UNDT/2019/022, McIlwraith et al.

UNAT Held or UNDT Pronouncements

The Tribunal noted that the starting point for the Tribunal's review of the legality of the contested decisions is the considerations of the Appeals Tribunal in its Judgments Ademagic et al. and McIlwraith 2013-UNAT-359 and Ademagic et al. 2016-UNAT-; 684, which remanded the decisions on the conversion of the Applicants' fixed-term appointments to the ASG/OHRM for reconsideration.; The Tribunal recalled the legal framework and identified the following issues for examination: Did the Administration discriminate against the Applicants in tying their suitability for permanent appointments exclusively to future service outside ICTY? The Tribunal found that the Administration was bound to examine the Applicants' transferrable skills, without regard to the fact that other staff members serving in nondownsizing entities were considered differently.; In the Tribunal's view, the issue at stake was not whether the Administration was allowed to examine the Applicants' transferrable skills but whether its review complied with the Appeals Tribunal's instructions in Ademagic et al. 2016-UNAT-684. Did the Administration err or abuse its discretion in limiting its examination of the Applicants' transferrable skills to positions in the Secretariat outside the ICTY and the; MICT? The Tribunal found that it fell within the ambit of the Administration's discretion to decide whether or not to consider positions in the ICTY or the MICT in its examination of the Applicants' transferrable skills.; The Tribunal also found that it had not been demonstrated that the Administration's view that the ICTY and the MICT did not offer career prospects to the Applicants was based on an erroneous application of the facts or disregarded relevant facts, as they were available in autumn 2011.; In these circumstances, the Tribunal found that it was not an unreasonable exercise of discretion nor contrary to the Appeals Tribunal's directions for the Administration to exclude positions in the ICTY and the MICT from the pool of positions "required on an ongoing basis" taken into account for assessing the Applicants' transferrable skills during the reconsideration exercise.; By giving the Applicants the opportunity to be granted permanent appointments based on the foreseeable needs for their individual skills within the Organization after the closure of 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. Did the Administration err or abuse its discretion in taking into account the limitations in the Staff Rules related to the recruitment of staff in the General Service category? The Tribunal considered that the Administration retained discretion as to how to assess the transferrable skills of locally recruited staff members.; The Tribunal found that the legal framework governing the administration of the; General Service Applicants' appointments is a relevant consideration in assessing the interests of the Organization to grant them permanent appointments. The Administration did not exercise its discretion unreasonably when looking at the manner in which the General Service Applicants' individual skills could be used by the Secretariat at their duty station in considering them for permanent appointments.; In view of the foregoing, the Tribunal found that the Administration did not err or abuse its discretion in deciding that it was not in the interests of the Organization to grant the General Service Applicants permanent appointments based on their lack of career prospects at their duty station, which in the context amounts to a lack of transferrable skills. Did the Administration commit errors in the consideration of specific individual cases by misstating the facts or not taking into account relevant facts? Given its finding in respect of the General Service Applicant's lack of transferrable skills, the Tribunal considered that it was not appropriate to examine whether the OiC ASG/OHRM committed factual errors in the consideration of their individual cases. The Tribunal thus limited its examination of the errors alleged by the Professional; Applicants and found that the alleged errors did not have any bearing on the conclusions of the contested decision.; In summary, the Tribunal considered that it was not demonstrated that the Administration failed to comply with the Appeals Tribunal's instructions when reconsidering the Applicants' suitability for permanent appointment. The; Administration did not consider irrelevant facts, nor did it give undue weight to the finite mandate of the ICTY and the MICT. Contrary to the previous rounds of litigation, the Administration did not solely rely on the fact that the ICTY was a downsizing entity in considering the interests of the Organization but, given ICTY's limited mandate, it looked at further employment opportunities for the Applicants within the Secretariat through the examination of their transferrable skills, as directed by the Appeals Tribunal.; Given the discretion left to the Administration in the reconsideration exercise, it was not unreasonable for the Administration to examine each of the Applicants' transferrable skills in the light of ongoing positions in the Secretariat as of September 2011 to

which they could possibly be transferred, taking into account the nature of their appointment as internationally or locally recruited staff members, as applicable. This does not amount to discrimination against ICTY staff members, but caters for the reality that they were serving in a downsizing entity, an element that the Administration was allowed to take into account in pondering the interests of the Organization in respect of whether to grant the Applicants permanent appointments pursuant to sec. 2 of ST/SGB/2009/10.; The Tribunal noted that the granting of a permanent appointment is not automatic and is subject to some level of discretion by the Organization, who shall take into account all its interests. The Applicants were entitled to individual, “full and fair” consideration of their suitability for conversion to a permanent appointment and there is no evidence that this right was violated in the 2016 reconsideration exercise.

Decision Contested or Judgment/Order Appealed

The Tribunal reviewed a joint application from 179 former staff members of ICTY who contested the decisions to deny each of them a conversion of their fixed-term appointment into a permanent appointment.

Legal Principle(s)

There is a statutory obligation on the Administration, in the context of the best interests of the United Nations, to give “every reasonable consideration” to those ICTY staff members demonstrating the proficiencies, competencies and transferrable skills which render them suitable for career positions within the Organization (Ademagic et al. and McIlwraith 2013-UNAT-359, Ademagic et al. 2016-UNAT-684).

Outcome

Dismissed on merits

Full judgment

Full judgment

Applicants/Appellants

McIlwraith et al.

Entity

ICTY

Case Number(s)

UNDT/GVA/2017/16

Tribunal

UNDT

Registry

Geneva

Date of Judgement

20 Feb 2019

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Appointment (type)
Permanent appointment

Applicable Law

Administrative Instructions

- ST/AI/2009/10

GA Resolutions
Other UN issuances (guidelines, policies etc.)

- Guidelines on consideration for conversion to permanent appointment of staff
- ICSC 83rd session (ICSC/83/R.6)
- A/64/267 (Secretary-General’s report of 7 August 2009 on the Administration’s strategic approach to staffing)
- A/65/305 (Secretary-General’s report on the human resources management reform to the General Assembly)

Secretary-General's bulletins

- ST/SGB/2009/10

Staff Rules

- Rule 104.13
- Rule 4.18
- Rule 4.4(a)
- Rule 9.6(e)
- Rule 9.6(f)

Related Judgments and Orders

2016-UNAT-684
UNDT/2012/131
UNDT/2012/129
UNDT/2012/130
UNDT/2012/162
2013-UNAT-359
2013-UNAT-360
2013-UNAT-357
2013-UNAT-358
2013-UNAT-375
UNDT/2015/115
UNDT/2015/116

UNDT/2015/117
UNDT/2015/032
2016-UNAT-682