

2013-UNAT-359, Ademagic et al. and McIlwraith

UNAT Held or UNDT Pronouncements

UNAT considered an appeal by the Secretary-General and an appeal Ademagic et al. UNAT held that judgment No. 2013-UNAT-357 applied mutatis mutandis and adopted paragraphs 33-82 of that judgment, summarised as follows: UNAT held that UNDT erred in law in finding that the authority to grant permanent appointments to to International Criminal Tribunal for the former Yugoslavia (ICTY) staff members vested in the ICTY Registrar and, accordingly, vacated the UNDT decision on that basis and upheld the Secretary-General's appeal on that issue; UNAT held that each candidate for permanent appointment was lawfully entitled to an individual and a considered assessment before a permanent appointment could be granted or denied and that this was their statutory entitlement which could not be disregarded; UNAT held that the staff members (including Ademagic et al. and Mr. McIlwraith) were discriminated against because of the nature of the entity in which they were employed and that therefore, the decision of the Assistant Secretary-General for the Office of Human Resources Management (ASG/OHRM) was legally void, being tainted by arbitrariness and the violation of the staff members' due process rights; UNAT held that the approach of the ASG/OHRM violated the provision that staff members would be given every reasonable consideration for permanent appointment and that the ASG/OHRM was not entitled to place reliance on the operational realities of the Organisation to the exclusion of all other relevant criteria set out in General Assembly Resolution 51/226; UNAT held that the right of the staff members, which was violated by the aforementioned discriminatory actions and by the absence of due process, was not entitled to the granting of a permanent appointment, but, rather to be fairly, properly, and transparently considered for permanent appointment; UNAT rescinded the impugned decision and remanded the matter to UNDT; UNAT held that Ademagic et al. 's appeal with respect to the setting of compensation had been rendered moot and UNAT found no basis to award him pecuniary damages; UNAT held that the substantive due process breaches in the

ASG/OHRM's decision-making met the fundamental nature test established in Asariotis (judgment No. 2013-UNAT-309) and, as such, of themselves merited an award of moral damages of 3,000 Euros. UNAT vacated the UNDT judgment, rescinded the decision of the ASG/OHRM, remanded the ICTY conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of Ademagic et al. Respondents/Appellants and Mr McIlwraith within 90 days of the date of the publication of its judgment in accordance with the guidelines set out therein; and awarded Ademagic et al. Respondents/Appellants 3,000 Euros in non-pecuniary damages.

Decision Contested or Judgment/Order Appealed

Previous decision: The Appellant contested the decision not to grant him a permanent appointment. UNDT found for the Appellant, ordering compensation in lieu of specific performance.

Legal Principle(s)

There is a right to be fairly, properly, and transparently considered for a permanent appointment. Damages for a moral injury may occur related to 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; 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.

Outcome

Appeal granted in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Ademagic et al. and McIlwraith

Entity

ICTY

Case Number(s)

2012-385

2012-393

Tribunal

UNAT

Registry

New York

Date of Judgement

17 Oct 2013

President Judge

Judge Faherty

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Appointment (type)

Permanent appointment

Compensation

Non-pecuniary (moral) damages

Applicable Law

Former Staff Rules

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

GA Resolutions

- A/RES/51/226
- A/RES/63/250

Other UN issuances (guidelines, policies etc.)

- Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009

Secretary-General's bulletins

- ST/SGB/2006/9
- ST/SGB/2009/10
- ST/SGB/280

Security Council Resolutions

- S/RES/1503

UNAT RoP

- Article 8

UNAT Statute

- Article 9.1(a)

UNDT Statute

- Article 10.5(b)

Related Judgments and Orders

UNDT/2012/131

2013-UNAT-346

2013-UNAT-309

2013-UNAT-340

2012-UNAT-242

2011-UNAT-110