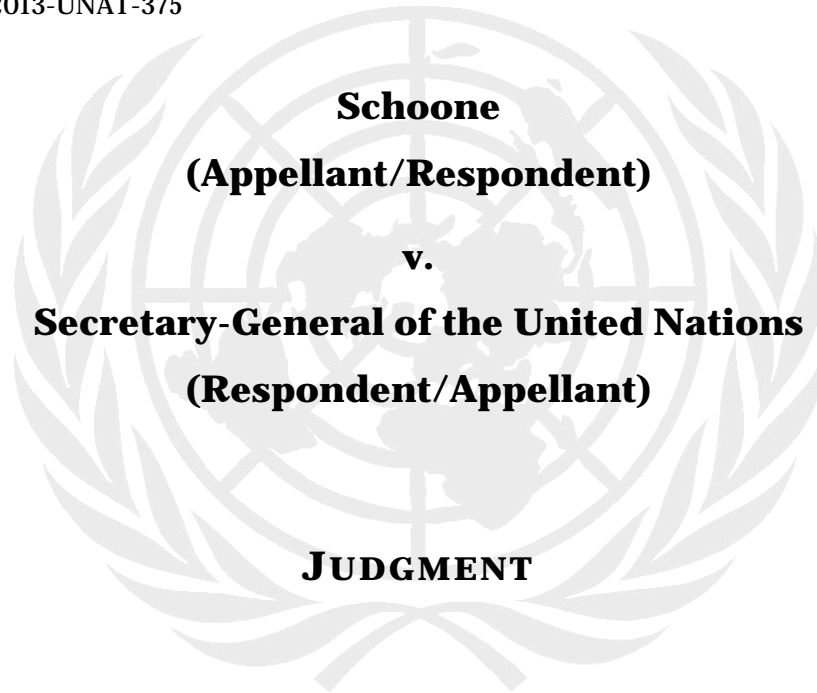




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-375



**Schoone
(Appellant/Respondent)**

v.

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

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Mary Faherty
Judge Richard Lussick

Cases No.: 2013-427 & 2013-433

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Mr. Schoone: Erol Arduc (Case No. 2013-427)
Alexandre Tavadian (Case No. 2013-433)

Counsel for Secretary-General: Phyllis Hwang
Stéphanie Cartier
Rupa Mitra

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Steven Muir Schoone against Judgment No. UNDT/2012/162, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 1 November 2012 in the case of *Schoone v. Secretary-General of the United Nations*. Mr. Schoone appealed on 7 January 2013 and the Secretary-General answered on 5 March 2013 (Case No. 2013-427). Also on 7 January 2013, the Secretary-General appealed the same UNDT Judgment and, on 8 March 2013, Mr. Schoone answered (Case No. 2013-433).

Facts and Procedure

2. The facts established by the Dispute Tribunal in Judgment No. UNDT/2012/162 read as follows:¹

... On 25 May 1993, the Security Council by resolution 827 (1993) decided to establish [the International Criminal Tribunal for the former Yugoslavia (ICTY)], an *ad hoc* international tribunal, for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia as of 1 January 1991, and requested the Secretary-General to make practical arrangements for the effective functioning of the Tribunal.

... [Mr. Schoone] entered the service of ICTY in The Hague in November 2002 on a fixed-term appointment in the General Service category.

... In resolution 1503 (2003) dated 28 August 2003, the Security Council endorsed the ICTY completion strategy and urged ICTY to take all possible measures to complete its work in 2010.

... On 23 June 2009, the Secretary-General issued the Secretary-General's bulletin ST/SGB/2009/10 on "Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009".

... "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as of 30 June 2009" were further approved by the Assistant Secretary-General for Human Resources Management [(ASG/OHRM)] on 29 January 2010, and transmitted by the Under-Secretary-General for Management on 16 February 2010 to all Heads of Department and Office, including at ICTY, requesting them to conduct a review of individual staff members in their department or office in order to make a preliminary determination on eligibility and subsequently, to submit recommendations to the [ASG/OHRM] on the suitability for conversion of eligible staff members.

¹ The following facts are taken from paragraphs 3–18.

... 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 to allow his recruitment with the United Nations Secretariat, and on 19 July [2010] he informed the relevant officials at ICTY of his resignation effective 31 August 2010.

... On 12 August 2010, the ICTY Registrar and the Acting Chief of Human Resources recommended to the [ASG/OHRM] that [Mr. Schoone], as well as other ICTY staff members, be granted a permanent appointment.

... On 27 August 2010, [Mr. Schoone] traveled from The Hague to New York and on 2 September 2010, he took up his new functions with the United Nations Secretariat.

... In February 2011, ICTY staff were informed that there had been no joint positive recommendation by [the Office of Human Resources Management (OHRM)] and ICTY on the granting of permanent appointments and that accordingly, the cases had been referred “to the appropriate advisory body, in accordance with sections 3.4 and 3.5 of ST/SGB/2009/10”.

... By memorandum dated 27 May 2011, the Central Review bodies informed the [ASG/OHRM] that they endorsed again the recommendation made by OHRM “on non-suitability for conversion of all recommended [ICTY] staff [including Mr. Schoone] to permanent appointments, due to the limitation of their service to their respective Tribunals and the lack of established posts”.

... By memorandum dated 20 September 2011, the [ASG/OHRM] informed the ICTY Registrar that:

... Pursuant to my authority under section 3.6 of ST/SGB/2009/10, I have decided in due consideration of all circumstances, giving full and fair consideration to the cases in question and taking into account all the interests of the Organization, that it is in the best interest of the Organization to (i) accept the [Central Review bodies’] endorsement of the recommendation by OHRM on the non-suitability [for conversion of ICTY staff] and (ii) approve the granting of permanent appointments to those eligible ICTY staff who:

- (i) have been recommended for conversion by the [ICTY] and have already been recruited to established posts within the Secretariat prior to and including 31 December 2010,

and

- (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 ICTY 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 he 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 oral hearing in this case together with several other cases filed by ICTY staff members, or former 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 that level except for terminations under article X of the Staff Regulations”. In view of this broad discretionary authority, and in accordance with its decision in the related ICTY cases,² the UNDT found that the ASG/OHRM was not the competent decision-maker to determine the granting of permanent contracts to ICTY staff members and, thus, “the contested decisions were tainted by a substantive procedural flaw”.³

5. Accordingly, as it had done in the above-referenced cases, the Dispute Tribunal rescinded the decision not to grant Mr. Schoone a permanent appointment. Recalling “the nature of the irregularity which led to the rescission, that is, a procedural irregularity as opposed to a

² *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/129; *Longone v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/130; *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/131.

³ Judgment No. UNDT/2012/162, para. 33.

substantive one” and the fact that “staff members eligible for conversion have no right to the granting of a permanent appointment but only that to be 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 operational realities’ of the Organization (see General Assembly resolution 51/226)”,⁴ the 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 the 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.⁵

Submissions

Mr. Schoone’s Appeal

7. Mr. Schoone submits that the UNDT erred in law in determining that it was required to order alternative compensation to specific performance pursuant to Article 10(5)(a) of its Statute, which requires alternative compensation where the impugned decision concerns “appointment, promotion and termination”. Conversion of a fixed-term contract to a permanent contract, he submits, is not a matter of “appointment”.

⁴ *Ibid.*, para. 39.

⁵ *Ibid.*, paras. 35-36.

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 error. He argues that appropriate compensation would be equal to the termination indemnity to which he would have been entitled at the projected end date of his ICTY service (which he calculates 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 notes 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 illegally 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 argues that, as a locally recruited General Service staff member, he was not excluded from her decision to grant permanent appointments to "those eligible ICTY staff who ... have been recommended for conversion by the Tribunal and have already been recruited to established posts within the Secretariat prior to and including 31 December 2010, and ... joined the Secretariat on a 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 option 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. Schoone 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 contends that the Dispute Tribunal was correct in concluding that, under Article 10(5)(a) 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 the compensation so ordered was "overly generous", and Mr. Schoone's argument that he deserved more is not sustainable. In fact, he overstates his "chance" of being converted and, indeed, voluntarily resigned from the ICTY; the likelihood of his conversion, then, was "negligible at best".

15. The Secretary-General contends that the UNDT was correct in not ordering other compensation, for pecuniary or non-pecuniary losses resulting from the decision not to award Mr. Schoone a permanent contract. His position was not terminated and he did not seek financial compensation in his application to the Dispute Tribunal.

16. The Secretary-General objects to Mr. Schoone's pleas concerning his move to New York, which he seeks to have qualified as a "transfer", without a break in service. The Secretary-General argues that, if Mr. Schoone took issue with the requirement that he resign from the ICTY to take up functions in New York, he should have challenged it at the time. Moreover, he did not include the matter of his break in service in his request for management evaluation or in his application to the Dispute Tribunal. As such, these issues are not properly before the Appeals Tribunal.

17. The Secretary-General submits that Mr. Schoone has established no error justifying an increase in compensation and requests that the Appeals Tribunal dismiss the appeal in its entirety.

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 granted 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, and made reference to the ICTY's restricted mandate and lifespan. No express exclusion of permanent appointments was required, because the authority granted was already limited in term, function and level. Moreover, the delegation of authority was never expanded to include granting permanent appointments and could not have been, given the "freeze" on permanent appointments then in force. Furthermore, ICTY staff were never intended to be offered permanent appointments, in view of the non-continuing nature of their functions.

20. The Secretary-General argues that the UNDT relied on obsolete rules, which had been revised in 2004 to make express mention of the "executive head" of programmes, funds and subsidiary organs having the authority to grant permanent appointments within such programme, fund or subsidiary organ. As the ICTY Registrar did not have the status of "executive head", the UNDT erred in law in applying this provision to the ICTY. Moreover, ST/SGB/2006/9 and ST/SGB/2009/10 made it clear that only the ASG/OHRM had the authority to grant permanent appointments; as such, even if the Registrar had had such delegated authority, it was implicitly revoked by these Bulletins.

21. The Secretary-General contends that the Dispute Tribunal erred in finding that Mr. Schoone had been "reassigned" to New York. On the contrary, he was never "assigned" to New York but, rather, resigned from the ICTY to take up a new appointment there as a locally-recruited General Service staff member.

22. Finally, the Secretary-General requests that the Appeals Tribunal consider the case itself, in the event that it decides to overturn the UNDT Judgment, rather than remand the matter for consideration on the merits. He asserts that Mr. Schoone should not prevail on the merits of his case: the correct procedure was followed and the ASG/OHRM reasonably exercised her discretion and, in any event, Mr. Schoone resigned from the ICTY, thereby severing his former contractual relationship with the Organization.

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 ongoing (non-revoked) delegated authority to grant permanent contracts to ICTY staff members. The Dispute Tribunal was correct in its conclusion: the 1994 memorandum stated that the Registrar had delegated authority "to appoint staff" and this must be read in the context of the Staff Regulations 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, then, *contra preferentum*, 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 necessary 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 in service" 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 in *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357; *Longone 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-359.⁶ In those Judgments, the Appeals Tribunal, *inter alia*, upholds the respective appeals of the Secretary-General, who had challenged the findings of the Dispute Tribunal that the ASG/OHRM lacked the competence to decide upon the granting of permanent appointments to eligible ICTY staff members, which the Dispute Tribunal held fell within the delegated authority of the ICTY Registrar.

30. For the reasons set forth in *Malmström et al.*, *Longone* and *Ademagic et al.*, the Appeals Tribunal finds that the delegation of authority granted to the ICTY Registrar cannot be construed so as to grant him the authority to convert staff members' fixed-term appointments into permanent appointments. Accordingly, it upholds the Secretary-General's appeal in Case No. 2013-433, and vacates the UNDT Judgment. Mr. Schoone's submissions in Case No. 2013-427 with respect to the award – and quantum – of compensation ordered by the UNDT in lieu of specific performance are thus rendered moot.

31. In *Malmström et al.*, *Longone* and *Ademagic et al.*, the Appeals Tribunal found that the decision-making authority to grant permanent appointments was properly vested in the ASG/OHRM, but that she failed to exercise her discretion in a lawful manner, by adopting a blanket policy of denial of permanent appointments to ICTY staff members rather than affording them the individual, "full and fair" consideration of their suitability for conversion to permanent appointment, to which they were entitled by the established procedures, as well as the principles of international administrative law. As such, the Appeals Tribunal concluded in those Judgments that the staff members were discriminated against and the impugned decisions were legally void, being tainted by arbitrariness and the violation of the staff members' due process rights. This reasoning applies, *mutatis mutandis*, to Mr. Schoone.

⁶ See para. 4, above.

32. Where Mr. Schoone's situation differs, however, is 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 deemed 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 another duty station – which he did not protest in any timely fashion – effectively ended his right 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 cannot 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.⁷

35. For the foregoing reasons, Mr. Schoone's appeal in 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 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar