



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

D'ASPREMONT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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JUDGMENT

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Counsel for Applicants:  
Jeffrey C. Dahl  
Jonathan Goldin

Counsel for Respondent:  
Alan Gutman, ALS/OHRM, UN Secretariat

## Introduction

1. On 29 May 2012, the Applicant, a staff member of the International Criminal Tribunal for the former Yugoslavia (“ICTY”

## Facts

7. On 12 August 2010 the Applicant submitted her application for consideration for conversion to permanent appointment.

8. On 12 July and 16 August 2010, ICTY Registrar transmitted to the ASG/OHRM the names of 448 eligible staff members, including the Applicant, 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 ICTY Registrar.

9. OHRM disagreed with ICTY recommendations and on 19 October 2010, it submitted the matter for review to the New York Central Review bodies (“CR bodies”) stating that “taking into consideration all the interests of the Organization and the operational realities of ICTY, OHRM [was] not in the position to endorse [ICTY] recommendation for the granting of permanent appointment”, as 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)”.

10. On 18 February 2011, ICTY staff members, including the Applicant, were informed that there had been no joint positive recommendation by OHRM and ICTY on the granting of permanent appointments and that, accordingly, the cases had been referred “to the appropriate advisory body, in accordance with

12. By memorandum dated 20 September 2011, the ASG/OHRM informed the ICTY Registrar that:

Pursuant to my authority under section 3.6 of ST/SGB/2009/10, I have decided in due consideration of all circumstances, giving full and fair consideration to the cases in question and taking into account all the interests of the Organization, that it is in the best interest of the Organization to ... accept the CRB's endorsement of the recommendation by OHRM on the non-suitability [for conversion of ICTY staff].

13. By letter dated 6 October 2011, the ICTY Registrar informed the Applicant of the decision of the ASG/OHRM not to grant her a permanent appointment.

14. On 2 December 2011, the Applicant requested management evaluation of the contested decision and in a memorandum dated 17 January 2012, received by the Applicant on 18 January 2012, the Management Evaluation Unit upheld the decision of the Secretary-General not to grant her a permanent appointment.

15. On 29 May 2012 the Applicant filed her application contesting the decision not to grant her a permanent appointment. The application was served on the Respondent on 5 June 2012 with a reply due on 5 July 2012.

16. The Applicant, on 18 June 2012, filed a motion of extension of time to file her application which she had earlier submitted on 29 May 2012. The reasons advanced for the late filing of her application were that she was suffering from a temporary total disability and as a result, she could not file her application on time. In support of her motion, she produced a medical certificate issued by an ICTY Medical Officer who had placed the Applicant on an extended period of sick leave from 15 February to 9 May 2012.

17. On 25 June 2012, the Respondent filed his reply in which he, inter alia, contested the receivability of the application *ratione temporis*. He also submitted that the Applicant was not eligible for consideration for conversion.

18. The Tribunal issued Order No. 123 (GVA/2012) on 9 July 2012 ruling that the Applicant's case was receivable *ratione temporis*.

19. By Order No. 125 (GVA/2012) dated 11 July 2012, the Tribunal ordered the Applicant to file comments and provide supporting documents on the Respondent's submissions regarding her eligibility for consideration for conversion by 25 July 2012.

20. On 26 July 2012, the Applicant filed a motion for extension of time to comply with Order No. 125 (GVA/2012). The Applicant's counsel argued that the Applicant was on sick leave and all documents requested by the Tribunal were in her office, that counsel was on vacation hence the eight hour time difference hampered effective communication between them. He therefore sought an extension by two weeks to respond to the Order.

21. By Order No. 130 (GVA/2012), issued on 31 July 2012, the Tribunal rejected the Applicant's motion for extension of time on grounds that it was filed after the expiry date to comply with the Order, and that no medical certificates had been produced in support of the assertion that the Applicant was on sick leave. The hearing of the Applicant's case scheduled for 22 August 2012 was cancelled.

22. On 11 April 2013, the Tribunal ordered the Applicant through Order No. 40 (GVA/2013), to produce supporting documentation of her status, duration and nature of employment with the OPCW by 6 May 2013.

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Applicant's submissions

25. The Applicant's principal contentions can be summarized as follows:
  - a. The decision of the ASG/OHRM denying her conversion to permanent appointment because she was serving at ICTY is ultra vires the United Nations Charter;
  - b. The exclusion of the entire ICTY staff members from consideration for conversion to permanent appointment based on the fact that ICTY was downsizing is discriminatory, unfair and unlawful, and an abuse of discretion and;
  - c. The ASG/OHRM decision that ICTY staff members are not part of the Secretariat is unlawful and depicts unequal treatment and discrimination.
26. The Applicant prayed the Tribunal to grant her the following remedies:
  - a. To order the ASG/OHRM to convert her fixed-term appointment to a permanent appointment;
  - b. Alternatively, to order the ASG/OHRM to grant her a permanent appointment limited to service with ICTY;
  - c. To award her compensatory damages as a result of the discrimination she suffered, and to account for the loss of recognition and career advancement possibilities and;
  - d. To award any other relief the Tribunal deems just and proper.

Respondent's submissions

27.







39. In the case at hand, the Tribunal notes that both breaks were initiated by the Applicant and not by the Organization, as it is often the case (see *Kulawat UNDT/2013/058*). During these voluntary breaks there was no contractual relation between the Applicant and the Organization.

40. As a result, the Applicant's prior employment neither with ICTY, between 26 July 2000 to 30 November 2000, nor with OPCW could possibly be used to make up for the required five years of qualifying service for conversion to permanent appointment because the Applicant had separated from the Organization. The Applicant's continuous years of service began accumulating anew when she rejoined ICTY on 6 June 2001.

41. The Tribunal finds that the breaks in service in the Applicant's employment history disrupted her accumulation of continuous service with the Organization, which was a fundamental requirement for eligibility for consideration for conversion. Consequently, the Applicant was ineligible for consideration for conversion to permanent appointment as the breaks in service resulted in her not having acquired five years of continuous service on a fixed-term appointment.

42. Finally, the Tribunal wishes to emphasize that the lack of competence of the ASG/OHRM to take the contested decision, as was held in *Ademagic et al UNDT/2012/131*, *Malmstrom et al UNDT/2012/129* and *Longone UNDT/2012/130*, has no impact on the Applicant's case.

43. Whether a staff member is eligible for consideration has to be assessed against clear and objective criteria.

