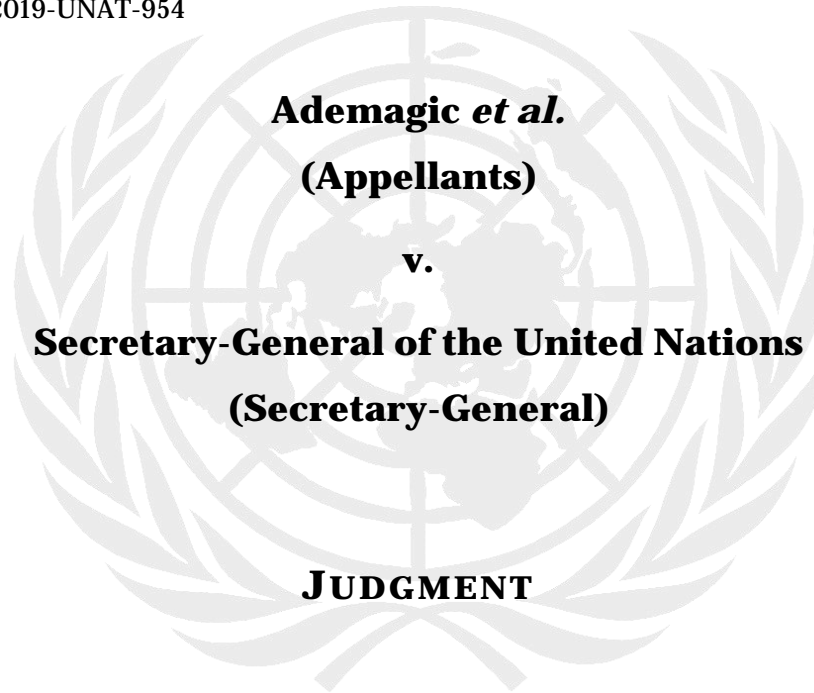




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-954



Ademagic *et al.*

(Appellants)

v.

Secretary-General of the United Nations

(Secretary-General)

JUDGMENT

Before: Judge Graeme Colgan, Presiding
Judge Dimitrios Raikos
Judge John Raymond Murphy

Case No.: 2019-1251

Date: 25 October 2019

Registrar: Weicheng Lin

Counsel for Ademagic *et al.*: April L. Carter

Counsel for Secretary-General: Noam Wiener

JUDGE GRAEME COLGAN, PRESIDING.

1. The present case arose from the Secretary-General's decisions not to grant permanent appointments to the 20 Appellants in this case (*Ademagic et al.*) who are former staff members of the International Criminal Tribunal for the former Yugoslavia (ICTY). Those 20 Appellants fell into two categories. 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. That was 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/2019/023, 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 that decision.

Facts and Procedure

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

3. The 20 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 Mechanisms for Criminal Tribunals (MICT) with reduced functions which would diminish further over time. It requested the ICTY to finish its work by 31 December 2014. These resolutions underscore the finite mandate of the ICTY and the MICT.

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 and 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 the Appellants in this case, 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 interest of the Organization to accept the CR Bodies' endorsement of the recommendation by OHRM on the non-suitability for conversion of the ICTY staff.

9. The Appellants, together with others, challenged the decisions before the UNDT, which issued the following three judgments: *Malmström et al.*, Judgment No. UNDT/2012/129; *Longone*, Judgment No. UNDT/2012/130; and *Ademagic 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 Under-Secretary-General (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 alternative compensation in lieu of effective rescission per appellant.

10. The Dispute Tribunal's Judgments were subsequently appealed to the Appeals Tribunal which issued several judgments including *Ademagic et al. and McIlwraith*, Judgment No. 2013-UNAT-359 (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 reliance on the operational realities of the Organization to the exclusion of all other relevant factors amounted to discrimination against the ICTY staff members and violated their right to be fairly, properly and transparently considered for permanent appointment. 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

11. In June 2014, after further consideration by the OHRM and review by the reviewing bodies, the ASG/OHRM wrote to all the staff members concerned and informed them by individual letters of the decisions not to grant any of them retroactive conversion of their respective fixed-term appointments into permanent appointments. All letters stated that the respective staff members fulfilled three out of the four required criteria (performance, conduct and qualifications) but that they did not meet the fourth criterion, namely, that the granting of a

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 the 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 before 19 June 2014. 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.

permanent appointment be in accordance with the interests of the Organization. Each letter contained one paragraph setting out, in identical terms, the reasons why the last criterion was considered not to have been met.

12. On 4 July 2014, the staff members concerned filed before the Appeals Tribunal a motion seeking execution of the Appeals Tribunal Judgment, which was rejected by Judgment No. 2014-UNAT-494, noting that the Appeals Tribunal's orders had been executed inasmuch as 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 subsequent to the Appeals Tribunal's rulings, was "*not* to be found in an application for execution but rather in 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 Appellants 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 they had not been given individual consideration in light of their proficiencies, qualifications, competencies, conduct and transferrable skills and the decisions were "exclusively based on the limited mandate of ICTY, to the exclusion of all other relevant factors".³ In the UNDT's view, the Administration had disregarded the Appeals Tribunal Judgment by launching a new eligibility assessment. The Dispute Tribunal rescinded the contested decisions and remanded the matter to the ASG/OHRM for retroactive individualized consideration of suitability for conversion to a permanent appointment, within 90 days of the issuance of its Judgment. The Dispute Tribunal further awarded moral damages in the sum of EUR 3,000 to each of the applicants.

14. On 30 June 2016, the Appeals Tribunal issued Judgment No. 2016-UNAT-684 (*Ademagic et al.*) (2016 Judgment) partially affirming the UNDT Judgment. It remanded the matter to the ASG/OHRM "for retroactive individualised consideration" of the *Ademagic et al.* litigants' suitability for conversion of their appointments to permanent ones, as mandated by ST/SGB/2009/10. The Appeals Tribunal required that this reconsideration exercise take place

² *Sutherland et al., McIlwraith, Ademagic et al. and Longone v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-494, para. 39 (original emphasis).

³ *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/115, para. 100.

within 90 days from the publication of the 2016 Judgment, i.e., by 22 November 2016. The Appeals Tribunal noted:⁴

... Upon remand, we expect the Administration to strictly adhere to our directives in the Appeals Tribunal Judgment and to our further instructions herein, where we explicitly instruct the ASG/OHRM to consider, on an individual and separate basis, each staff member's respective qualifications, competencies, conduct and transferrable skills when determining each of Ademagic *et al.*'s applications for conversion to a permanent appointment and not to give predominance or such overwhelming weight to the consideration of the finite mandate of 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.

15. Following a third round of the conversion exercise reconsidering 255 former ICTY staff members for permanent appointments in light of the situation in 2011, the ASG/OHRM granted permanent appointments limited to the ICTY to 45 professional staff members. Thirty-five professional staff and 175 general service staff, including the 20 Appellants in the present case, were denied permanent appointments.

16. Seven of the Appellants in the professional category, all language staff, were denied retroactive conversion of their fixed-term appointments into permanent appointments on the ground that they did not have "transferrable skills". Each of these language staff was found to lack the required language skills to be suitable for language positions within the Secretariat as at September 2011. That was either because they had not passed the LCE and/or they possessed skills in unneeded language combinations such as BCS. It was thus considered unlikely that the staff members' services would be required by the Organization beyond the end of 2014 or early 2015, when the ICTY was scheduled to close, and a career appointment was considered unjustified.

17. In turn, the 13 Appellants in the general service category were informed by individual letters that they had been denied a permanent appointment. Four of the 13 general service non-language Appellants were found to have the qualifications and background that would make them suitable for positions in duty stations outside The Hague. However, they were denied a permanent appointment on the ground that they could not be transferred to any of these

⁴ *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684, para. 58.

positions outside The Hague since they had been recruited “locally”.⁵ As to the remaining nine general service Appellants, they were found not suitable for alternative positions within the Secretariat, in addition to lacking mobility due to their local recruitment. They each received a letter reviewing their professional qualifications and background and a conclusion that “[o]utside the ICTY, in September 2011, there were no ongoing positions in the Secretariat for translators with the language combination Bosnian/Croatian/Serbian into English or French”. The letters also reproduced the reasons why, as local recruits, they could not be transferred to positions outside The Hague in any event. In view of the fact that it was not anticipated that their services would be needed beyond the closure of the ICTY in 2014 or early 2015, they were found not suitable for permanent appointments.

18. On 3 March 2017, the Under-Secretary-General for Management (USG/Management) communicated the Administration’s decision not to accept the recommendations of the MEU with respect to the Appellants. The USG/Management stated that “[t]he MEU advised that OHRM [was] reviewing its decisions ... based on information provided in the personal statements ... and that a final decision [was] pending. Accordingly, the MEU [found] that the request for management evaluation with respect to [these 22 litigants was] premature and [,] thus, not-receivable at this time.”

19. On 21 June 2017, the Appellants filed with the Appeals Tribunal a motion for execution of judgment seeking an order requiring immediate execution of the 2016 Judgment and the issuance of final decision letters. By Order No. 289 (2017) dated 14 July 2017, the Appeals Tribunal granted the motion and ordered that the Secretary-General fully execute the 2016 Judgment by issuing final decisions with respect to each of the Appellants within 21 calendar days of the issuance of the Order.

20. On 6 and 31 July 2017, the ASG/OHRM notified the Appellants of the contested decisions, whereby OHRM reconsidered for a fourth time their suitability for conversion to permanent appointments. The ASG/OHRM followed the recommendations of the CR Bodies and denied permanent appointments to each of the Appellants. In particular, the ASG/OHRM revisited the background and experience of each of the professional Appellants but reached the same conclusion as to their lack of transferrable skills. This was said to be due to the absence of any ongoing need for translation services for their language combinations and/or the fact that

⁵ Despite their national origins, they had been in the Netherlands at the dates of their engagement and they were therefore regarded as “local” recruits.

they had not passed the required LCE. For some Appellants who had professional experience other than in language services, such as Mr. Popovic who had experience as a media analyst, their additional experience was considered to be insufficient to qualify them for alternative positions at the same level. Similarly, the administrative and managerial experience of Mr. Sasic was considered to be insufficient to qualify him for managerial and programme officer roles at the P-4 level beyond language services.

21. As to the general service Appellants, the ASG/OHRM found that seven of them would be suitable for a number of positions within the Secretariat, but all outside their duty station. In turn, the ASG/OHRM found that the six general service language Appellants would not be suitable for ongoing positions in the Secretariat due to their language combinations and their lack of mobility.

22. On 23 August 2017, the Appellants jointly requested management evaluation of the decisions of 6 and 31 July 2017. The request was rejected on 18 September 2017, on the same grounds as those provided in the letter of 3 March 2017.

23. On 22 September 2017, the Appellants filed an incomplete application with the UNDT which they perfected on 15 November 2017. This is the case, backgrounded to this point, from which the current appeals come.

24. On 20 February 2019, the UNDT issued Judgment No. UNDT/2019/023, dismissing the joint application. The UNDT found that the contested decisions were lawful and in accordance with the instructions of the 2016 Appeals Tribunal Judgment, and that the Appellants had been given individualized full and fair consideration for permanent appointments. In order to reach its conclusion, the UNDT addressed four questions in turn.

25. First, the UNDT found that the Administration had not discriminated against the Appellants in tying their suitability for permanent appointments exclusively to future service outside the ICTY. The Appeals Tribunal had clearly allowed the Administration to establish a distinction between staff members serving in downsizing entities, and those not so serving. The UNDT held that the Administration was bound to examine the Appellants' transferrable skills, without regard to the fact that other staff members serving in non-downsizing entities were considered differently.

26. Second, the UNDT found that the Administration had not erred or abused its discretion in 2011 in limiting its examination of the Appellants' transferrable skills to existing positions in the Secretariat but outside the ICTY and the MICT. The UNDT found that it fell within the ambit of the Administration's discretion to decide whether to consider positions in the ICTY or the MICT in its examination of the Appellants' transferrable skills. The UNDT also held that by expanding its review of the Appellants' career prospects beyond the ICTY, the Administration struck a balance between the operational realities of the ICTY as a downsizing entity and its interests to provide reasonable incentives to its staff members to stay on board for as long as possible.

27. Third, the UNDT found that the Administration had not erred or abused its discretion in deciding that it was not in the interests of the Organization to grant the general service Appellants permanent appointments based on their lack of career prospects at their duty station. It concluded that, in the context, this 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 was discretionary and bore important financial implications for the Organization. The general service Appellants did not have any legal entitlement to a change of their locally recruited status to internationally recruited, and the Dispute Tribunal concluded that it could not impose an obligation on the Organization to grant it.

28. The UNDT found that the Administration did not exercise its discretion unreasonably when it looked at the manner in which the general service Appellants' individual skills could be used by the Secretariat at their duty station. Contrary to the Appellants' assertion, 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. The examination of transferrable skills intrinsically implied the consideration of positions to which the staff members may be transferred. According to the Secretary-General, there was no other entity in The Hague to which the general service Appellants could be transferred as neither of the two United Nations entities based there, the MICT and the International Court of Justice, is part of the Secretariat. 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. That was because it had already found that the Organization did not err or abuse its discretion in determining that the MICT did not offer career opportunities to the Appellants.

29. As to the Appellants located in Sarajevo, Zagreb, and Belgrade, the UNDT found that the Secretary-General committed no errors in finding that there would be no general service positions located at those duty stations within the Secretariat upon closure of the ICTY. The UNDT noted that one of the general service staff members, Mr. Georgijev located in Belgrade, had ultimately been granted a permanent appointment on the basis that he could be transferred to the United Nations Mission in Kosovo (UNMIK). This demonstrated that the Administration looked at his individual skills and the possibility of a transfer to a position in Belgrade upon closure of the ICTY. The UNDT also considered, at its own instigation, the situation of Mr. Kosanovic who was also located in Belgrade. Mr. Kosanovic was a Language Assistant at the G-5 level specialized in translations from BCS into English and vice versa. The UNDT found that it had no information allowing it to conclude that, in September 2011, the Administration erred in determining that, outside the ICTY, there were no ongoing positions in the Secretariat requiring this combination of languages and, in particular, that there were ongoing needs for translation services from BCS to English in UNMIK at that time.

30. Finally, the UNDT found that the Administration did not err in the consideration of specific individual cases by misstating the facts or not taking into account relevant facts. The UNDT concluded that the Administration had not considered irrelevant facts or given undue weight to the finite mandate of the ICTY and the MICT. Given the discretion left to the Administration in the reconsideration exercise, it was not unreasonable, in September 2011, for the Administration to examine each of the Appellants' transferrable skills in the light of ongoing positions in the Secretariat to which they could possibly be transferred, taking into account, as applicable, the nature of their appointments as internationally or locally recruited staff members. This did not amount to discrimination against ICTY staff members, but rather catered for the reality that they were serving in a downsizing entity. The Administration was allowed to take this consideration into account in pondering the interests of the Organization in respect of whether to grant the Appellants permanent appointments.

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

32. The Appellants filed their appeal on 18 April 2019, and the Secretary-General filed an answer on 21 June 2019.

Submissions

The Appellants' Appeal

The UNDT erred in law and fact when it included downsizing as a suitability criterion.

33. The Appellants say 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 following ST/SGB/2009/10. Pursuant to these procedures, there were two “checkboxes”: the first, to affirm that the staff member had met or exceeded his or her performance goals in the relevant time period; and, the second, that no administrative or disciplinary measure had been taken against him or her. If an eligible staff member met those two criteria, the Administration should have found the staff member suitable and should have granted a permanent appointment without any further consideration.

34. When the Appeals Tribunal issued its Judgments in 2013 and 2016, finding that the Administration must consider qualifications, competencies, conduct and transferrable skills in order to determine suitability, it was unaware of the facts related to the established procedures used to conduct the conversion exercise pursuant to ST/SGB/2009/10. Before the presently impugned exercise, the Secretary-General had gone so far as to make misrepresentations to the Appeals Tribunal claiming that no such evidence existed. Believing that a thorough process had taken place which simply failed to consider relevant factors properly, the 2013 Appeals Tribunal Judgment sought to provide the necessary balance of factors for non-discriminatory consideration of the ICTY staff.

35. Upon the establishment of the permanent contract regime in 1982, the General Assembly decided that consideration for permanent appointments should be given once a staff member attained five years of continuing good service. Between 1982 and 1995, however, the Administration's practice was to consider only those who “happened to be placed on a regular budget post at the time of consideration”. Ultimately, in July 1995, the former Administrative Tribunal (UNAdT) held that any exercise “must treat staff equally”, “regardless of how many, or how few, permanent appointments the Organization can afford to grant” and that

performance, length of service, and the general financial framework of the Organization were the critical factors for assessment whether permanent appointments could be granted. Four months later, as of November 1995, the Secretary-General suspended the granting of permanent appointments due to the financial state of the Organization.

36. In 1997, the General Assembly rendered resolution 51/226, effectively confirming the UNAdT's finding. It affirmed that a staff member's attainment of the five-year eligibility criterion is not dispositive of the granting of a permanent appointment and that overall operational realities should guide whether a conversion exercise should take place at all, as opposed to an individual criterion. Indeed, due to the operational realities of the Organization, no one was considered for permanent appointment for eleven years.

37. When the Secretary-General agreed to lift the suspension of permanent appointment consideration and the Regulations and Rules were not amended, the Administration began to structure a framework and implemented an exercise in 2006 setting out two suitability criteria which it listed in its guidelines and a checkbox assessment form: the staff member had met or exceeded 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 the 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. As the exercise pursuant to ST/SGB/2006/9 (Consideration for conversion to permanent appointment of staff members eligible to be considered in 1995) allowed only for consideration of those who reached eligibility on or before 15 November 1995, the Administration conducted a final exercise to assess those who reached eligibility between 1995 and the abolishment of former Rule 104.13 in 2009.

38. The 2009 exercise was controlled by ST/SGB/2009/5 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, creating a three-step process: (i) eligibility; (ii) suitability; and (iii) decision taking into account all the interests of the Organization.

39. The General Assembly has never adopted a rule change which altered the suitability criteria. Staff Regulation 4.5(d) and Rule 4.14 state that the Secretary-General shall prescribe which staff members are eligible for consideration for continuing appointments. The Secretary-General prescribed the eligibility criteria in ST/SGB/2011/9. Resolution 51/226 was intended to apply to a new system which became the continuing appointment regime. Moreover, the resolution's criteria for consideration were never intended to apply to suitability but rather eligibility. Thus, a suitability determination based on the established checkbox procedure is not inconsistent.

Transferability is no more than an exclusion due to downsizing.

40. Should the Appeals Tribunal find that its bespoke test for the 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 the 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 because of alleged lack of transferability and is a discriminatory exercise.

41. The UNDT erred in law when allowing for no consideration to be given to the needs of the ICTY and the MICT. It was evident in autumn 2011 that the ICTY would not meet its mandate in the time frame allotted. In each of its four completion strategy reports for 2010, 2011, and beyond, the ICTY warned that "[a]s the Tribunal nears the end of its mandate, highly qualified and essential staff continue to leave the Tribunal at alarming rates for more secure employment elsewhere" and that "[t]he loss of the Tribunal's experienced staff has significantly impacted proceedings, placed an onerous burden upon the Tribunal's remaining staff and will place a much heavier financial burden on the international community in the long run".

Relief

42. 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 procedure 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.

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

44. 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

45. This is, first, that the UNDT correctly found that the contested decisions were lawful and dismissed the applications. The UNDT's conclusion is in accordance with the facts of the present case and the relevant law, including General Assembly resolution 51/226, former Staff Rule 104.13, and ST/SGB/2009/10. In the 2016 Judgment, the Appeals Tribunal applied these legal instruments. It concluded that the Secretary-General had not correctly evaluated the case files of each staff member eligible for conversion of his or her fixed-term appointment to a permanent appointment and provided explicit instructions for the evaluation process that the Secretary-General was to undertake. In particular, the Secretary-General was to "consider, on an individual and separate basis, each staff member's respective qualifications, competencies, conduct and transferrable skills when determining each of the [now Appellants'] applications for conversion to a permanent appointment".

46. 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 his or her skills and

refrained from giving undue weight to the downsizing of the ICTY or the MICT's limited mandate. Consequently, the UNDT, upon reviewing the Secretary-General's decision-making process, concluded that the Secretary-General had complied with the 2016 Appeals Tribunal Judgment. In view of the foregoing, the UNDT correctly found the contested decisions to be lawful and dismissed the applications.

47. Furthermore, 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 a 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" (2006 Guidelines), refer directly to the requirement that the interests of the Organization be taken into consideration. ST/SGB/2006/9 repeats the provisions of Section 2 *verbatim*. ST/SGB/2009/10 contains the same provision.

48. 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 included only 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. They are, however, 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 regarding each individual staff member.

49. The UNDT also correctly held that the Secretary-General took into consideration the interests of the ICTY and the MICT when determining whether to grant the Appellants permanent appointments. The UNDT held that the Secretary-General was acting within his discretion when he determined that because both the ICTY and the MICT were slated to be downsized and then closed, posts existing in 2011 in these two entities did not create a basis upon which the interests of the Organization would be served by granting the Appellants permanent appointments. The Appellants' assertion that the UNDT erred by not requiring the Secretary-General to assume certain posts at the ICTY and the MICT would provide viable career prospects is erroneous. It conflates two separate questions. In accordance with the 2016 Appeals Tribunal Judgment, the UNDT correctly addressed the question of the interests of the ICTY and the MICT. The Secretary-General was obligated to take these into consideration, and did, separately from the question whether the Secretary-General had the authority to determine that. This was because the ICTY and the MICT were both slated to be closed. The staffing requirements of these two organs could not create an interest for the Organization to convert staff members' fixed-term appointments to permanent appointments.

50. The UNDT correctly found that for the Organization to be able to find posts for general service staff members who had transferrable skills but were locally recruited pursuant to former Staff Rule 104.6, such posts would have had to exist at their local duty station. Absent the existence of such posts, the Organization's assertion that it would not be in its interest to grant locally recruited staff members permanent appointments was lawful. Furthermore, former Staff Rule 109.1(c)(ii)(a) provided, in relation to locally recruited staff members, that the various rights of staff members on permanent appointments "shall be deemed to have been satisfied if such locally recruited staff members have received consideration for suitable posts available at their duty stations". Had other such posts existed at the local duty station, whether at the ICTY or the MICT or at other offices, the Organization would have been ready to examine the transferability of the locally recruited staff members to those posts. Since the Organization did not anticipate such posts would be available at the local duty station of each appellant, it was reasonable for the Organization to determine that it was not in its interest to grant permanent appointments to locally recruited Appellants.

51. The Secretary-General properly followed the instructions of the 2016 Appeals Tribunal Judgment by carefully evaluating the conduct and skills of each staff member; by assessing the transferability of his or her skills; and by refraining from giving

undue weight to the downsizing of the ICTY. The UNDT, therefore, correctly held that the contested decisions were lawful. Accordingly, the Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and reject the appeal.

52. Should the Appeals Tribunal find that the UNDT erred, and that despite the careful weighing by the Secretary-General of each individual staff member's case file, the procedure undertaken by the Secretary-General was flawed, the Appeals Tribunal should remand the matter to the Secretary-General for further consideration of the staff members' cases, according to the Appeals Tribunal's instructions. The jurisdiction of the Appeals Tribunal is limited to a judicial review of the exercise of discretion by the competent decision maker and it is not its role 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.

Considerations

53. This Judgment deals with the same issues, at least of law and principle, as that which has been delivered at the same time by this Tribunal in *McIlwraith et al v. Secretary-General of the United Nations*.⁶ Although there are some factual differences between the two appeals, the legal issues and principles, and our decisions on them, are the same. The same Judges have decided both cases, but having given careful and earnest consideration to each separately. Where it is applicable to the facts of this Judgment, we adopt the reasoning of the *McIlwraith et al.* Judgment.

54. Despite the length and complexity of the submissions of the parties, decision of these appeals comes down to several essential questions. Lawfulness and reasonableness of the UNDT's decision are the touchstones of our task. The legality and rationality of the Secretary-General's decision that it was in the Organization's interests to either retain staff who lacked the transferable skills and/or not to appoint them to other positions within the Organization, are the subset of these questions of legality and rationality.

55. We address first our reasons, for deciding as recorded in a Minute, to decline the Appellants' request for an oral hearing. This was on grounds of the length and complexity of the background to this appeal. We were not persuaded that the grounds advanced meant that it was in the interests of justice to direct an oral hearing of the appeal.

⁶ *McIlwraith et al. v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-953.

56. Turning to the substantive elements of the appeal, the Appellants argue that the Appeals Tribunal had erred previously in establishing the criteria in permanent appointment conversion cases, and that consequently the UNDT erred in applying these flawed criteria. This submission in effect seeks a revision of Judgments numbered 2016-UNAT-684⁷ and 2013-UNAT-359.⁸ Under Article 11 of the Appeals Tribunal Statute, requests for revision need to be made within one year of the issuance of the Judgment. The Appellants are therefore time-barred from raising these arguments. Moreover, the new issue they are presenting is not an issue of fact, but an issue of law. There are no other avenues of review of its own particular past judgments by the Appeals Tribunal. The criteria established by the Appeals Tribunal therefore stand and the UNDT did not err in applying them. Even if we were empowered to reconsider our previous Judgment(s), we have not been satisfied that the wrong criteria were adopted and applied.

57. Next, the Appellants say the UNDT erred in tying suitability to the availability of future positions outside the ICTY. We conclude, however, that the UNDT did not so err. It was within its discretion to consider that the ICTY and the MICT were temporary institutions with a finite mandate and that therefore there were no posts to which the staff members' skills could have been transferrable. The so-called "two-step" process addressed "eligibility" for permanent appointment (as the Appellants in fact submit), but that is not the same as requiring permanent appointment upon those two steps being satisfied.

58. The Appellants then contend that the UNDT erred in not granting permanent appointments to general service staff members. We disagree. The Appeals Tribunal's Judgment did not contain any specific instruction as to how the transferrable skills of the general service Appellants had to be assessed in the reconsideration exercise, in particular whether their status as local recruits had to be taken into consideration in examining alternative positions to which they could be transferred. The Administration retained a discretion as to how to assess the transferrable skills of locally recruited staff members and we have not been satisfied that it erred in exercising that discretion.

⁷ *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684.

⁸ *Ademagic et al. and McIlWraith v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359.

59. The UNDT correctly found that for the Organization to be able to find posts for general service staff members who had transferrable skills but were locally recruited pursuant to former Staff Rule 104.6, such posts would have had to exist at their local duty station. Absent the existence of such posts, the Organization's assertion that it would not be in its interest to grant locally recruited staff members permanent appointments was rational and lawful.

60. 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 was discretionary and carried important financial implications for the Organization. The general service Appellants did not have any legal entitlement to a change of their locally recruited status to internationally recruited, nor can the Tribunal impose an obligation on the Organization to grant it. The UNDT did not err in finding that the contested decisions were lawful.

61. Finally, the Appellants submit that the UNDT erred in not granting permanent appointments to professional staff members. Although there was a distinction between general service and professional category Appellants in that the Administration possessed an additional or greater discretion in respect of the latter, we are likewise not satisfied that this discretion was exercised improperly. As in the case of the general service Appellants, the guiding Appeals Tribunal's Judgment did not contain any specific instruction as to how the transferrable skills of the professional category Appellants had to be assessed in the reconsideration exercise. In particular, it did not specify whether their status as local or international recruits had to be taken into consideration in examining alternative positions to which they could be transferred. The Administration retained discretion as to how to assess the transferrable skills of staff members and did not err in exercising it.

62. Our reasoning in respect of the general service Appellants as set out above, otherwise applies also to the professional category Appellants. We will not repeat it.

63. The UNDT did not err in finding that the contested decisions were lawful. We can detect no error on the part of the UNDT. We affirm the Judgment of the Dispute Tribunal and dismiss the appeal. Because of our foregoing decisions, no questions of further relief for the Appellants arise.

64. In case it needs to be said, this Judgment and indeed others given in this litigation, do not reflect adversely at all on the performance by the Appellants or their dedication to the Organization (and the ICTY in particular). That Tribunal with a specialist mandate had to conclude its unique mission and it is regrettable, but was inevitable and ultimately lawful, that not all former staff could be re-engaged using their skills and experience elsewhere.

Judgment

65. The appeal is dismissed and Judgment No. UNDT/2019/023 is affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Colgan, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Murphy

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

(Signed)

Weicheng Lin, Registrar