

# **UNDT/2015/116, Sutherland, Reid, Marcussen, Goy, Jarvis, Baig, Edgerton, Nicholls**

## **UNAT Held or UNDT Pronouncements**

Recalling the above-mentioned Appeals Tribunal's ruling and the requirements set therein for the reconsideration ordered by it, the Tribunal found that the impugned decisions were unlawful on several accounts, but primarily in that (a) the Applicants were not considered individually in light of their proficiencies, qualifications, competencies, conduct and transferrable skills, and (b) the decisions were based on the limited mandate of ICTY alone, to the exclusion of all other relevant factors. Accordingly, the Tribunal rescinded the impugned decisions, ordered the matter to be remanded once again for a second re-consideration by the Administration within 90 days of the issuance of the Judgment, and awarded EUR3,000 as moral damages to each Applicant.

## **Decision Contested or Judgment/Order Appealed**

Eight staff members or former staff members of the International Criminal Tribunal for the former Yugoslavia ("ICTY") contested the decisions denying them conversion of their respective fixed-term appointment into permanent ones. These decisions arose from a re-consideration exercise ordered by the Appeals Tribunal (Judgment 2013-UNAT-357) following the rescission of non-conversion decisions issued in an initial round of a one-time Secretariat wide-exercise of review for conversion to permanent appointment.

## **Legal Principle(s)**

Binding force of UNAT judgments: Judgments of the Appeals Tribunal are binding upon the parties. Their binding effect is not restricted to the orders provided under the “Judgment” section, but also extends to the other operative paragraphs, which set out the major considerations for the determinations made.

Articulation of the interest of the Organization and the criteria for conversion: The interest of the Organization is a legitimate consideration to be taken into account when assessing the suitability of a staff member; however, as articulated in the relevant rules, it is ancillary to the two primary suitability criteria (i.e., the concerned staff member’s qualifications, performance and conduct, and the highest standards of efficiency, competence and integrity) and is to be appraised together with, and in relation to, them, as opposed to a fully independent criterion on equal footing with the two others.

Meaning of “retroactive consideration”: Implementing retrospectively the decisions resulting from the reconsideration exercise is not sufficient to meeting the requirement of retroactive consideration. The reconsideration exercise ought not to include new circumstances that were only known when the new decisions were reached, but be limited to those known at the time of the initial conversion exercise. For the purpose of the reconsideration exercise, the Applicants’ suitability should have been appraised by reference to the relevant circumstances as they stood at the time of the first impugned refusal to convert their appointments.

Reassignment of staff members holding appointments limited to a certain entity: The limitation of the Applicant’s appointment to service in ICTY/MICT does not preclude the possibility of reassigning them under sec. 11.1(b) of ST/AI/2010/3.

Identifying and weighting the interests of the Organization: The Organization disposes of broad discretion to determine what the interests of the Organization are and in weighting them up together with other circumstances. The finite mandate of a staff member’s entity of employment is a factor that can be validly considered in deciding on the conversion of the Applicants’ appointment to permanent, as it is a relevant “operational reality”. However, although it is acceptable to give adequate weight to the operational realities of the entity in question, including its finite mandate, the Administration cannot rely exclusively on this circumstance.

Specific performance: Where the judicial review concerns the exercise of discretion, the Tribunal can order specific performance, such as granting conversion to a permanent appointment, solely in the rare hypothesis where the result of the exercise of discretion is narrowed down in such a way that there is only one legally correct outcome.

Non-retroactive application of the Statute’s amendment: An amendment of the applicable rules cannot apply to an application filed prior to the adoption of said amendment.

Publication of rules: Staff members can only be expected to be aware of any

regulations introduced if and when they have been subjected to public announcement. Despite the absence of specific rules on the procedures for the entry into force of norms within the Organization, new rules cannot become binding until they are duly published.

## Outcome

Judgment entered for Applicant in full or in part

## Outcome Extra Text

Both financial comp. and specific performance

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Sutherland, Reid, Marcussen, Goy, Jarvis, Baig, Edgerton, Nicholls

## Entity

ICTY

## Case Number(s)

UNDT/GVA/2014/85

UNDT/GVA/2014/86

UNDT/GVA/2014/87

UNDT/GVA/2014/113

UNDT/GVA/2014/114

UNDT/GVA/2014/115

UNDT/GVA/2014/122

UNDT/GVA/2014/147

## Tribunal

UNDT

## Registry

Geneva

## Date of Judgement

16 Dec 2015

## Duty Judge

Judge Laker

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Appointment (type)

Permanent appointment

## Applicable Law

Administrative Instructions

- ST/AI/2010/3

Secretary-General's bulletins

- ST/SGB/2009/10

Staff Rules

- Rule 104.12

UNDT Statute

## UNAT Statute

- Article 2.1(a)

## Related Judgments and Orders

UNDT/2013/172

UNDT/2015/078

2010-UNAT-061

2010-UNAT-084

2011-UNAT-110

2013-UNAT-303

2013-UNAT-309

2013-UNAT-357

2013-UNAT-358

2013-UNAT-359

2014-UNAT-410

2013-UNAT-360

2013-UNAT-372

2014-UNAT-396

2014-UNAT-409

2014-UNAT-444