



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D APPEL DES NATIONS UNIES

JdgentNo. 2016-UNAT-696



Benser
(Respondent/Applicant)

v.

Secretary-General of the United Nations

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/016, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 8 March 2016 in the case of *Benser v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 9 May 2016, and Ms Aina Benser filed an answer on 10 June 2016.

Facts and Procedure

2. The facts found by the Dispute Tribunal read as follows: ¹

... The Applicant is a staff member in the General Service category [in the Department for General Assembly and Conference Management (DGACM)]. On 2 September 2008, the Applicant joined the Organization at the G-3 level on a ~~temporary~~ appointment in the Department of Management.

... In 2009 the Applicant ~~was~~ when an Administrative Assistant at the G-3 level, applied to sit a competitive examination for language reference assistants. This application was in response to [ST/IC/2009/27] the 2009 competitive examination for language reference assistants. That Information Circular informed staff members that the examination was being conducted under the framework of ST/AI/1998/4 [(Competitive examinations for the placement of general service) and related categories in particular occupational groups]... ²

... The Applicant successfully completed the competitive examination for language reference assistants and was placed on a list of successful candidates.

... On 1 May 2011, the Applicant was promoted to the G-4 level as an

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appointed to lead an unit and
assisted by the Secretary-General. The Diptu
to grant MsBensa continuing appointment or
compensation in lieu of such appointment. The
referral damages as he had failed to
from the contested decision.

near extent of other occupational groups
The Tribunal ordered revision of the decision not
alternately payment of USD 5,000 to her as
Diptu Tribunal, however rejected MsBensa's
adduce any leading evidence to how it was

Submissions

The Secretary-General's Appeal

4. The Diptu Tribunal erred in law by find
General Assembly resolutions 63/250 and 65/2
category has the reference to posting spec
to staff in the General Service category and that
mandate for the Secretary-General to grant co
General Service category in language posts
appointment. These findings were based on a im
General Assembly resolution 63/250 and para
resolution 65/247. 5 The UNDT's decision failed to consider the 2006 Report of the
Secretary-General on the Composition of the Secretariat
that the definition of language posts

ing that the relevant paragraphs in
47 applied to staff in the General Service
ial language skills in Staff Rule 4.16(b) applied
he to General Assembly resolution provided a
nining appointments to staff in the
after a review of only two years on a fixed-term
interpretation of paragraph 23, Section II, of
graph 50, Section VI, of General Assembly
at (A/61/257; hereinafter the 2006 Report)
to staff in the Professional category

5. By finding that consent to continuing
to contractees for candidates who had a
language staff, General Assembly resolution 63/250 and 65/247 were
he Professional category or serving in posts
pecial language skills and who have been recr

appointments should be made according
cessfully passed competitive examinations for
being solely to staff in
ions in the conference servicing area during
ited and made in accordance with ST/AI/2000/1

5 General Assembly resolution 63/250, Section II, para. 23 reads " Reaffirms that while continuing
appointments are not precluded, successful candidates for non-regular competitive recruitment
examinations and staff for language services after a review of probationary service will continue to
be 4.5 appointment 5() 73.8 (Professional)

(Special Conditions for Recruitment or Competence Examination for Posting Special definition, could not have been referring to

Placement of Candidates Scored in a 1 Language Skills. These positions by staff in the General Service category

6. The Dispute Tribunal erred in law in finding referred to in Staff Rule 4.16(b) are prohibited pursuant to successful completion of an Particular Occupational Group Examination AI is related to the appointment of special language positions that are in the Professional (Competence Examinations for Recruitment Language Skills in the Professional Category) the Particular Occupational Group Examination examinations administered for them therein in a large variety of General Service competencies including skills ranging from bookkeeping to language assistance services

that posting persons with special language skills which staff in the General Service category are examination administered according to the . However, that Administrative Instruction age positions and has nothing to do with special al category. In contrast to ST/AI/1998/7 and Placement in Posts Requiring Specific in the Special Language Examination AI), ion AI has a different purpose and governs order to create posts of suitable candidates

7. The UNDT erred on two points in determining that the administrative instance comparable to ST/AI/2000/1, for staff in the General Service category as Information Circular ST/IC/2009/27. First, it is an error to equate an information circular in an administrative instance, as the former holds a lower position in the non-hierarchy of the Organization. Secondly, while ST/AI/2000/1 lists the posts that can be filled exclusively by way of the competence examinations administered according to ST/AI/1998/7 and provides explicit reference to the conditions for conversion to permanent appointment. ST/IC/2009/27, on the other hand, applied only to one examination scheduled on 9 October 2009 and did not mention conversion of fixed-term appointments to continuing appointments

8. In the present case, Ms Bensrafiachid pursuant to an examination administered according to the Particular Occupational Group Examination AI; he was not tied to a post which falls under the exception set forth in Staff Rule 4.16(b). Consequently, he is not eligible for conversion to a continuing appointment after two years of service.

9. The Secretary-General requests that the Appeals Tribunal accept Judgment No. UNDT/2016/016.

Ms. Benser's Answer

10. The Secretary-General sought to litigate the case by relying on new evidence and arguments not cited to the Dispute Tribunal. Prior to the appeal before the UNDT, he did not address the 2006 Report as evidence, nor did he argue that the relevant General Assembly resolutions should be interpreted by reference to that report. For this reason alone, the appeal should be dismissed.

11. The General Assembly's reliance on the definition of language posted in the 2006 Report. Yet its resolutions made no reference to language posted as defined by the Secretary-General. They referred to staff for language services. Indeed, none of the proposed reasons concerning appointments in the terminology language posted or make reference to the 2006 Report's definition. The Secretary-General's reliance on the 2006 Report's definition is therefore an illegal basis.

12. The use of different terminology by the General Assembly indicates that its resolutions were referring to something different than language posted. In contrast to language posted, language services is a reference to an organizational unit rather than specific posts.

13. The UNDT's finding that Ms. Benser's work in language services is not contested by the Secretary-General and therefore does not form part of the present appeal. Since her work in language services is the relevant General Assembly's resolutions clearly apply to her.

14. The prevailing practice until Ms. Benser refused a continuing appointment was to grant language reference assignments a continuing appointment after two years probationary period, such as in the case of her two language reference assignment colleagues. The Secretary-General does not contest the UNDT's finding in his regard. Consequently, he cannot challenge his finding on appeal.

15. The Dispute Tribunal correctly found that the complaint's examination by which Ms. Benser's case fell under the provisions of Staff Rule 4.16(b).

16. The Secretary-General has failed to identify any proposed issue that establishes the differentiation between General Secretariat and Professional Staff. The differentiation does not exist in law.

17.

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Secretary-General contends that the 2006 Report, which includes a section on the definition

Do Staff Rules 4.14(b) and 4.16(b) apply to staff at the General Service level?

36. Staff Rules 4.14 and 4.16 operate in implementation of General Assembly resolutions 63/250 and 65/247.

37. Staff Rule 4.14 on continuing appointments provides

- (a) A continuing appointment is an open-ended appointment
- (b) Staff members cited upon the completion of a competitive examination pursuant to Staff Rule 4.16 shall be granted a continuing appointment after a year on a fixed-term appointment subject to satisfactory service.
- (c) The Secretary-General shall prescribe the criteria determining staff members' eligibility for consideration for continuing appointments

38. Staff Rule 4.16 on competitive examinations sets

- (a) Boards of examinations established by the Secretary-General shall ensure the equality of the competitive examinations administered in accordance with the conditions established by the Secretary-General.
- (b) Boards of examinations shall make recommendations to the Secretary-General in respect of the following:

- (i) Appointment
appointments to P-1 and P-2 posts shall be subject to the most desirable ranges and to possessing special language competence at the United Nations Secretariat shall be made exclusively through competitive examination. Appointments to posts at the P-3 level in the United Nations Secretariat shall be made normally through competitive examination;

- (ii) Recruitment at the Professional category of staff from the General Service and related categories in the United Nations Secretariat
recruitment to the Professional category at the United Nations Secretariat of staff from the General Service and related categories shall be made in the appropriate competitive examinations shall be made in the lists established by the General Assembly. Recruitment shall be made exclusively through competitive examination.

- (c) Staff members appointed to the Professional category after a competitive examination shall be subject to mandatory resignation under conditions established by the Secretary-General.

39. Staff Rule 4.14(b) does not make any distinction between General Service level and Professional level staff recruited on the basis of a competitive examination.

40. Pursuant to Staff Rule 4.14 (b), a staff member in the language services needs to satisfy the following mandatory conditions to be granted a continuing appointment (a) he staff member in the United Nations Secretariat be recruited on the basis of a competitive examination pursuant to Staff Rule 4.16; (b) he staff member recruited to was on a fixed-term appointment and (c) he staff member's services have been satisfactory

41. We therefore agree with the UNDT's finding that Staff Rule 4.14(b) applies to all appointments possessing special language competence in the United Nations Secretariat including appointments to posts at the General Service level, such as Ms Bensipos

42. Staff Rule 4.16(b)(i) applies to (a) the appointment of P-1 and P-2 level posts that are subject to the normal desirable ranges at the United Nations Secretariat and to (b) the appointment to possessing special language competence in the United Nations Secretariat

43. Staff Rule 4.16(b)(i) makes no distinction between posts possessing special language competence at the General Service level and possessing special language competence at the Professional level. It follows that Staff Rule 4.16(b)(i) is applicable to all appointments possessing special language competence in the United Nations Secretariat including posts at the General Service level.

44. We find no error in the following reasoning of the UNDT in this regard: ¹¹

... Moreover according to the general legal principle of interpretation, *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish, the interpreter of the law cannot distinguish where the law does not distinguish and cannot create and/or add an exception to an established rule in a general applicability and hereby limit its area of application. The [Dispute] Tribunal considered that for Staff Rule 4.16 to apply only to P-level posts the first part of Staff Rule 4.16(b)(i) would have had a different content such as for instance: Appointments to P-1 and P-2 level posts that are subject

¹¹ *Ibid.*, para. 49.

to be of the same nature and to

Original and ~~Aboriginal~~ ~~Version~~: English

Dated ~~his~~ 28th day of October 2016 in New York, United States

(Signed)

Judge ~~Lin~~, ~~Priding~~

(Signed)

Judge ~~Thomas~~ Felix

(Signed)

Judge Knieim

Entered in the Register ~~his~~ 20th day of December 2016 in New York, United States

(Signed)

Weicheng Lin, Registrar