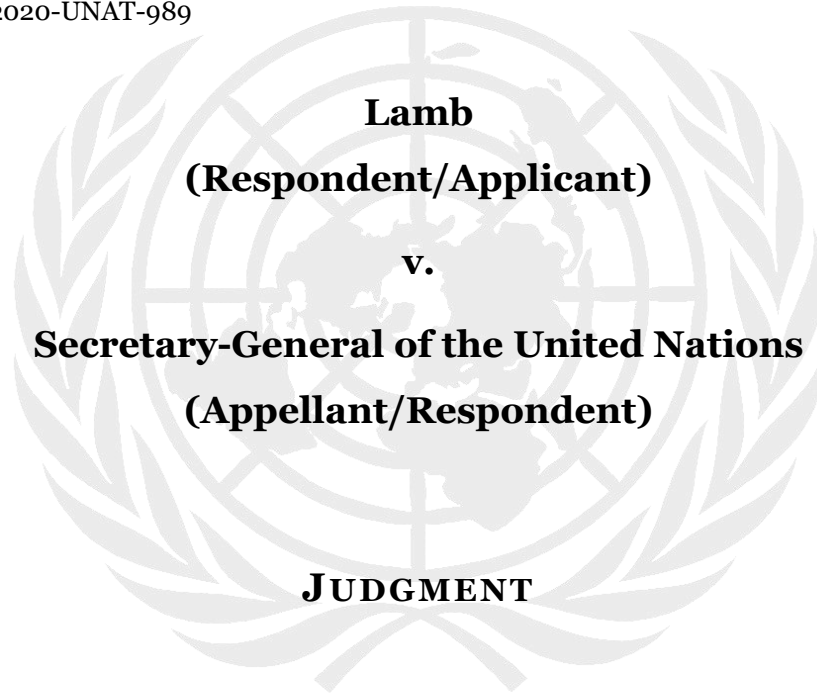




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-989



**Lamb
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2019-1293
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Ms. Lamb:	Robbie Leighton
Counsel for Secretary-General:	Noam Wiener

JUDGE GRAEME COLGAN, PRESIDING.

1. Ms. Susan Lamb is a former Senior Legal Officer at the P-5 level at the United Nations Assistance to the Khmer Rouge Trials (UNAKRT). Following litigation before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) and the United Nations Appeals Tribunal (Appeals Tribunal), Ms. Lamb received a retroactively effective offer of conversion of her fixed-term appointment to a permanent appointment. This was after she had already separated from the Organization. Upon acceptance of this offer, the Administration informed her that she could only obtain a position within UNAKRT by applying for the UNAKRT posts and being appointed after a process of competitive appointment. She challenged this decision as a failure of the Organization to provide her with an effective remedy. The UNDT granted her application and ordered that UNAKRT offer Ms. Lamb a suitable post without competitive process and ordered in-lieu compensation. The Secretary-General appeals, arguing among other things that her retroactive appointment was disrupted when she resigned and separated. He says that she therefore had no contractual relationship with the Organization obliging it to place her preferentially in vacant posts as someone holding a permanent appointment. On appeal, we find that the UNDT erred in law, that its Judgment cannot stand, and the Secretary-General's appeal must be allowed.

Facts and Procedure

2. Pursuant to 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), and further to the promulgated Guidelines, Ms. Lamb was assessed to be eligible for consideration to have her appointment converted to a permanent appointment.

3. However, on 31 January 2012, the Chief, Human Resources Management in the Department of Economic and Social Affairs (DESA), the entity that administered UNAKRT, sent Ms. Lamb a letter rejecting her request for conversion to a permanent appointment. It stated that the "decision was taken after a review of [her] case, taking into account all the interests of the Organization and was based on the operational realities of the Organization, particularly that UNAKRT is a downsizing entity".

4. Ms. Lamb filed a timely request for management evaluation. The Management Evaluation Unit (MEU) upheld DESA's decision. On 11 June 2012, Ms. Lamb (and seven other UNAKRT staff members who were likewise denied conversion) filed separate applications with the UNDT.

5. While still awaiting a decision of this case, Ms. Lamb informed the Administration, by letter dated 30 May 2013, that she would not seek renewal of her fixed-term appointment with UNAKRT. Upon the expiry of her appointment on 30 June 2013, Ms. Lamb separated from service.

6. On 26 August 2014, the UNDT, disposing of the eight applications (including Ms. Lamb's), issued *Tredici et al.*¹ and rescinded the decision of the Assistant Secretary-General for Human Resources Management (ASG/OHRM) to not convert the appointments of the eight applicants. The UNDT remanded the UNAKRT conversion exercise to the ASG/OHRM to retroactively consider each applicant's case. The UNDT also awarded each applicant EUR 3,000 in damages. The UNDT's judgment was not appealed.

7. On 24 November 2014, the ASG/OHRM informed Ms. Lamb that, after reconsideration, her office had again decided to not convert her fixed-term appointment to a permanent appointment. This was on the grounds that the fourth applicable criterion was not met, namely that the permanent appointment be in the interest of the Organization. The ASG/OHRM explained that although she had transferable skills, her appointment was limited to UNAKRT, which had a finite mandate, and thus there was no authority to place her in a position in another entity. Within the time to do so, Ms. Lamb requested a management evaluation of this decision, which the MEU again upheld.

8. On 4 March 2015, Ms. Lamb and six other UNAKRT staff members filed separate applications with the UNDT. On 29 March 2016, the UNDT in *Gueben et al.*² held that the denial of conversion of Ms. Lamb and the others was unlawful as the applicants had not been given proper and individual consideration in light of their qualifications and instead the decisions had been based on the finite mandate of UNAKRT alone. The UNDT found that the Administration had failed to abide by its *Tredici et al.* Judgment as well as the Appeals Tribunal's

¹ *Tredici et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/114.

² *Gueben et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/026.

instruction in *Malmström et al.*³ The UNDT rescinded the decisions and remanded the claims to the ASG/OHRM for retroactive and individualized consideration. The UNDT awarded moral damages of EUR 3,000 to each applicant. The UNDT's Judgment in *Gueben et al.* was appealed to the Appeals Tribunal, which issued its Judgment on 28 October 2016,⁴ affirming the UNDT's Judgment but vacating the moral damages award.

9. On 17 March 2017, the Acting Assistant Secretary-General for Human Resources Management (AASG/OHRM) informed Ms. Lamb that, upon reconsideration, she was offered a permanent appointment "limited to service with UNAKRT effective retroactively 30 June 2009". Ms. Lamb sent an e-mail to the Chief of the Human Resources Management Services (HRMS) accepting the offer of appointment, indicating she was available to work, and requested advice as to the next steps and when she should report for duty. By e-mail dated 3 May 2017, the Chief of HRMS responded to Ms. Lamb noting that she had separated from the Organization and so a reappointment was only possible through applying for a vacant position and being selected through usual recruitment procedures. Thus, he advised her that she could only return to UNAKRT if she applied to and was selected for a position. This e-mail serves as the basis of the administrative decision which Ms. Lamb contests. Ms. Lamb requested a management evaluation of the decision "not to provide her with an effective remedy" and the Under-Secretary-General for Management replied by letter dated 10 August 2017 to her request for management evaluation, upholding HRMS's decision.

10. On 3 November 2017, Ms. Lamb filed a further application with the UNDT challenging this decision. On 23 May 2019, the UNDT issued Judgment No. UNDT/2019/092, the Judgment now on appeal. The Dispute Tribunal first determined that her application was receivable as the contested administrative decision identified was the failure of the Administration to provide her with an effective remedy after having been granted a permanent appointment with retroactive effect. It was also receivable as not barred by *res judicata* norms⁵ because the prior judgments of the UNDT and Appeals Tribunal dealt with a different administrative decision, namely the refusal to grant her a permanent appointment.

³ *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357.

⁴ *Gueben et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-692.

⁵ The principle in law that an already decided case cannot be open for re-decision.

11. On the merits, the UNDT held that Ms. Lamb had separated from service by resignation as evidenced by her letter of resignation, and thus she could not be considered as having separated by her appointment's expiration. Likewise, as she separated by resignation and not because the Secretary-General terminated her appointment, she was not entitled to receive a termination indemnity. Furthermore, nothing in her resignation letter indicated her resignation was related to the delay in receiving her permanent appointment and thus any claim for pecuniary loss relating to the delay was denied. The UNDT also found that the letter of 17 March 2017 offered her a permanent appointment, which she accepted unconditionally. Thus, this offer and its acceptance constituted a valid contract with UNAKRT. Regardless of her resignation in 2013, a new contractual relationship had been forged. The UNDT held that to implement the decision to grant Ms. Lamb a permanent appointment, her case should be treated in effect as would be an abolition of post. Therefore, the Administration was bound to consider her for suitable current and future vacant posts on a preferential basis in accordance with Staff Rules 9.6(e) and 13.1(d). The UNDT said she was required to apply for advertised job openings, but the Administration was then obliged to consider her application on a preferential or non-competitive basis. Thus, she needed only to express her interest in a vacancy but not to take part in a competitive recruitment process. She was also entitled to apply for positions at her grade level and below. Accordingly, the UNDT granted her application in part, ordering specific performance. It directed the Administration to consider her applications for suitable posts on a preferred or non-competitive basis and set compensation, in lieu of this specific performance, the equivalent of three months' net base salary at Ms. Lamb's grade level at the time of her separation from service.

Submissions

The Secretary-General's Appeal

12. The Secretary-General requests the Appeals Tribunal to vacate the impugned Judgment and uphold the decision of the Chief of HRMS. In support, the Secretary-General argues that the UNDT erred in holding that a contractual relationship existed between Ms. Lamb and the Organization. The offer of a permanent appointment was retroactively effective as from 30 June 2009 but was ended in June 2013 by Ms. Lamb's resignation. The context of the 17 March 2017 letter is clear in that it did not offer Ms. Lamb a new appointment but rather converted her fixed-term appointment from 30 June 2009 to 30 June 2013 to a permanent

appointment. Her rights stemming from her appointment were extinguished by her resignation with effect from 30 June 2013 and did not continue thereafter.

13. The UNDT erred in law by analogizing Ms. Lamb's situation to that of a staff member facing an abolition of post. This was erroneous in law because Ms. Lamb was not separated from service by termination, but rather at her own volition by resignation. In situations of abolitions of post, the Organization is obliged to give preference to staff members holding permanent appointments who, through no fault of their own, have found themselves unable to hold onto their posts subject to downsizing or retrenchment. In this case, Ms. Lamb resigned and separated from service. A staff member's lack of choice in an abolition of post situation cannot be equated to Ms. Lamb's voluntary separation by resignation. Thus, the Appeals Tribunal should hold that abolition of a post was not the correct paradigm by which to have evaluated Ms. Lamb's rights.

14. The UNDT erred in law by concluding that Ms. Lamb was entitled to consideration, on a non-competitive basis, for the UNAKRT positions. The UNDT erred in interpreting the *Timothy*⁶ case in finding preferential consideration meant there was no requirement to competitively recruit and Ms. Lamb needed only to express her interest in a vacant post to enable her to be appointed to it. The Secretary-General says that if this were permitted to stand, it would remove any need for assessing whether a candidate is fully competent for a position.

Ms. Lamb's Answer

15. Ms. Lamb requests the Appeals Tribunal to affirm the impugned Judgment. In support, she argues that the UNDT did not err in concluding that the grant of her permanent appointment created a contractual relationship. The contents of the 17 March 2017 letter contained an express offer that was prospective in nature as it spoke to the appointment being subject to the Staff Regulations and Rules which may change from time to time. The letter also referred to her future applications for vacant positions, and referenced a future possibility where it said "should [her] appointment be terminated, the Secretary-General will pay such indemnity". This language clearly created a contractual relationship intended to endure into the future. In addition, the letter required her acceptance. If the offer had come to an end four years previously then she would not have been required to accept it. If she truly had no contractual relationship since 2013, then she would have had no standing to litigate before the UNDT, but the Secretary-General at

⁶ *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847.

no point challenged her standing. The UNDT thus correctly concluded there was a contractual relationship established in 2017.

16. The UNDT did not err in analogizing her situation to that of a staff member facing abolition of his or her post. The UNDT correctly identified her situation as exceptional, and that there was no rule precisely on point. Thus, a legal analogy was appropriate and required to provide an effective remedy. The delay and unlawful denial of her permanent appointment were not Ms. Lamb's choice.

17. The UNDT did not err in concluding Ms. Lamb was entitled to consideration on a non-competitive basis for the UNAKRT positions. The Secretary-General's interpretation of the *Timothy* case is at odds with the clear wording of the decision which states that, once an application process is completed, "the Administration is required by Staff Rule 9.6(e) and (f) and the Comparative Review Policy to consider the continuing or indefinite appointment holder on a preferred or non-competitive basis for the position".⁷ Furthermore, the Appeals Tribunal has found in *El-Kholy*⁸ that to require a staff member to apply for suitable and advertised posts on the same conditions as external candidates would render moot the right of preference deriving from Staff Rules 9.6(e) and 9.6(g) and 13.1(d).

Considerations

18. We preface our discussion of the several and important considerations necessary to deciding this appeal by saying that if they are typical of similar employment disputes, the foregoing analysis of the facts, chronology and procedures around this case reflect poorly on the state of employment relations within the United Nations.

19. Ms. Lamb's case has taken almost 11 years from when the issues at its heart first arose to this point which may or may not be its final chapter. It has undergone no fewer than three management evaluations of significant decisions affecting Ms. Lamb's employment. It has been before the Dispute Tribunal for judgments on no fewer than three separate occasions, and has already been the subject of an appeal to this Tribunal. Although Ms. Lamb's successes in the UNDT have been modified once (by setting aside an award of moral damages), she has been successful consistently on matters of law and principle.

⁷ *Ibid.*, para. 47.

⁸ *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, para. 33.

20. As an appellate tribunal, however, our task is to determine whether the UNDT erred in its judgment which is the subject of this appeal by the Secretary-General. To do so, we have applied the previous judgments of both the UNDT and this Tribunal in, or affecting, Ms. Lamb's case. While there are some findings and reasonings for them with which we might take issue if those matters were before us for decision, we will not do so.

21. We consider that the UNDT concluded correctly that Ms. Lamb's employment ended in mid-2013 at her own initiative, that is by her resignation, albeit by the unusual method of giving a month's notice that she would not seek to renew her fixed-term contract with UNAKRT when it expired. That conclusion is, however, determinative of Ms. Lamb's claims as we will explain, and the UNDT thereafter erred in law in reaching the findings it did in her favour.

22. The UNDT was also correct to conclude, as it did, that there was nothing in the relevant contemporaneous documentation relating to Ms. Lamb's resignation to support her belated assertion that this was precipitated by uncertainty about her longer-term prospects with UNAKRT. Ms. Lamb referred to having obtained other employment in India before tendering her resignation. Her letter of resignation of 30 May 2013 referred to an earlier indication that she had given to the Administration that she would be resigning. It referred also to on-going consultancy services that she would provide to UNAKRT after her resignation took effect and that these had also been discussed previously. There is nothing that would support a claim, in effect, that she had no real option other than to resign, or in other words, that she was dismissed constructively.

23. Just why Ms. Lamb applied to the UNDT with the apparent intention of obtaining permanent employment with UNAKRT but then resigned before the UNDT delivered its decision (which was in her favour) is enigmatic and unexplained. In these circumstances, we would not be willing to infer anything about Ms. Lamb's motivation.

24. In 2017, Ms. Lamb was ultimately offered, and promptly accepted, permanent employment status (albeit to an unspecified role or position) with UNAKRT. This offer included a deemed retroactivity to mid 2009, a period of four years before she resigned in 2013. The effect in law of this agreement reached between the parties was that Ms. Lamb's employment from mid-2009 was as a permanent member of the UNAKRT staff. That status was, however, ended by Ms. Lamb's self-induced separation from service by her resignation in mid-2013. That being the manner in which her employment came to an end, Ms. Lamb cannot be entitled to any

benefits except those to which she might have been entitled as one resigning on notice from a permanent appointment. Those benefits that she sought, and that the UNDT granted to her, are not ones arising from a separation from service by resignation.

25. The UNDT was wrong to have decided (at paragraph 67 of its Judgment) that the parties' 2017 agreement created a new contractual relationship that survived Ms. Lamb's 2013 resignation. Rather, the correspondence between the parties at that time created a retroactive conversion of her employment status, from fixed-term appointment to permanent appointment, as from mid-2009.

26. It must follow that the UNDT's Judgment was in error and cannot stand.

Judgment

27. The appeal is upheld and Judgment No. UNDT/2019/092 is hereby vacated.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar