UNITED NATIONS DISPUTE TRIBUNAL

Cases No.: UNDT/NY/2012/044-051
Judgment No.: UNDT/2014/114
Date: 26 August 2014
Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

TREDICI
GUEBEN
LAMB
LOBWEIN
MATAR
PASTORE STOCCHI
REXHEPI
VANO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicants, eight staff members from the United Nations Assistance to the Khmer Rouge Trials ("UNAKRT") at the relevant time, filed eight individual applications contesting the non-individualized decision sent to each of them denying them conversion to permanent appointment on grounds of operational reasons as UNAKRT is a downsizing entity. These cases are *Tredici* UNDT/NY/2012/044; *Gueben* UNDT/NY/2012/045; *Lamb* UNDT/NY/2012/046; *Lobwein* UNDT/NY/2012/047; *Matar* UNDT/NY/2012/048; *Pastore Stocchi* UNDT/NY/2012/049; *Rexhepi* UNDT/NY/2012/050; and *Vano* UNDT/NY/2012/051.

2. The Applicants request a declaration that the contested decisions were unlawful, and "that the Secretary-General is under a duty to consider [their applications] for permanent appointment on an individual basis where "operational realities" or funding concerns cannot predetermine the outcome". The Applicants further request, *inter alia*, rescission of the contested decisions, various heads of loss including termination indemnity, "compensation for moral/non-pecuniary and pecuniary damages of an amount equal to USD10,000 for stress and anxiety caused by persistent job insecurity as a result of the Administration's continuing failure to respond to established legal precedents", and that they be awarded interest on any award.

Relevant background

3. On 23 June 2009, the Organization issued ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009).

4. Following the issuance of this bulletin, the Applicants, between December 2009 and March 2010, requested to be considered for conversion to permanent appointment.

5. On 4 June 2010, each of the Applicants received a letter informing them that "the Secretary-General ha[d] decided to conduct a one-time review of conversion to permanent appointment of staff members who were eligible for such consideration by 30 June 2009…[and u]pon preliminary review, it appears that you could be considered as having met the eligibility requirements".

6. On 8 March 2011, the Capacity Development Office ("CDO"), Department of Economic and Social Affairs ("DESA") submitted a list of all eligible UNAKRT staff to the Office of Human Resources Management ("OHRM") with a negative recommendation on the issue of conversion to permanent appointment on the basis that, although deemed eligible for consideration, and having met the human resources requirements, it was not in the best interests of the Organisation to convert their fixed-term appointment due to the resulting financial liability. OHRM similarly provided a negative recommendation on 18 March 2011, stating that the cases would be reviewed by a Central Review Committee ("CRC") and the Central Review Panel ("CRP"), and requesting additional documentation pertaining to the UNAKRT staff members' eligibility in view of the submission of the cases to the CRC for review.

7. The Chairpersons of the CRC and CRP, by memorandum dated 12 January 2012, informed the Assistant Secretary-General, OHRM ("ASG/OHRM"), that the review of the submission for conversion to permanent appointments of UNAKRT staff members had been completed. The CRC and CRP noting "the recommendations received from the substantive Department and the respective Human Resources Office, and [noting] that UNAKRT was a downsizing entity", recommended that, in the interest of the Organisation and of the operational realities of UNAKRT, the Applicants should not be granted permanent appointments and therefore should not be deemed suitable for conversion.

8. On 31 January 2012, each of the Applicants received a letter from the Chief, Human Resources Management, DESA, informing them that:

> …following the decision of the Assistant Secretary-General for Human Resources Management pursuant to ST/SGB/2009/10, you will not be granted a permanent appointment.

> This decision was taken after a review of your 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.

9. On 30 March 2012, the Applicants filed individual requests for management evaluation of the 31 January 2012 decisions that they would not be granted permanent appointment. The Applicants stated that their right to individual due consideration for consideration to permanent appointment were not respected and requested that the decisions be rescinded.

10. On 14 May 2012, the Management Evaluation Unit ("MEU") informed the Applicants that the Secretary-General had decided to uphold the contested decisions. The MEU letter stated that individual reviews had been conducted, that the Applicants employment records, performances and conduct had been fully taken into account and that the CDO/DESA, in line with instructions from OHRM, had determined that the Applicants met the basic eligibility requirements for consideration. The MEU observed that the ASG/OHRM's decisions with regard to individual consideration, "was an objective decision based on the finite mandate of UNAKRT and the ongoing uncertainty of funding".

11. On 11 June 2012, the Applicants filed the present applications. The Respondent, in his 31 July 2012 replies, submitted that the Organization had provided each Applicant with reasonable consideration in accordance with the rules and regulations.

Relevant procedural history

12. By Order No. 46 (NY/2013), dated 15 February 2013, the Tribunal, following a Case Management Discussion, granted the Applicants' motion for joinder of the eight individual UNAKRT applications herein. The Applicants had initially requested that these cases be joined with some 14 cases filed by staff members of the International Criminal Tribunal for the former Yugoslavia ("ICTY") with the Dispute Tribunal in Geneva concerning similar matters and issues to those raised in the UNAKRT cases. The Tribunal, however, noted that a set of judgments had

recently been issued by the Dispute Tribunal in the ICTY cases which were the subject matter of appeals and cross appeals with the United Nations Appeals Tribunal, resulting in the Applicants withdrawing their request for joinder of the UNAKRT cases with those of the ICTY. The Tribunal further ordered that the proceedings would thereafter be dealt with as one case and that a single judgment would be issued in respect of all eight applications.

13. On 19 December 2013, the United Nations Appeals Tribunal published the judgments it had rendered in the ICTY cases. The Appeals Tribunal found, *inter alia*, that although the decision-making authority was properly vested in the ASG/OHRM, in adopting a blanket policy of refusing permanent appointments to ICTY staff members, her decision was "legally void, being tainted by arbitrariness and violat[ed] the staff members' due process rights". The Appeals Tribunal vacated the judgments of the Dispute Tribunal in the ICTY cases; rescinded the decision of the ASG/OHRM, and remanded the conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of each complainant within 90 days of the date of publication of the judgment in accordance with guidelines set out by the Appeal Tribunal therein. The Appeals Tribunal also awarded each ICTY staff member EUR3,000 in non-pecuniary damages (see *Malmström* 2013-UNAT-357; *Longone* 2013-UNAT-358; *Ademagic et al.* 2013-UNAT-359; and *McIlwraith* 2013-UNAT-360).

14. On 24 December 2013, the Dispute Tribunal, by Order No. 352 (NY/2013), requested the parties to file a jointly-signed submission by 24 January 2014, confirming whether they agreed to abide by the decision of the Appeals Tribunal in the ICTY cases in whole or in part and, if not, reasons were to be provided by the objecting party. In addition, the parties were asked to inform the Tribunal as to whether they had attempted to, or agree to attempt to resolve these cases informally, either *via inter partes* discussions or through mediation. At the request of the parties, the deadline to submit the joint submission was extended twice by Orders No. 19 and 29 (NY/2014), until 24 February 2014.

15. In the joint submission filed on 24 February 2014, and during the case management discussion held on 30 July 2014, the Respondent informed the Tribunal that, in order to abide by the Appeals Tribunal's decision in the ICTY cases, the administration "will rescind the contested decision and issue new individual decisions following a *de novo* review of the eligibility and suitability of the Applicants for permanent appointments". The Respondent also submitted that the Applicants are not "similarly situated to ICTY staff members, and therefore [are not] entitled to the same compensation". Further, the Respondent stated that in *Branche* 2013-UNAT-372, which also concerned the issue of conversion to permanent appointment, the Appeals Tribunal remanded the case to the Administration for further consideration but did not award any compensation. The rescission of the contested decision would therefore render these applications moot.

16. In their 24 February 2014 submission, the Applicants stated that the lead ICTY case, *Malmström* 2013-UNAT-357, is dispositive of the UNAKRT cases and they are willing to abide by the Appeal Tribunal's findings. The Applicants submit that "any argument that financial considerations are different at UNAKRT/ECCC and that they are an overriding consideration in the Cambodia Tribunal is a frontal attack upon *Malmström*. Any argument that there were special restrictions upon the Applicants' appointments does not distinguish these cases". The Applicants further consider that these cases cannot be rejected as moot due to the fact that, *inter alia*, such a decision would not guarantee a proper reconsideration of their suitability for permanent appointment, or guarantee that compensation will be awarded in line with *Malmström.* The Applicants also submitted that the reason compensation was not awarded in *Branche* was that it had not been sought by the applicant in that case.

17. Further efforts at informal resolution having failed, the Tribunal convened a case management discussion on 30 July 2014 whereat the Respondent reiterated his submissions regarding his intention to rescind the decision and to issue new individual decisions with a *de novo* review of both eligibility and suitability of the Applicants. Having heard the parties' submissions, the Tribunal is of the view that

no further submissions are required, this matter having been extensively case-managed, numerous orders having been issued, and the parties' positions and submissions having been clearly articulated.

Consideration

18. The Tribunal will deal firstly with the Respondent's contention that the Applicants are not similarly situated to the ICTY staff members because of the peculiarity of UNAKRT funding by voluntary contributions. The former Administrative Tribunal, in *Alba* Judgment No. 712 stated that:

> V. … this practice of excluding an entire group of staff even from consideration for career appointment [based on the source of funding] is unfair.
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> …
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> VIII. The Tribunal recognizes the financial constraints under which the Respondent has to operate and the efforts which are being made to deal with the problems exemplified by this case. However, a solution in accordance with resolution 37/126 must treat staff members equally, that is without distinctions based on sources of funding, regardless of how many, or how few, permanent appointments the Organization can afford to grant.
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> The Tribunal is of the view that merit of performance combined with length of service are the factors with regard to individual staff members which should be primary in granting reasonable consideration for career appointment. While the general financial framework might ultimately determine whether or not career appointments can be granted, the source of funding for an individual staff member's post cannot justify the failure to even consider him or her for a career appointment after years of good service, if career appointments are being granted by the Organization.

19. The Applicants submitted "that the lead ICTY case, *Malmström,* is dispositive of these cases and [that they] are willing to abide by the decision(s) of the UNAT in the ICTY cases". The Respondent has stated that he would "rescind the contested decision and issue new individual decisions following a *de novo* review of the eligibility and suitability of the Applicants for permanent appointments. The Organization is taking steps to abide by the decisions of the United Nations Appeals Tribunal in the ICTY cases … ".

20. The pertinent facts and the legal issues in the present cases are on all fours with the ICTY cases. As both parties have accepted the *ratio decidendi* of the decisions by the Appeals Tribunal in the ICTY cases, the Tribunal adopts, where relevant, the Appeals Tribunal's findings in *Malmström*, including the following:

> 65. Each of the staff members who are the subject of the present Judgment received a letter, in identical terms, from the ICTY Registrar informing him or her of the decision taken by the ASG/OHRM to deny conversion. By way of example, the letter issued to Ms. Malmström on 6 October 2011 read as follows:
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> > …
> >
> > I wish to inform you that … you will not be granted a permanent appointment.
> >
> > This decision was taken after a 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 …
>
> 66. ICTY staff members - like any other staff member – are entitled to individual, "full and fair" (in the lexicon of promotion cases) consideration of their suitability for conversion to permanent appointment. …
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> 67. We are not persuaded by the Secretary-General's argument that the staff members received the appropriate individual consideration in the "suitability" exercise. The ASG/OHRM's decision, as communicated to the staff members, provides no hint that their candidature for permanent appointment was reviewed by OHRM against their qualifications, performance or conduct; their proven, or not proven, as the case may be, suitability as international civil servants; or the highest standards of efficiency, competence and integrity, as established in the United Nations Charter. Each candidate for permanent appointment was lawfully entitled to an individual and a considered assessment on the above basis before a permanent appointment could be granted or denied. This was their statutory entitlement and cannot be overridden or disregarded merely because they are employed by the ICTY.
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> 68. It is patently obvious that a blanket policy of denial of permanent appointments to ICTY staff members was adopted by the ASG/OHRM simply because the ICTY was a downsizing entity. The ASG/OHRM was not entitled to rely solely on the finite mandate of the ICTY or Security Council Resolution 1503 (2003) as the reason to depart from the principles of substantive and procedural due process which attaches to the ASG/OHRM's exercise of her discretion under

ST/SGB/2009/10. We determine that the ASG/OHRM's discretion was fettered by her reliance, to the exclusion of all other relevant factors, on the ICTY's finite mandate. Accordingly, we are satisfied that the staff members were discriminated against because of the nature of the entity in which they were employed. As such, the ASG/OHRM's decision was legally void, being tainted by arbitrariness and the violation of the staff members' due process rights.

…

70. The right of the staff members, which was violated by the afore-mentioned discriminatory actions and by the absence of due process, is not to the granting of a permanent appointment but, rather, to be fairly, properly, and transparently *considered* for permanent appointment. Since we find that the ASG/OHRM breached the staff members' rights in this respect, the Appeals Tribunal hereby rescinds the impugned decision.

…

73. The ASG/OHRM shall use a process that is fair, properly documented and completed in a timely manner. Given the duration of these proceedings, and mindful of the finite mandate of the ICTY and the stress uncertain contract situations imposes on staff, the Appeals Tribunal directs that the conversion process be completed within 90 days of the publication of this Judgment. Each staff member is entitled to receive a written, reasoned, individual and timely decision, setting out the ASG/OHRM's determination on his or her suitability for retroactive conversion from fixed-term to permanent contract. This applies equally to any litigant staff members who were part of the original conversion exercise at issue but have since left the service of the ICTY.

…

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

81. In *Asariotis* [2013-UNAT-309, para. 36], the Appeals Tribunal stated:

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

> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
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> …
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> 82. We find that the substantive due process breaches in the ASG/OHRM's decision-making meet the fundamental nature test established in *Asariotis* and, as such, *of themselves* merit an award of moral damages. In assessing the quantum of such damages, the Tribunal takes into consideration the satisfaction being granted to the staff members, namely, that a new "suitability exercise" shall be conducted, with retroactive effect. This remedy – to a considerable extent – corrects the harm sustained by the staff members. Nevertheless, the Appeals Tribunal is persuaded that an award of damages is merited for the breach which occurred and, in all the circumstances, awards compensation in the amount of 3,000 Euros to each of the Respondents/Appellants.

Mootness

21. At the final case management discussion on 30 July 2014, the Respondent reiterated that the Administration would rescind the contested non-individualized decisions and commence a *de novo* review in order to abide by the Appeals Tribunal decisions in the ICTY cases, thus rendering these cases purely academic. The Applicants invited the Tribunal to reject any proposal by the Respondent to "unilaterally" rescind the decisions in order to render the proceedings moot, and submitted that they were willing to abide by the decisions in the ICTY cases, save for the issue of compensation as they anticipate that the Respondent will reject the conversions to permanent appointment as has apparently been the fate of the applicants in the ICTY cases. In this regard, therefore, the Applicants requested that they be awarded, as an alternative remedy, a "contingent" award of termination indemnity and USD10,000 in moral damages. However, the Applicants are effectively asking the Tribunal to speculate on the outcome of a conversion exercise

following the conclusion of this matter, and the Tribunal cannot entertain an eventuality that may or may not result.

22. The Respondent contends that in view of the fact that the decision will be, or is being, rescinded, the issue before the Tribunal is now moot and, considering that the Applicants did not suffer any damages, no compensation is warranted.

23. The Tribunal finds the Respondent's proposal, under the guise of compliance with the judgments of the Appeals Tribunal, disingenuous. The rescission of the original decisions and thereafter subjecting the Applicants to an entirely new process, including that regarding eligibility, a question which had already been settled, must inherently result in a new challengeable individual decision. The appropriate manner of compliance with the Appeal Tribunal's judgment is to fully respect the judgment in all aspects of its pronouncement. Besides, the Tribunal cannot adjudicate cases involving decisions of a changing nature (*Adundo* UNDT/2012/118, paras. 76-77). When decisions have been erroneously made, reversed, or even reconsidered, the honourable and *bona fides* measure to take is to make the appropriate acknowledgements, i.e. to withdraw one's defence or plea, and tender the appropriate relief and costs where relevant.

24. The Appeals Tribunal has stated that while not every violation of a right will lead to an award of compensation, the Tribunal has the right, upon determining that an applicant has been exposed to a breach of a fundamental procedural right to assess whether this breach warrants a compensatory award and, if so, to determine that award (see *Gehr* 2012-UNAT-253). Consequently, in addition to having to consider whether the rescission of the decision is sufficient to cure the damage stemming from the decision, it is for the Applicants to show that the unlawful decision affected their rights, and that there was a causal link between the breach and the damage suffered. (see *Wu* 2010-UNAT-042, *Kamal* 2012-UNAT-204 and *Mirkovic* 2013-UNAT-290). The Tribunal finds that the mere rescission of the decision and the satisfaction of having a new suitability exercise conducted in-line with the one taking place in the ICTY cases is not sufficient to cure the harm sustained by the Applicants. The Dispute Tribunal sees no reason to depart from the findings of the Appeals

Tribunal. Taking into consideration the similarities between the facts in the ICTY case and those from the UNAKRT cases, and in accordance with *Mallström* and *Gehr*, the Tribunal finds it appropriate to award each of the Applicants the USD equivalent of EUR3000 for the breach of their due process rights to be properly, fairly and individually considered for permanent appointment.

Former staff member

25. The Tribunal notes that one of the Applicants, Ms. Lamb, resigned from UNAKRT in the course of the current proceedings. As stated by the Appeals Tribunal, each staff member is equally entitled to receive a written, reasoned, individual and timely decision on his or her suitability for retroactive conversion from fixed-term to permanent contract, including "any litigant staff members who were part of the original conversion exercise at issue but have since left the service of the ICTY".

26. In assessing whether Ms. Lamb should be awarded damages, the Tribunal considers that her due process rights too were breached in the same way as those of the similarly situated Applicants in the present proceedings. Consequently, the fact that Ms. Lamb is no longer with the Organization is of no effect on the award of damages and she is also to be awarded the USD equivalent of EUR3000 in damages for the breach of her due process rights to be properly and individually considered for permanent appointment.

Conclusion

27. The Dispute Tribunal rescinds the decision of the ASG/OHRM and remands the UNAKRT conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of each applicant within 90 days of the date of publication of this judgment in accordance with the guidelines set out by the Appeals Tribunal in the matter of *Malmström* 2013-UNAT-357.

28. The Applicants are each awarded the sum of the USD equivalent of EUR3000 in non-pecuniary damages.

29. These amounts are to be paid within 60 days from the date this Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 26th day of August 2014

Entered in the Register on this 26th day of August 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York