



**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-360

**McIlwraith  
(Appellant)**  
**v.**  
**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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**Before:** Judge Mary Faherty, President  
Judge Sophia Adinyira  
Judge Luis María Simón  
Judge Richard Lussick  
Judge Rosalyn Chapman

**Case No.:** 2012-408

**Date:** 17 October 2013

**Registrar:** Weicheng Lin

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**Counsel for Mr. McIlwraith:** Self-represented/ Robbie Leighton

**Counsel for Secretary-General:** Phyllis Hwang  
Rupa Mitra  
Simon Thomas

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Fraser Dickson McIlwraith against Judgment No. UNDT/2012/131, *Ademagic et al. v. Secretary-General of the United Nations*, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 29 August 2012.<sup>1</sup> Mr. McIlwraith, acting *pro se*, filed an appeal on 29 October 2012 and the Secretary-General filed an answer on 7 January 2013. Effective 1 October 2013, Mr. McIlwraith was represented by counsel.

### **Facts and Procedure**

2. Mr. McIlwraith was hired by the International Criminal Tribunal for the former Yugoslavia (ICTY) on 9 March 1998. As of 30 June 2009, he was employed at the G-7 level on a fixed-term appointment in the Office of the Prosecutor.

3. On 13 April 2012, Mr. McIlwraith filed an application before the UNDT, challenging the Secretary-General's decision not to convert his fixed-term appointment to a permanent appointment. He was one of 262 ICTY staff members, or former staff members, who filed individual applications with the UNDT which were subsequently consolidated, upon their request, into Case No. UNDT/GVA/2012/045 (*Ademagic et al.*). In support of his application, Mr. McIlwraith - like the other Applicants whose cases were consolidated - filed a "Common Memorandum of Fact and Law".

4. The factual background and procedure set forth by the Appeals Tribunal in *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359, paragraphs 5–14, pertain to Mr. McIlwraith, and it is not necessary to repeat them in detail here.

5. In Judgment No. UNDT/2012/131 (*Ademagic et al.*), the Dispute Tribunal found that the Secretary-General had made a procedural error during the conversion consideration of the Applicants, and ordered that the decisions not to convert them be rescinded or, alternatively, in lieu compensation in the amount of 2,000 Euros, plus interest, if applicable, be paid by the Secretary-General to each ICTY staff member.

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<sup>1</sup> Judgment No. UNDT/2012/131 was also appealed by the Secretary-General and by *Ademagic et al.* in Cases No. 2012-385 and No. 2012-393, respectively. Mr. McIlwraith filed an individual answer in Case No. 2012-385. The Appeals Tribunal during its 2013 fall session issued *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359, addressing Cases No. 2012-385 and No. 2012-393.

## Submissions

### Mr. McIlwraith's Appeal

6. Mr. McIlwraith contends that the UNDT erred on a question of law when it concluded that Article 10(5)(a) of the UNDT Statute was applicable to its decision and ordered compensation in lieu of specific performance or rescission of the contested decision. He also asserts that it was procedural error for the UNDT to apply an alternative compensatory remedy when it failed to reach the merits of his claims; such remedy does not address a threshold procedural irregularity, such as the UNDT found. Relying upon Judgment No. UNDT/2012/121, *Rockcliffe v. Secretary-General of the United Nations*, Mr. McIlwraith submits that cases of conversion to permanent appointment do not come within Article 10(5)(a), which requires alternative compensation where the impugned decision concerns “appointment, promotion or termination”.

7. In the alternative, Mr. McIlwraith argues that the UNDT erred on a question of law when it set an amount of compensation under Article 10(5)(a) of the UNDT Statute that did not adequately compensate him for the injury he suffered. As he had a very strong chance of being granted a permanent appointment in a properly conducted exercise, the amount of compensation awarded should have equaled the termination indemnity and other benefits to which he would be entitled from a permanent appointment. In this regard, he maintains that the UNDT improperly failed to consider the doctrine of loss of chance or opportunity in setting the amount of compensation. In awarding the same amount of alternative compensation to each Applicant, regardless of his or her job functions and years of service, the UNDT improperly failed to consider the individualized facts of each case, and did not assess the staff members' genuine prospects for conversion.

8. Mr. McIlwraith requests that the Appeals Tribunal overturn the UNDT Judgment and remand his case for full and fair consideration of conversion.

### The Secretary-General's Answer

9. The Secretary-General submits that the Appellant had no foreseeable chance of being granted a permanent appointment, as the operational realities of the United Nations precluded it. As such, he argues that the UNDT erred in rescinding the impugned decision and in ordering compensation.

10. In the alternative, the Secretary-General argues that if the Appeals Tribunal upholds the UNDT's decision to rescind, then the UNDT was correct in applying Article 10(5)(a) of the UNDT Statute and in ordering compensation in lieu of specific performance.

11. With respect to the quantum of the in lieu compensation, the Secretary-General contends that it was "overly generous" and the Appellant's claim that he deserved more is not sustainable.

12. In sum, the Secretary-General requests that the Appeals Tribunal dismiss the appeal.

### Considerations

13. On appeal, Mr. McIlwraith raises claims substantially similar to, if not identical to, those raised by the other ICTY staff members who appealed Judgment No. UNDT/2012/131, as well as the staff members who appealed Judgment No. UNDT/2012/129 and Judgment No. UNDT/2012/130. Their appeals are disposed of in *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359; *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357; and *Longone v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-358, respectively.

14. The Secretary-General appealed each of the UNDT Judgments cited above, and Mr. McIlwraith filed an individual answer in the Secretary-General's appeal of Judgment No. UNDT/2012/131. In *Malmström et al.*, which is quoted, *in extenso*, in *Longone* and *Ademagic et al.*, the Appeals Tribunal determines that the UNDT erred in concluding that the ICTY Registrar had the discretionary authority to grant permanent appointments to ICTY staff members. The Appeals Tribunal agrees with the Secretary-General's contention that such decision-making authority was vested in the Assistant Secretary-General for Human Resources Management (ASG/OHRM), but finds that, in adopting a blanket policy of refusing permanent appointments to ICTY staff members, her decision was "legally void, being tainted by arbitrariness and ... violations of the staff members' due process rights".<sup>2</sup> Accordingly, the Appeals Tribunal rescinds the impugned decisions and remands the matter to the ASG/OHRM to "lawfully exercise her discretion and carry out the conversion exercise ... in accordance with the requirements of fairness and due process".<sup>3</sup> Mr McIlwraith is a beneficiary of the

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<sup>2</sup> *Malmström et al.*, para. 68.

<sup>3</sup> *Ibid.*, para.74.

Appeals Tribunal's decision in this regard; thus, the Judgment herein does not address these aspects of our decision.<sup>4</sup>

15. Since the Appeals Tribunal rescinds the UNDT Judgment against which the staff members appealed, the majority of their claims are rendered moot. Our reasoning in *Malmström et al.* applies to Mr. McIlwraith's claims that the UNDT erred when it applied Article 10(5)(a) of its Statute or, alternatively, erred in awarding compensation in lieu that was too low, and these claims are moot for the reasons set forth in paragraph 76 of *Malmström et al.*, which we incorporate by reference.

16. The legal memorandum Mr. McIlwraith filed before the UNDT in support of his application raised the claim that he should be awarded non-pecuniary or moral damages for the fundamental procedural violation of his rights during the conversion process. The matter of non-pecuniary damages is addressed by the Appeals Tribunal in *Malmström et al.*, paragraphs 78–82, which apply, *mutatis mutandis*, to the instant case and are adopted in their entirety, as follows:

... The UNDT declined to make an award of non-pecuniary damages, pursuant to Article 10(5)(b) of its Statute, stating that “it would be highly speculative to award [such] compensation ... considering that it has decided to rescind the contested decisions only because of a procedural irregularity and ... has not addressed the merits of [the] decisions”.

... Since the Appeals Tribunal has vacated the erroneous finding of the Dispute Tribunal that the ASG/OHRM's decision should be rescinded for lack of competence, its reasoning cannot support the staff members' claim for non-pecuniary damages.

... However, given that this Tribunal has addressed the merits of the impugned decision of the ASG/OHRM, and has determined that that decision violated the staff members' right to have been fairly, individually and properly assessed for conversion, we shall consider whether the breach warrants an award of non-pecuniary damages.

... In *Asariotis*, the Appeals Tribunal stated:

To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

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<sup>4</sup> *Ademagic et al.*

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process 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.<sup>5</sup>

... 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 [staff members]. 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**

17. For the reasons set forth above, the Appeals Tribunal awards Mr. McIlwraith compensation in the amount of 3,000 Euros, payment to be executed within 60 days from the date of issuance of this Judgment to the parties. If payment is not timely made, interest shall be applied, calculated as follows: five per cent shall be added to the US Prime Rate from the date of expiration of the 60-day period to the date of payment.

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<sup>5</sup> *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36. (Emphasis in the original. Footnote omitted.) See also *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-346.

Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2013 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Simón

*(Signed)*

Judge Lussick

*(Signed)*

Judge Chapman

Entered in the Register on this 19<sup>th</sup> day of December 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar