



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-462

**Balan
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT



Counsel for Ms. Balan:

Robbie Leighton, OSLA

Counsel for Secretary-General:

Rupa Mitra

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Cristina Balan against Judgment No. UNDT/2013/106, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 22 August 2013 in the case of *Balan v. Secretary-General of the United Nations*. Ms. Balan appealed on 22 October 2013. By Order No. 163 (2013), the Appeals Tribunal accepted Ms. Balan's appeal as timely filed, though it was filed one day beyond the deadline due to technical difficulties. The Registry received an answer from the Secretary-General on 6 January 2014.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case read as follows:¹

... The Applicant joined the United Nations in November 1998. On 23 June 2009, the Secretary-General promulgated Secretary-General's bulletin, ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009), which entered into force on 26 June 2009. [Bulletin]

... On 29 January 2010, the [Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM)] approved the issuance of "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009" ("Guidelines on conversion").

... By memorandum dated 14 April 2010, the Director, Strategic Communications Division, DPI, sent a list of eligible staff members who he recommended for conversion to permanent appointment to the Officer-in-Charge, Executive Office, [Department of Public Information (DPI)]. In his memorandum, the Director stressed that he had decided not to recommend three categories of staff members, otherwise eligible for conversion. He wrote, *inter alia*:

In submitting this, I would like to note that although they would otherwise be eligible (based on age, length of service and performance), within the OHRM's guidelines, I have decided not to recommend:

Staff from [United Nations Information Centres (UNICs)] Bucharest, Tripoli and Warsaw who occupy posts funded by the host country as the continuation of their posts is subject to the availability of such funding;

¹ The following text is taken from Judgment No. UNDT/2013/106, paragraphs 5-18.

The incumbents of the remaining two posts at UNIC Bucharest, which are covered by the regular budget, in view of the likelihood that UNDP will be reducing its presence in Romania in the next year or so;

...

... On 16 April 2010 the Officer-in-Charge, Executive Office, DPI, and the Officer-in-Charge, Human Resources Services, OHRM, sent a memorandum to the ASG/OHRM, with respect to the Applicant's conversion to permanent appointment. In their recommendation, they indicated that as of 22 November 2003, the Applicant had completed five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules and was under the age of 53 years, hence eligible for consideration for conversion to permanent appointment. They further noted that the Applicant had received performance ratings indicating that she successfully met or exceeded performance in her five most recent performance evaluations. The Officers also indicated, however, that the Applicant was serving in an entity that was downsizing or expected to close and recommended that the Applicant not be offered a permanent appointment.

... On 15 May 2010 the Chief [,] Centre Operations Section, DPI, wrote to the Applicant and other staff members, informing them that DPI had decided not to recommend conversion to permanent appointment for staff members serving in Information Centers that depended on extra-budgetary contributions. He noted that such conversion would not be in the interest of the Organization, in view of the fact that the contributions from host governments were voluntary and as such subject to change with little notice, which could create unwarranted liabilities for the Organization with respect to termination entitlements payable to staff members if their contractual status were to be permanent.

... In May 2010, the Applicant contacted the Chief, Centre Operations Section, DPI, inquiring whether a formal, individual decision from OHRM regarding her non-conversion to permanent appointment would be issued. The Chief, Centre Operations Section, DPI responded, noting that his earlier message was not the formal personalized OHRM notification and that he was unaware when OHRM might send such notification. He also reiterated his earlier communication that none of the staff members in Bucharest were being recommended for conversion and further told the Applicant of the possibility of UNIC closing down, due to the funding problems.

... By memorandum of 28 June 2010, the Human Resources Services, OHRM,

Permanent mission of Romania to the United Nations had informed DPI that “it was not able to ensure its annual contribution to the Information Centre ... having in mind the scenario in which UNIC would find alternative sources to finance its activity.”

... The Applicant filed her application on 10 August 2012 to which the Respondent filed his reply on 10 September 2012.

3. In Judgment No. UNDT/2013/106, the Dispute Tribunal rejected Ms. Balan’s application. It found:

In view of th[e] limitation of the Applicant’s contractual status and of the operational realities faced by the UNIC Bucharest, the Tribunal finds that the determination by the Administration that the conversion of the Applicant to permanent appointment was not in the interest of the Organization was acceptable. Indeed, it cannot be in the interest of the Organization nor of its operational activities to grant permanent appointment to staff whose service, by the terms of their letter of appointment, is limited to an entity which is downsizing. ... Accordingly, in the case at hand, the decision not to grant the Applicant a permanent appointment constitutes a reasonable exercise of discretion on the part of the Administration.²

The UNDT rejected Ms. Balan’s argument that the financial situation to be taken into account should have been that of the year 2009 and not that of 2012, stating:

Such an assertion presupposes the continuation of the *status quo*.TD.0001 Tc-.0018 1.4s garizbe.i-53(so)

13. The Dispute Tribunal correctly concluded that its review of the Secretary-General's exercise of discretion in this case was limited.

14. Ms. Balan should not be awarded pecuniary or non-pecuniary damages, as there is no factual or legal basis for such compensation and there was no breach of any right of Ms. Balan as a staff member.

15. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss Ms. Balan's appeal in its entirety.

Considerations

16. By resolution 63/250 of 24 December 2008, the General Assembly approved proposals of the Secretary-General for contract reform and, in view of the forthcoming revision of the Staff Regulations and Rules, the Secretary-General proceeded to consider for conversion to permanent appointments those staff members who were eligible under the 100 Series of the Staff Rules as at 30 June 2009.

17. To give effect to the General Assembly's direction, the Secretary-General promulgated ST/SGB/2009/10 on "Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered by 30 June 2009".

18. Section 1 of ST/SGB/2009/10 reads as follows:

Eligibility

To be eligible for consideration for conversion to a permanent appointment under the present bulletin, a staff member must by 30 June 2009:

- (a) Have completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules; and
- (b) Be under the age of 53 years on the date such staff member has completed or completes the five years of qualifying service.

Section 2

Criteria for granting permanent appointments

In accordance with staff rules 104.12 (b) (iii) and 104.13, a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible staff members who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they

meet the highest standards of efficiency, competence and integrity established in the Charter.

19. On 29 January 2010, the ASG/OHRM approved “Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009”, which were subsequently transmitted to all Heads of Departments and Offices within the United Nations, on 16 February 2010, for a review of their staff members to determine eligibility and make recommendations to the ASG/OHRM, for consideration for conversion.

20. Ms. Balan was eligible. Nonetheless, the Human Resources Services, OHRM, decided, on 28 June 2010, not to recommend her for a permanent appointment in her own country although she had completed five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules and was under the age of 53 years. The reason for the non-conversion was that she was serving in UNIC Bucharest, an entity that was downsizing or expected to close “in the near future”. The funding depended on voluntary contributions from the host country. Therefore, none of the staff members in UNIC Bucharest were recommended for conversion.

21. The Permanent Mission of Romania to the United Nations informed the Organization on 2 April 2012 that it was not able to ensure its annual contribution to UNIC Bucharest. It is recalled that back in 2010 both DPI and OHRM already anticipated that UNIC Bucharest, among others, was scheduled to close in the very

25. We find nothing to suggest that the discretion vested in the Administration pursuant to the Guidelines (approved by the ASG/OHRM on 29 January 2010), for the purpose of ensuring that the aspirations of Section 2 of the ST/SGB/2009/10 were achieved, was unfairly or capriciously exercised.⁶ We recall what this Tribunal stated in *Sanwidi* and *Pérez-Soto*:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.⁷

It is not the function of this Tribunal to stand in the shoes of the ASG/OHRM and involve itself in the decision-making process reserved for the ASG/OHRM pursuant to ST/SGB/2009/10. In cases such as the present, the jurisdiction of the Appeals Tribunal is limited to a judicial review of the exercise of discretion by the competent decision maker.⁸

26. We are satisfied that the Dispute Tribunal committed no error in finding the Secretary-General's decision legal.

Judgment

27. The Judgment is affirmed.

⁶ *Santos v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-415.

⁷ *Pérez-Soto v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-329, para. 32, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

⁸ *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, para. 62.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar