



Judgment No. 2016-UNAT-683/Corr.1

Counsel for Ms. Featherstone Self-Represented

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Reissued for technical reasons on 25 August 2016; reissued on 1 September 2016

... The USG for Management responded to the President of ICTY, by letter dated 10 March 2010, clarifying that “[i]n accordance with the old staff rules 104.12(b)(iii) and 104.13, consideration for a permanent appointment involves ‘taking into account all the interests of the Organization’”. She further noted that in 1997, the General Assembly adopted resolution 51/226, in which it decided that five years of continuing service did not confer an automatic right to conversion to a permanent appointment, and that other considerations—such as the operational realities of the Organization and the core functions of the post—should be taken into account in granting permanent appointments. Therefore, she added, “when managers and human resources officers in ICTY are considering candidacies of staff members for permanent appointments they have to keep in mind the operational realities of ... ICTY, including its finite mandate”.

... On 23 April 2010, ICTY established an online portal on staff eligibility for permanent appointments.

... On 11 May 2010, ICTY transmitted to the Office of Human Resources Management (“OHRM”), at the United Nations Secretariat Headquarters in New York, the list of staff eligible for conversion to a permanent appointment.

... At the XXXIst Session of the Staff-Management Coordination Committee (“SMCC”), held in Beirut from 10 to 16 June 2010, it was “agreed that management [would] consider eligible Tribunal staff for conversion to a permanent appointment on a priority basis”.

... On 12 July and 16 August 2010, the ICTY Registrar transmitted to the ASG/OHRM the names of 448 eligible staff members who had been found suitable for conversion by ICTY, and who were therefore “jointly recommended by the Acting Chief of Human Resources Section” and the Registrar of ICTY.

... On 31 August 2010, the Deputy Secretary-General, on behalf of the Secretary-General, approved the recommendations contained in the Report of the SMCC XXXIst Session (...) including the recommendation that eligible ICTY staff would be considered for conversion to permanent appointments on a priority basis.

... Based on its review of ICTY submissions of 12 July and 16 August 2010, OHRM disagreed with ICTY recommendations and, on 19 October 2010, submitted the matter for review to the New York Central Review (“CR”) bodies—namely, the CR Board for P-5 and D-1 staff, the CR Committee for P-2 to P-4 staff, and the CR Panel for General Service staff. In its submission, OHRM stated that “taking into consideration all the interests of the Organization and the operational reality of ICTY, [it was] not in [a] position to endorse ICTY’s recommendation for the granting of permanent appointment”. As grounds for its position, OHRM sustained that ICTY was “a downsizing entity and [was] expected to close by 2014 as set out in the latest report on the completion strategy of the Tribunal (A/65/5/Add.12) following the Security Council resolution 1503 (2003)”.

... After requesting management evaluation of the decision not to convert her appointment to permanent, and being informed that it had been upheld by the USG for Management, the Applicant filed an application before the [UNDT] on 16 April 2012, which by Order No. 80 (GVA/2012) of 4 May 2012 was consolidated, at the Applicant[']s request, with that of other 261 staff members concerned by analogous decisions[...].

... The [UNDT] ruled on these consolidated applications by Judgment Ademagic et al. UNDT/2012/131, dated 29 August 2012, finding that the ASG/OHRM was not the competent authority to make the impugned decisions, as the USG had delegated such authority to the ICTY Registrar. On this ground, the [UNDT] rescinded the contested decisions and, considering that they concerned an appointment matter, set an alternative compensation in lieu of effective rescission of EUR 2, 000 per applicant.

... On appeal, the Appeals Tribunal vacated Ademagic et al. UNDT/2012/131, by Judgment No. 2013-UNAT-359 issued on 19 December 2013.¶] The Appeals Tribunal held that the power to decide on the conversion of ICTY staff appointments into permanent[...] ones had not been delegated to the ICTY Registrar and that, hence, the ASG/OHRM was the competent authority to make the decisions at stake.

... The Appeals Tribunal also concluded that placing reliance on the operational realities of the Organization to the exclusion of all other relevant factors amounted to discriminating against ICTY staff members because of the nature of the entity in which they served, and violated their right to be fairly, properly and transparently considered for permanent appointment. Accordingly, it

- a. Applicants who were active ICTY staff members as at the date of the contested decisions;
- b. Applicants who were active ICTY staff members in the General Service category as at the date of the contested decisions;
- c. Applicants who had transferred to MICT as at the date of the contested decisions;
- d. Applicants who had separated from ICTY as at the date of the contested decisions;
- e. Applicants at the P-5 level; and
- f. Applicants who had separated from ICTY due to downsizing after the contested decisions.

... By individual letters dated 13 to 19 June 2014, and received shortly thereafter, all re-considered staff members were informed by the ASG/OHRM of the decisions not to grant any of them retroactive conversion of their respective fixed-term appointments into permanent appointments. The Applicant was informed by such a letter dated 17 June 2014. The language and structure of the respective letters were remarkably similar [...], save for the personal and factual details mentioned, although the wording was adjusted depending on which of the aforementioned six categories of staff the letter's recipient belonged to. All letters stated that the respective staff members fulfilled three out of the four required criteria and that they did not meet the fourth criteria, namely, that the granting of a permanent appointment be in accordance with the interests of the Organization. Each letter contained one paragraph setting out, in identical terms, the reasons why the last criterion was not considered to be met:

I have considered that though you may have transferable skills, your appointment is limited to service with the ICTY. Under the legal framework for the selection of staff members, I have no authority to place you in a position in another entity outside of this legal framework. As mandated by the Charter, the resolutions of the General Assembly, and the Organization's administrative issuances, staff selection is a competitive process to be undertaken in accordance with established procedures. All staff members have to apply and compete with other staff members and external applicants in order to be selected for available positions with the Organization. Given the finite nature of the Tribunal's mandate, and the limitation of your appointment to service with the ICTY, the granting of a permanent appointment in your case would not be in accordance with the interests or the operational

realities of the Organization. Therefore, you have not satisfied the fourth criterion.[³]

... On 4 July 2014, the Applicant, as well as all other applicants affected by Judgments [Baig] et al. 2013-UNAT-[3]57 and Ademagic et al. 2013-UNAT- [3]59, filed before the Appeals Tribunal a “Renewed Motion for an Order Requiring Respondent to Execute the Judgment”, which was rejected by Judgment No. 2014-UNAT-494, noting that the Appeals Tribunal’s orders had been executed inasmuch as payment of moral damages had been effected, and a new conversion process had been completed. The Appeals Tribunal further noted that recourse for complaints regarding the conversion process undertaken subsequent to the Appeals Tribunal’s rulings was not to be found in an application for execution but rather in Staff Rule 11.2 ... [that] provides the mechanism whereby the complained-of decisions of the ASG/OHRM [could] be challenged by the affected staff members” (emphasis in the original).

... The Applicant requested management evaluation of the June 2014 decision (...) on 18 August 2014. By letter dated 29 September 2014, the Applicant was informed that the USG for Management had upheld the contested decision.

4. On 29 December 2014, Ms. Featherstone filed an application with the Dispute Tribunal seeking, inter alia , rescission of the 17 June 2014 decision of the ASG/OHRM; retroactive conversion to a permanent appointment effective June 2009, with or without limitation of service to ICTY; compensation calculated according to the applicable termination indemnity associated with a permanent appointment plus the monetary equivalent of any other benefits which would have accrued to her; and compensation for bias and discrimination, delay and moral distress.

5. In Judgment No. UNDT/2015/117, the UNDT held that the contested decision denying Ms. Featherstone a conversion of her fixed-term appointment to a permanent one was unlawful, primarily because her case was not given individual consideration in light of her proficiencies, qualifications, competencies, conduct and transferrable skills and the decision was “exclusively brofie8ny.8(6ican)-7Mnable 8imthe(e)-8.6(nY)-7.1(e)-5.4(Mo)-7.28(t)-4.9(h)-83e Decr11.6(u-4

permanent one”,⁵

of the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 (Guidelines), having failed to take into account Staff Rule 9.6(c)(i). The UNDT's conclusions are therefore misplaced.

10.

18. Ms. Featherstone asks the Appeals Tribunal to reject the Secretary-General's arguments that the UNDT usurped the discretion of the ASG/OHRM to grant or deny permanent appointments.

19.

22. Consideration of the Appeals Tribunal Judgment is essential for determining the legality of the conversion exercises that are the subject of the pending appeal. In the Appeals Tribunal Judgment (*Ademagic et al.*), which was applied *mutatis mutandis* in *Baig et al.*,⁷ the Appeals Tribunal stated:⁸

... The question before the Appeals Tribunal is not whether the ICTY staff members were eligible for conversion but, rather, whether the determination of the ASG/OHRM that they were not suitable for conversion can withstand judicial scrutiny.

...

... ICTY staff members - like any other staff member – are entitled to individual, “full and fair” (in the lexicon of promotion cases) consideration of their suitability for conversion to permanent appointment. The established procedures, as well as the principles of international administrative law, require no less. This principle has been recognized in the jurisprudence of the Appeals Tribunal.

... We are not persuaded by the Secretary-General’s argument that the staff members received the appropriate individual consideration in the “suitability” exercise. The ASG/OHRM’s decision, as communicated to the staff members, provides no hint that their candidature for permanent appointment was reviewed by OHRM against their qualifications, performance or conduct; their proven, or not proven, as the case may be, suitability as international civil servants; or the highest standards of efficiency, competence and integrity, as established in the United Nations Charter. Each candidate for permanent appointment was lawfully entitled to an individual and a considered assessment on the above basis before a permanent appointment could be granted or denied. This was their statutory entitlement and cannot be overridden or disregarded merely because they are employed by the ICTY.

... It is patently obvious that a blanket policy of denial of permanent appointments to ICTY staff members was adopted by the ASG/OHRM simply because the ICTY was a downsizing entity. The ASG/OHRM was not entitled to rely solely on the finite mandate of the ICTY or Security Council Resolution 1503 (2003) as the reason to depart from the principles of substantive and procedural due process which attaches to the ASG/OHRM’s exercise of her discretion under ST/SGB/2009/10. We determine that the ASG/OHRM’s discretion was fettered by her reliance, to the exclusion of all other relevant factors, on the ICTY’s finite mandate. Accordingly, we are satisfied that the staff members were discriminated against because of the nature

⁷ *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v.*

24. Moreover, we find that the Secretary-General's submissions that the Appeals Tribunal did not "specifically prohibit" the Administration from conducting an eligibility review are

directly at issue. (See, e.g., *Costa Rica v. Costa Rica*, IT-10-027, ¶¶ 46-47, 57-58, 61, 63, 65, 66, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.)

member's transferrable skills when considering his or her suitability for a permanent appointment. The failure of the Administration to do this, and to give any meaningful consideration to this criterion, of itself, is sufficient to vitiate the contested decisions.

The reasons relied upon in the contested decisions

32. The Administration's reasons for not granting permanent appointments was the limitation of the staff member's appointment to service with ICTY and the finite nature of ICTY's mandate. As stated by the Dispute Tribunal, there is no question that the staff member's letter of appointment provides that her service shall be limited to ICTY. Nevertheless, the UNDT determined that the Administration could have elected to grant Ms. Featherstone a permanent contract not limited to service with ICTY/MICT and would

After determining the availability of a suit able position in consultation with the head of department/office and the staff member concerned, the Assistant Secretary-General for Human Resources Management shall decide on the placement, in accordance with staff regulation 1.2(c).

34. The Dispute Tribunal relied on Section 11.1(b) as the mechanism for the potential reassignment of the ICTY staff in case of abolition of their posts, concluding that there was “no absolute legal bar for the ASG/OHRM to move any of the [ICTY staff members] ... to a different entity on the basis of the above-referenced provision if their posts were to be abolished”.¹¹

35. Paragraph 10 of the Guidelines provides:

Where the appointment of a staff member is limited to a particular department/office, the staff member may be granted a permanent appointment similarly limited to that department/office. If the staff member is subsequently recruited under established procedures including review by a central review body for positions elsewhere in the United Nations Secretariat, the limitation is removed.

36. The UNDT construed the word “may” as precluding a staff member who previously held a fixed-term appointment from receiving a permanent appointment subject to the same limitation. In this regard, the Dispute Tribunal stated: “If it were mandatory to equally limit the permanent appointment to said department/office upon conversion, the Guidelines would and should have explicitly stated same”.¹²

37. The Dispute Tribunal, thus, found that of the two grounds put forward by the

39. The Secretary-General further contends that the UNDT erred by failing to take into account Staff Rule 9.6(c)(i), which states:¹³

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

(i) Abolition of posts or reduction of staff[.]

40. In other words, the Secretary-General submits that the ICTY staff members, who were on fixed-term appointments with end dates, did not fall into the category of those whose “appointments [were] slated to be terminated due to abolition of posts, reduction of staff, funding cutbacks, or on any other grounds” (emphasis in original). Accordingly, the Secretary-General submits that the ASG/OHRM could have properly concluded that she could not place the staff members in another entity outside of ICTY.

41. Insofar as the UNDT relied on the contents of paragraph 10 of the Guidelines in determining that the ASG/OHRM could have given some ICTY staff members a permanent appointment limited to service within ICTY and given other ICTY staff members permanent appointments with no service limitations, the Secretary-General argues that the Dispute Tribunal misread paragraph 10. He contends that the word “may” in paragraph 10 of the Guidelines is no more than a reiteration of the language in Section 2 of ST/SGB/2009/10, that “a permanent appointment may be granted” to staff who meet the criteria for such appointments. Furthermore, the Secretary-General relies on the second sentence of paragraph 10 which states “[i]f the staff member is subsequently recruited under established procedures including review by a central review body for positions elsewhere in the United Nations Secretariat, the limitation is removed”.

42. Ms. Featherstone submits that the UNDT was correct to find that the ASG/OHRM could place her in a position outside of ICTY. She contends that the Administration seeks to cast her as an individual who merely has a fixed-term appointment that will expire, as opposed to a person affected by the abolition of posts, leaving her to fall outside of those persons who can be placed outside of the normal process. She submits there is nothing in ST/AI/2010/3 or

¹³The Secretary-General’s Bulletin SGB/2010/6 of 2 September 2010.

our clear directives has unduly delayed the administration of justice for Ms. Featherstone, as well as for the interests of the Organization itself.

46. Although the Administration is entitled to consider “all the interests of the Organization” under Section 2 of ST/SGB/2009/10, when considering staff members’ suitability for permanent appointments, we hold that provision cannot be construed as narrowly as the ASG/OHRM interprets it. “[A]ll the interests of the Organization” encompasses the interests of ICTY, as an institution established by the General Assembly, not merely as a downsizing entity. As such, ICTY has an interest in maintaining in its employ staff members who meet the “highest standards of efficiency, competence and integrity established in the Charter” in order for it to carry out its mandate.¹⁴ Thus, the ASG/OHRM’s exclusive reliance on the finite mandate of ICTY—which has been in existence for 20 years and still exists through its successor, MICT—ill-served the ICTY staff members in 2011 and again in 2014 upon remand. As set forth in the Appeals Tribunal Judgment, and here, the ICTY staff members are entitled to “full and fair” consideration of their respective qualifications, competencies, conduct and transferrable skills when determining their suitability for conversion to permanent appointments.

47. Accordingly, the Appeals Tribunal upholds the Dispute Tribunal’s finding that the decision made with respect to the staff member was flawed and we uphold UNDT’s rescission of said decision.

The UNDT’s award of moral damages

48. The Secretary-General contends that the UNDT erred in law by awarding moral damages of EUR 3,000 to the staff member in light of the General Assembly’s amendment to Article 10(5)(b) of the UNDT Statute, which provides that compensation may only be awarded for harm when supported by evidence. As the amendment was in effect on 17 December 2015, when the UNDT issued the impugned Judgment, the UNDT erred by awarding compensation in the absence of evidence capable of proving harm suffered.

49. Ms. Featherstone submits that the UNDT did not err in granting moral damages. She argues that “the finding by the UNDT that the Administration has not complied with the UNAT

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Thomas-Felix

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar