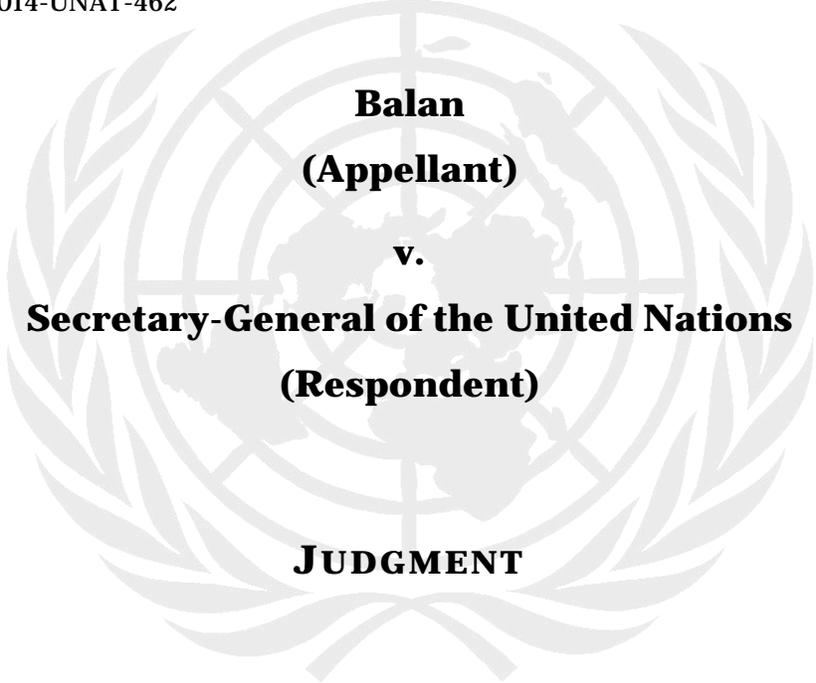




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-462



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

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Richard Lussick
Judge Rosalyn Chapman

Case No.: 2013-532

Date: 17 October 2014

Registrar: Weicheng Lin

Counsel for Ms. Balan: Robbie Leighton, OSLA

Counsel for Secretary-General: Rupa Mitra

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Cristina Balan against Judgment No. UNDT/2013/106, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 22 August 2013 in the case of *Balan v. Secretary-General of the United Nations*. Ms. Balan appealed on 22 October 2013. By Order No. 163 (2013), the Appeals Tribunal accepted Ms. Balan's appeal as timely filed, though it was filed one day beyond the deadline due to technical difficulties. The Registry received an answer from the Secretary-General on 6 January 2014.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case read as follows:¹

... The Applicant joined the United Nations in November 1998. 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), which entered into force on 26 June 2009. [Bulletin]

... On 29 January 2010, the [Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM)] approved the issuance of "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009" ("Guidelines on conversion").

... By memorandum dated 14 April 2010, the Director, Strategic Communications Division, DPI, sent a list of eligible staff members who he recommended for conversion to permanent appointment to the Officer-in-Charge, Executive Office, [Department of Public Information (DPI)]. In his memorandum, the Director stressed that he had decided not to recommend three categories of staff members, otherwise eligible for conversion. He wrote, *inter alia*:

In submitting this, I would like to note that although they would otherwise be eligible (based on age, length of service and performance), within the OHRM's guidelines, I have decided not to recommend:

- Staff from [United Nations Information Centres (UNICs)] Bucharest, Tripoli and Warsaw who occupy posts funded by the host country as the continuation of their posts is subject to the availability of such funding;

¹ The following text is taken from Judgment No. UNDT/2013/106, paragraphs 5-18.

- The incumbents of the remaining two posts at UNIC Bucharest, which are covered by the regular budget, in view of the likelihood that UNDP will be reducing its presence in Romania in the next year or so;

...

... On 16 April 2010 the Officer-in-Charge, Executive Office, DPI, and the Officer-in-Charge, Human Resources Services, OHRM, sent a memorandum to the ASG/OHRM, with respect to the Applicant's conversion to permanent appointment. In their recommendation, they indicated that as of 22 November 2003, the Applicant had completed five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules and was under the age of 53 years, hence eligible for consideration for conversion to permanent appointment. They further noted that the Applicant had received performance ratings indicating that she successfully met or exceeded performance in her five most recent performance evaluations. The Officers also indicated, however, that the Applicant was serving in an entity that was downsizing or expected to close and recommended that the Applicant not be offered a permanent appointment.

... On 15 May 2010 the Chief [,] Centre Operations Section, DPI, wrote to the Applicant and other staff members, informing them that DPI had decided not to recommend conversion to permanent appointment for staff members serving in Information Centers that depended on extra-budgetary contributions. He noted that such conversion would not be in the interest of the Organization, in view of the fact that the contributions from host governments were voluntary and as such subject to change with little notice, which could create unwarranted liabilities for the Organization with respect to termination entitlements payable to staff members if their contractual status were to be permanent.

... In May 2010, the Applicant contacted the Chief, Centre Operations Section, DPI, inquiring whether a formal, individual decision from OHRM regarding her non-conversion to permanent appointment would be issued. The Chief, Centre Operations Section, DPI responded, noting that his earlier message was not the formal personalized OHRM notification and that he was unaware when OHRM might send such notification. He also reiterated his earlier communication that none of the staff members in Bucharest were being recommended for conversion and further told the Applicant of the possibility of UNIC closing down, due to the funding problems.

... By memorandum of 28 June 2010, the Human Resources Services, OHRM, sent a negative recommendation with respect to the conversion to permanent appointment of the Applicant and other staff members to the Central Review Panel ("CRP"). In its submission, the Human Resources Services, OHRM, stated that the Applicant and her colleagues were occupying posts funded by the host countries and that the continuation of their posts was subject to availability of government funding.

Additionally, it was mentioned that UNIC in Bucharest and another country were scheduled to be closed “in the near future.”

... In a letter dated 17 September 2010 from the Under-Secretary-General for Communications and Public Information (“USG”) to the Permanent Representative of Romania to the United Nations, the USG made reference to several reminders that had been sent to the Government of Romania regarding its contributions to UNIC Bucharest, the delay in payment of the 2010 contributions and the repercussions this was having on the operations of UNIC Bucharest. The letter sought to know when the transfer of funds could be expected and also indicated the contributions expected for the year 2011. With reference to the Applicant’s post, the USG wrote:

The funds covering the salary of the National Information Officer will run out by the end of October, requiring the Department to give notice to the staff member this month. With the remaining two staff members providing support functions only, UNIC would not be able to carry out its mandated functions and would, in fact, exist in name only.

... In October 2010, the Applicant received an extension of her contract through 31 December 2010. On 12 January 2012, the CRP sent a memorandum to the ASG/OHRM regarding the Applicant’s and other affected staff members’ requests for conversion. The CRP made a recommendation not to grant a permanent appointment to the Applicant. It concluded that in view of the funding of the posts and the closing down of UNIC Bucharest in the near future, it was not in the interest of the Organization to grant the Applicant and other affected staff members a permanent appointment, who should not be considered suitable for conversion.

... Subsequently, the ASG/OHRM took the decision dated 1 February 2012, informing the Applicant that her non conversion to a permanent appointment was based on the interests of the Organization and the operational realities of the Organization specific to UNIC Bucharest, which might not be sustainable in the future.

... The Applicant requested management evaluation of the contested decision on 28 March 2012 and on 16 May 2012 she received a response, informing her that the Secretary-General had decided to uphold the decision not to grant her a permanent appointment.

... On 6 June 2012, the Applicant signed a contract extension from 1 July to 31 October 2012. In the contract, under “official duty station”, it was indicated “limited to Bucharest, Romania.”

... On 2 August 2012, the Applicant received a letter [from] the Executive Officer, DPI, informing her of the decision not to renew her contract beyond 31 October 2012. In the letter, the Applicant was informed that the reason for the decision was severe financial constraints faced by UNIC Bucharest and that on 2 April 2012, the

Permanent mission of Romania to the United Nations had informed DPI that “it was not able to ensure its annual contribution to the Information Centre ... having in mind the scenario in which UNIC would find alternative sources to finance its activity.”

... The Applicant filed her application on 10 August 2012 to which the Respondent filed his reply on 10 September 2012.

3. In Judgment No. UNDT/2013/106, the Dispute Tribunal rejected Ms. Balan’s application. It found:

In view of th[e] limitation of the Applicant’s contractual status and of the operational realities faced by the UNIC Bucharest, the Tribunal finds that the determination by the Administration that the conversion of the Applicant to permanent appointment was not in the interest of the Organization was acceptable. Indeed, it cannot be in the interest of the Organization nor of its operational activities to grant permanent appointment to staff whose service, by the terms of their letter of appointment, is limited to an entity which is downsizing. ... Accordingly, in the case at hand, the decision not to grant the Applicant a permanent appointment constitutes a reasonable exercise of discretion on the part of the Administration.²

The UNDT rejected Ms. Balan’s argument that the financial situation to be taken into account should have been that of the year 2009 and not that of 2012, stating:

Such an assertion presupposes the continuation of the *status quo* of 2009 for an Organization that sustains itself from the funding of member states. Therefore, it cannot be said that the status of funding three years preceding a decision should be taken into account for an Organization whose funding has been tardy since its inception, a situation which the Applicant was well aware of.³

Ms. Balan’s Appeal

4. Though found eligible, she was not given individual consideration for conversion to a permanent appointment. Instead, she was subject to a blanket policy based on the nature of the funding of her post, which was applied to all UNIC staff holding posts funded by the host country and to all UNIC Bucharest staff. This places her in the same position as the staff members of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). The Appeals Tribunal’s

² Judgment No. UNDT/2013/106, para. 33.

³ *Ibid.*, para. 34.

reasoning in *Malmström et al.*⁴ and other cases applies to her situation. The former Administrative Tribunal also rejected the application of such a policy.

5. By holding the “interests of the Organization” as a discrete and overriding criterion or a further eligibility requirement, the UNDT legitimized the application of a blanket policy. Ms. Balan submits that the “interests of the Organization” or the “needs of the Organization” do not constitute a single criterion that overrides all other considerations. Instead, the “interests of the Organization” are defined by the considerations that follow.

6. The Dispute Tribunal’s endorsement of the Administration’s interpretation of the interests of the Organization appears to run contrary to paragraph 3 of the Guidelines, which guarantees that the staff members on posts funded by extra-budgetary resources will be given consideration provided they are found to be eligible. The funding of a post or duty station should not be used as an exclusive reason for finding a staff member unsuitable for conversion. It should be considered with the other criteria listed in Section 2 of the Bulletin. The said Bulletin does not support the UNDT’s broad interpretation and application of the Bulletin. By looking no further than the funding of her post, the Administration failed to consider relevant matters in exercising its discretion circumventing her right to every reasonable consideration for conversion to a permanent appointment. The Dispute Tribunal erred in law by failing to consider whether such exercise of discretion was lawful.

7. Ms. Balan requests that she be awarded damages amounting to the value of the termination indemnity that would have been awarded to her if she had held a permanent appointment and, moreover, monetary compensation of EURO 3,000 for stress and anxiety resulting from the failure to consider her for a permanent appointment.

The Secretary-General’s Answer

8. The UNDT properly concluded that it would not be in accordance with the needs of the Organization to grant a permanent appointment to Ms. Balan, and that it was within the Organization’s discretion to so determine. General Assembly resolution 51/226 has expressly called on the Secretary-General to take “operational realities” into account in determining whether or not to convert an appointment to a permanent one. Accordingly, the ASG/OHRM made a realistic assessment of the operational realities of UNIC Bucharest, which was already

⁴ *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357.

functioning with reduced staff and uncertainty of funding by the host country. Ms. Balan's arguments on this matter are factually inaccurate and legally unsustainable.

9. Ms. Balan received consideration that was not merely given through the lens of whether she was on a post funded by an extra-budgetary source. The sustainability of operations at UNIC Bucharest was not solely based on whether her post was funded through an extra-budgetary source.

10. The UNDT Judgment is not based on an assumption that a permanent appointment requires a permanent post. No such thing exists within the United Nations system. Neither the UNDT nor the Administration considered that a permanent post would be necessary to grant a permanent appointment. However, UNIC Bucharest was downsizing and was expected to close altogether. These factors are entirely relevant to considering whether granting a permanent appointment is in accordance with the needs of the Organization.

11. The cases decided by the former Administrative Tribunal in *Alba et al.*, *Uspensky* and *Tankov* involved different factual circumstances that render them inapplicable to the present case.⁵ Unlike *Uspensky* and *Tankov*, the consideration for conversion to a permanent appointment was afforded to Ms. Balan by DPI, OHRM and the CRP per the process established under the Bulletin.

