limited to UNAKRT. Nevertheless, the UNDT found that the Administration could have elected to grant the staff members permanent contracts not limited to service with UNAKRT and would then have been free to reassign them without impediment. In coming to this conclusion, the UNDT considered the relevant

[16] *Ibid.*, para. 63.
[17] *Ibid.*, para. 67.

administrative issuances regarding the staff selection system, namely ST/AI/2010/3 and the Guidelines.

31. The UNDT relied on Section 11.1(b) of ST/AI/2010/3 as the mechanism for the potential reassignment of UNAKRT staff in case of abolition of their posts, concluding that there was "no absolute legal bar for the ASG/OHRM to move any of the Applicants, who held appointments limited to UNAKRT, to a different

35. The UNDT therefore concluded that the limitation of service to UNAKRT was incorrectly asserted to be an obstacle to the staff members' reassignment and, ultimately, to the conversion of their appointments to permanent.

36. The UNDT thus found that of the two grounds put forward by the Administration, the limitation of the staff members' fixed-term appointments to service in UNAKRT had been established to carry little weight.

37. The Secretary-General contends that the UNDT erred in law and misconstrued Section 11.1(b) of ST/AI/2010/3. He argues that Section 11.1(b) does not specify that the ASG/OHRM's exceptional authority extends to the placement of staff members outside of their particular department. Rather, it provides only that the ASG/OHRM would have authority to place staff members outside the normal staff selection process.

38. The Secretary-General further contends that the UNDT erred by failing to take into account Staff Rule 9.6(c)(i), which states:

> (c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:
>
> (i) Abolition of posts or reduction of staff[.]

In other words, the Secretary-General submits that the UNAKRT staff members, who were on fixed-term appointments with end dates, did not fall into the category of those whose "appointments [were] slated to be terminated due to abolition of posts, reduction of staff, funding cutbacks, or on any other grounds". Accordingly, the Secretary-General submits that the ASG/OHRM could have properly concluded that she could not place the staff members in another entity outside of UNAKRT.

39. Insofar as the UNDT relied on the contents of paragraph 10 of the Guidelines in determining that the ASG/OHRM could have given some UNAKRT staff members permanent appointments limited to service within UNAKRT and given other UNAKRT staff members permanent appointments with no service limitations, the Secretary-General argues that the Dispute Tribunal misread paragraph 10. He contends that the word "may" in paragraph 10 of the Guidelines is no more than a reiteration of the language in Section 2 of ST/SGB/2009/10, that "a

permanent appointment may be granted" to staff who meet the criteria for such appointments. Furthermore, the Secretary-General relies on the second sentence of paragraph 10 of the Guidelines, which states "[i]f the staff member is subsequently recruited under established procedures including review by a central review body for positions elsewhere in the United Nations Secretariat, the limitation is removed".

40. The staff members submit that the Secretary-General's arguments purporting to support his claim that the UNDT erred in ruling that the O-i-C/OHRM could have converted their fixed-term appointments to permanent ones with out a limitation of service to UNAKRT have already been advanced to the Appeals Tribunal in Ademagic et al.[21] The UNDT's reasoning in this case conforms exactly to that relied on in the ICTY cases and was endorsed by the Appeals Tribunal, as was the finding that the ASG/OHRM would have the power to transfer such staff members to a suitable post within the wider United Nations.

41. We find that the UNDT did not err in law or fact in its interpretation of the relevant provisions.

Did the Dispute Tribunal improperly substitute its discretion for that of the ASG/OHRM?

42. The Secretary-General contends that the UNDT usurped the discretion of the O-i-C/OHRM to grant or deny conversion of th e staff members' fixed-term appointments to permanent ones. In particular, the UNDT erred in improperly deciding on the weight to be assigned to certain criteria in the consideration process. The UNDT further erred by making its own factual assessments of the staff members' candidacies, including their transferrable skills. The UNDT thus stepped into the shoes of the O-i-C/OHRM and substituted its own substantive opinions for those of the O-i-C/OHRM.

43. We find no merit in this argu ment. First, we note that th e Dispute Tribunal recognised that the ASG/OHRM was entitled to take into consideration the finite mandate and downsizing situation of a certain entity in reaching a dete rmination on the conversion of its staff. It appropriately referenced former Staff Rule 104.13 and Section 2 of ST/SGB/2009/10 as the legal bases for giving due weight to "all the interests of the Organization". It also had regard to General Assembly resolution 51/226, which clearly states that the "operational realities of the organizations" are considerations the Administra tion may legitimately consider when making

[21] Ademagic et al. v. Secretary-General of the United Nations , Judgment No. 2016-UNAT-684.

administrative decisions such as conversion to permanent appointments. In adherence to classic

Nor does it show any accrued difficulty for him to be placed against another post".[23] No decision turned on this observation and there is no substance to the Secretary-General's submission that it reversed the burden of proof.

47. Accordingly, the Appeals Tribunal upholds the Dispute Tribunal's finding that the Administration's decisions not to grant permanent appointments to the staff members were flawed and we uphold the UNDT's rescission of the flawed decisions.

Remand

48. Although we have determined that the Administration failed to afford the staff members

The UNDT's awards of moral damages

50. The UNDT awarded moral damages of Euros 3,000 to each of the staff members. Although the General Assembly's amendment to Article 10(5)(b) of the UNDT Statute was in force when the UNDT delivered the impugned Judgment, the UNDT opined that, since the cause of action (the decision letters of 24 November 2014) arose before the amendment came into effect, the amendment did not apply to their claims since it did not operate retrospectively. Pursuant to the amendment, compensation for harm can only be awarded when supported by evidence.

51. The UNDT decided that, in any event, irrespective of the amendment, an award of moral damages was warranted on the basis of the staff members' submissions.

52. We hold that the UNDT erred in law by not applying the UNDT Statute as it existed at the time the Dispute Tribunal rendered its Judgment. As an award of damages takes place at the time the award is made, applying the amended statutory provision is not the retroactive application of law. Rather, it is applying existing law.

53. Moreover, pursuant to the amended Statute, a mere assertion of distress by a staff member is not sufficient evidence to support an award of moral damages.

54. Accordingly, we vacate the awards of moral damages.

Judgment

55. The appeal is partly successful in that the appeal of the awards of moral damages is allowed. The remainder of the appeal is dismissed. Judgment No. UNDT/2016/026 is affirmed, except for the awards of moral damages, which are vacated.

Judge Knierim's Dissenting Opinion

1. While I agree with my colleagues on the outcome of the case that we uphold the UNDT Judgment and dismiss the Secretary-General's appeal (except for the awards of moral damages), I have sincere objections to certain parts of the reasoning of this Judgment, which, in my opinion, justify these dissenting remarks.

2. I do not agree with my colleagues, who think "a remand to be the most effective and equitable of the remedies". In my view, by deciding to remand, the Dispute Tribunal exceeded its competence and committed errors of law on several grounds.

3. Under Article 10(5) of the UNDT Statute, as part of its Judgment, the Dispute Tribunal may only order one or both of the following:

> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ...
>
> (b) Compensation for moral harm, supported by evidence ...

4. Article 10(4) of the UNDT Statute provides that, "[p]rior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months".

5. In my view, the UNDT violated these statutory provisions by:

(i) Ordering rescission without offering in-lieu compensation as an alternative to rescission;

(ii) Remanding the matter to the Administration in its Judgment on the merits without the concurrence of the Secretary-General; and

(iii) Ordering retroactive and individualised consideration.

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10. However, as the staff members have not appealed the UNDT's decision and the Secretary-General does not assert that, by ordering rescission without in-lieu compensation and by remanding the matter for retroactive consideration without the concurrence of the Secretary-General, the Dispute Tribunal exceeded its competence or committed an error of law in violation of Article 2(1) of our Statute, I agree with my colleagues that the outcome of the case is correct and the Secretary-General's appeal has to be dismissed, except for the awards of moral damages.