

UNDT/2012/129, Malmstrom, et al.

UNAT Held or UNDT Pronouncements

Competence of decision-maker: Competence of the decision-maker is a cornerstone of the legality of an administrative decision. When the exercise by the Administration of its discretionary power is under judicial review, any lack of authority leads inevitably to the rescission of the contested decision. As this is an essential element for the legality of the contested decision, the authority of the decision-maker has to be assessed by the Tribunal on its own motion, regardless of the parties' views at any stage of the administrative and judicial proceedings.

Delegation of authority: Exclusions from a broad delegation of authority have to be explicit. Similarly, any withdrawal or limitation of a delegation of authority must be explicit. Transparency and legal certainty require that when a delegation of authority is granted, the delegating authority must first clearly and formally revoke the delegation before it can exercise its authority again.

Administrative discretion and judicial review: The outcome of the consideration for conversion to a permanent appointment is a discretionary decision and in its discretion, the Administration is bound to take into account "all the interests of the Organization" as per former staff rule 104.12(b), as well as "the operational realities" of the Organization (see GA 51/226). It is established case law that the Tribunal, in conducting its judicial review, may not lightly interfere with the exercise of administrative discretion, nor substitute its judgment for that of the Secretary-General.

Alternative compensation under art. 10.5(a) of UNDT Statute: It is not required that alternative compensation be set by the UNDT at a level which would force the Secretary-General to implement the order for rescission. Compensation must be set following a principled approach and on a case-by-case basis. In particular, the Tribunal must take into account the nature of the irregularity which led to the rescission, as well as the prohibition on the award of exemplary or punitive damages set out in article 10.7 of its Statute. In the case at hand, the Tribunal must further bear in mind that staff members eligible for conversion have no right to the granting of a permanent appointment but only that to be considered for conversion.

Compensation under art. 10.5(b) of UNDT Statute: Not every violation

will necessarily lead to an award of compensation. In this case, the Tribunal found that it would be highly speculative to award compensation under article 10.5(b) considering that it decided to rescind the contested decisions only because of a procedural irregularity and that it did not address the merits of such decisions.

Decision Contested or Judgment/Order Appealed

The 11 Applicants, all staff members or former staff members of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), contested the decision whereby the Assistant Secretary-General for Human Resources Management refused to convert their fixed-term appointments into permanent appointments. The Tribunal found that the contested decision was tainted by a substantial procedural flaw—that of the lack of competence of the decision-maker, the Assistant Secretary-General for Human Resources Management. It accordingly rescinded the contested decision and set at EUR2,000 the amount of compensation that the Respondent may elect to pay to each Applicant as an alternative to the rescission.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Malmstrom, et al.

Entity

ICTY

Case Number(s)

UNDT/GVA/2012/30
UNDT/GVA/2012/31
UNDT/GVA/2012/32
UNDT/GVA/2012/33
UNDT/GVA/2012/35
UNDT/GVA/2012/36
UNDT/GVA/2012/37
UNDT/GVA/2012/38
UNDT/GVA/2012/39
UNDT/GVA/2012/40
UNDT/GVA/2012/43

Tribunal

UNDT

Registry

Geneva

Date of Judgement

29 Aug 2012

Duty Judge

Judge Laker

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Appointment (type)
Permanent appointment
Compensation

Applicable Law

Former Staff Rules

- Rule 104.12(b)
- Rule 104.13(c)
- Rule 104.14(a)(i)

GA Resolutions

- A/RES/37/126
- A/RES/51/226

Secretary-General's bulletins

- ST/SGB/2006/9
- ST/SGB/2009/10
- ST/SGB/280
- ST/SGB/Staff Rules/1/Rev. 7/Amend. 3

UNDT Statute

- Article 10.5(a)
- Article 10.5(b)
- Article 10.7

Related Judgments and Orders

UNDT/2011/178

UNDT/2012/121

2010-UNAT-044

2010-UNAT-076

2010-UNAT-084

2011-UNAT-110

2012-UNAT-212