12. Ms. Balan asserts that the financial situation relevant to the consideration process was that of the year 2009, and not 2012. She is making this argument for the first time on appeal. As per the jurisprudence of the Appeals Tribunal, this new argument should be disregarded as not receivable. The Secretary-General nonetheless maintains, on this point, that the relevant financial situation was that of 2012, the year in which the contested decision was taken. The plain meaning of the word "realities" in General Assembly resolution 51/226 can only logically refer to current realities, not just past realities. It would not be sensible to limit the Organization to considering the needs and interests of the Organization at a previous point in time, whether or not they remain valid at the time that the decision is taken.

⁵ Former Administrative Tribunal Judgment No. 712, *Alba et al.* (1995); former Administrative Tribunal Judgment No. 1040, *Uspensky* (2001); former Administrative Tribunal Judgment No. 1168, *Tankov* (2004).

13. The Dispute Tribunal correctly concluded that its review of the Secretary-General's exercise of discretion in this case was limited.

14. Ms. Balan should not be awarded pecuniary or non-pecuniary damages, as there is no factual or legal basis for such compensation and there was no breach of any right of Ms. Balan as a staff member.

15. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss Ms. Balan's appeal in its entirety.

Considerations

16. By resolution 63/250 of 24 December 2008, the General Assembly approved proposals of the Secretary-General for contract reform and, in view of the forthcoming revision of the Staff Regulations and Rules, the Secretary-General proceeded to consider for conversion to permanent appointments those staff members who were eligible under the 100 Series of the Staff Rules as at 30 June 2009.

17. To give effect to the General Assembly's direction, the Secretary-General promulgated 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".

18. Section 1 of ST/SGB/2009/10 reads as follows:

Eligibility

To be eligible for consideration for conversion to a permanent appointment under the present bulletin, a staff member must by 30 June 2009:

- (a) Have completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules; and
- (b) Be under the age of 53 years on the date such staff member has completed or completes the five years of qualifying service.

Section 2

Criteria for granting permanent appointments

In 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, 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 established in the Charter.

19. On 29 January 2010, the ASG/OHRM approved “Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009”, which were subsequently transmitted to all Heads of Departments and Offices within the United Nations, on 16 February 2010, for a review of their staff members to determine eligibility and make recommendations to the ASG/OHRM, for consideration for conversion.

20. Ms. Balan was eligible. Nonetheless, the Human Resources Services, OHRM, decided, on 28 June 2010, not to recommend her for a permanent appointment in her own country although she had completed five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules and was under the age of 53 years. The reason for the non-conversion was that she was serving in UNIC Bucharest, an entity that was downsizing or expected to close “in the near future”. The funding depended on voluntary contributions from the host country. Therefore, none of the staff members in UNIC Bucharest were recommended for conversion.

21. The Permanent Mission of Romania to the United Nations informed the Organization on 2 April 2012 that it was not able to ensure its annual contribution to UNIC Bucharest. It is recalled that back in 2010 both DPI and OHRM already anticipated that UNIC Bucharest, among others, was scheduled to close in the very near future, due to the uncertainty of the funding by the host country, on which the continuation of Ms. Balan’s post depended.

22. Ms. Balan was recruited as a National Professional Officer in Bucharest. UNIC Bucharest was an entity funded by voluntary contributions and staffed with locally-recruited, and not internationally-recruited, professionals.

23. This Tribunal’s assessment is limited to determining whether the Administration abused its discretion in not granting a permanent appointment to a national who was working in her own country on a post funded by her government that would be abolished.

24. In considering Ms. Balan’s suitability for a permanent appointment, the Administration was entitled to have regard to the fact that she was recruited because she was a national of Romania for the specific post in UNIC Bucharest.

25. We find nothing to suggest that the discretion vested in the Administration pursuant to the Guidelines (approved by the ASG/OHRM on 29 January 2010), for the purpose of ensuring that the aspirations of Section 2 of the ST/SGB/2009/10 were achieved, was unfairly or capriciously exercised.⁶ We recall what this Tribunal stated in *Sanwidi* and *Pérez-Soto*:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.⁷

It is not the function of this Tribunal to stand in the shoes of the ASG/OHRM and involve itself in the decision-making process reserved for the ASG/OHRM pursuant to ST/SGB/2009/10. In cases such as the present, the jurisdiction of the Appeals Tribunal is limited to a judicial review of the exercise of discretion by the competent decision maker.⁸

26. We are satisfied that the Dispute Tribunal committed no error in finding the Secretary-General's decision legal.

Judgment

27. The Judgment is affirmed.

⁶ *Santos v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-415.

⁷ *Pérez-Soto v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-329, para. 32, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

⁸ *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, para. 62.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar