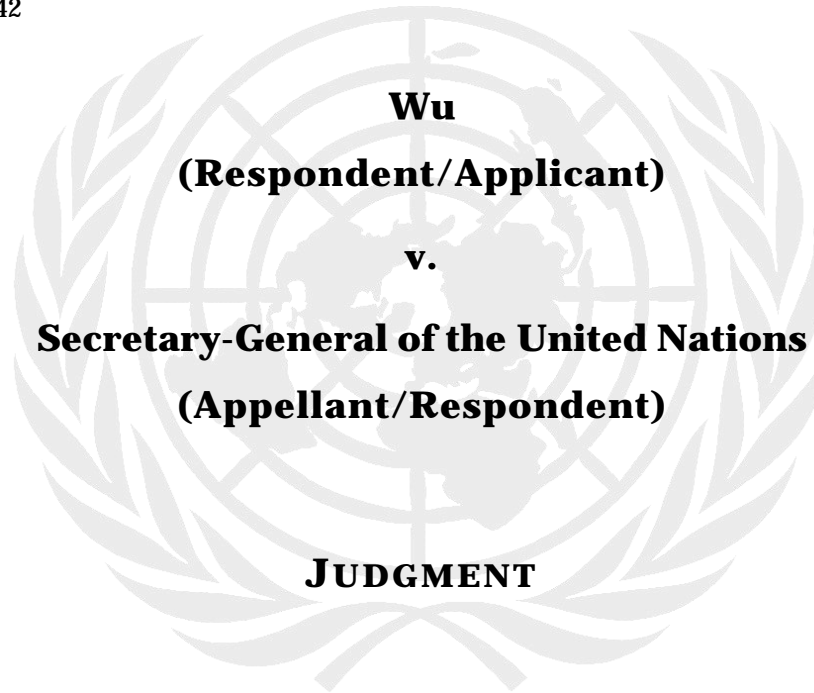




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-042



**Wu
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Kamaljit Singh Garewal, Presiding
Judge Mark P. Painter
Judge Luis María Simón

Judgment No.: 2010-UNAT-042

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Muhammad Mohi-us Sunnah

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. Ming Wu (Wu), himself a P-4 level Chinese Reviser, was wrongly denied an appointment to the P-4 level post of Chinese Reviser as a 15-day candidate. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found in his favour and awarded compensation to Wu under the provisions of Article 10(5)(b) of the statute of the Dispute Tribunal (UNDT statute), equivalent to two months' net base salary. The UNDT decision is affirmed.

Facts and Procedure

2. Wu's claims relate to his non-selection for two posts as a Chinese Reviser at the P-4 level in the Conference Services Division of the United Nations Office at Geneva (UNOG). At the time of his application for these posts, Wu was serving as a Chinese Reviser at the P-4 level in the United Nations Office at Nairobi (UNON). He applied to a vacancy announcement advertising two vacancies for Chinese Reviser posts at the P-4 level in UNOG and was considered a 15-day candidate. He was interviewed and included in the list of four recommended candidates transmitted to the Central Review Committee, which approved the selection procedure and recommended that the UNOG Director-General proceed with the selection of the candidates. The Director-General selected two other candidates and placed Wu on the roster for similar positions in the future. The selection process was completed on 29 April 2008.

3. On 17 June 2008, Wu wrote to the Secretary-General requesting an administrative review of the decision not to select him for the posts.

4. By letter of 3 July 2008, Wu was informed that he had been placed on the roster of candidates pre-approved for similar positions under Section 9.3 of Administrative Instruction ST/AI/2006/3 entitled "Staff selection system".

5. On 26 August 2008, Wu was informed that the decision not to select him for the posts was confirmed. Wu's subsequent appeal against the decision to the Joint Appeals Board (JAB) was transferred to the UNDT on 1 July 2009.

6. In its Judgment issued on 20 November 2009, the UNDT found, based on the *Kasyanov*¹ Judgment, that the decision to choose two 30-day candidates instead of Wu, a 15-day candidate, violated Section 7.1 of ST/AI/2006/3 and that, therefore, the decision not to appoint Wu was procedurally flawed. In *Kasyanov*, the UNDT ruled that the selection of a 30-day candidate when there is a suitable 15-day candidate was in breach of ST/AI/2006/3, since it interpreted section 7.1 of the Administrative Instruction as requiring 15-day candidates to be given priority consideration before any 30-day mark candidates could be considered. The UNDT noted that shortly after Wu had been notified that he had not been selected for the two subject posts, he was informed that he was successful in his application for another Chinese Reviser post at the P-4 level in Geneva. Wu assumed the functions of this post on 1 September 2008. The UNDT, therefore, found that Wu's loss of opportunity was limited in scope and time.

7. The UNDT nevertheless awarded Wu compensation in the amount of two months' net base salary. It justified the award on the grounds that "the Organization did not only commit a breach of law by applying a most doubtful practice twice on [Wu], but also did not act in good faith when notifying [Wu] very late of the outcome of his application. Therefore, the immaterial damage in terms of being neglected and emotional stress may not be regarded as not being worth to be compensated in money".

8. The Secretary-General appealed the UNDT Judgment on 1 February 2010.² Wu filed an answer to the appeal on 18 March 2010.

¹ *Kasyanov v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/022.

² The Secretary-General was granted an extension of the time-limit to file an appeal until 1 February 2010.

Submissions

Secretary-General's Appeal

9. The Secretary-General submits that the UNDT erred in law and fact in awarding compensation for moral damages in the present case. The Secretary-General does not contest the UNDT's main finding that Wu was wrongly denied an appointment and that the selection process was procedurally flawed.

Legal framework governing compensation

10. Under Article 10 of the UNDT statute, the UNDT may order compensation when it has made a determination on the merits of a case and found in favour of an applicant. Article 10(7) of the UNDT statute, however, expressly prohibits the award of exemplary and punitive damages. The prohibition on exemplary and punitive damages was not present in the statute of the former Administrative Tribunal. It was expressly introduced into the UNDT statute upon the recommendation of the Secretary-General. In making this recommendation, the Secretary-General noted that it would be inappropriate to use the public funds of the Organization to award compensation to individual staff members to punish the Organization.

Compensation for procedural errors

11. The Secretary-General submits that in recent years, the former Administrative Tribunal awarded compensation on the basis of procedural error alone, even where such error either did not result in a pecuniary loss or did not change the outcome of the proceedings. He contends that the continuing applicability of this jurisprudence needs to be revisited in view of the new express prohibition on exemplary and punitive damages in the UNDT statute. Awarding compensation in cases of procedural or administrative errors, where the staff member has shown no demonstrable financial loss, may be deemed to constitute an award of punitive or exemplary damages ordered solely to punish the Organization for failing to comply with its own rules and procedures.

Compensation for moral injury

12. The Secretary-General submits that the UNDT may award compensation for non-pecuniary loss, such as moral injury. In order for a claim for moral damages to be successful, the former Administrative Tribunal required the staff member to provide specific evidence demonstrating that moral injury had in fact occurred. The Secretary-General contends that the UNDT erred in asserting that monetary compensation was the only effective judicial remedy available for addressing a breach of rights. Even where moral injury was established, the former Administrative Tribunal did not always award monetary compensation where it determined that a favourable judgment itself constituted sufficient satisfaction. Particularly in view of the prohibition on awarding exemplary and punitive damages, a judgment pronouncing that the Organization acted wrongly vis-à-vis an applicant may, in appropriate cases, constitute a sufficient and effective judicial remedy for any moral injury suffered by an applicant.

Alleged errors of law and fact in awarding compensation in the present case

13. The Secretary-General contends that in the present case, the UNDT determined that moral damages were incurred by Wu based on two grounds: firstly, that the failure to follow procedures constituted a violation of due process rights; and secondly, that the allegedly late notification of Wu regarding the outcome of his application caused him emotional stress.

14. With respect to the first ground, the Secretary-General submits that in the present case, a judgment in favour of Wu provides a sufficient judicial remedy as it provides judicial confirmation that the Organization failed to comply with its own rules. Moreover, the award of compensation for moral damages based on procedural non-compliance alone is primarily punitive and, as such, constitutes an error of law.

15. Regarding the alleged delays in notifying Wu about the outcome of the selection process causing him emotional stress, the Secretary-General submits that the UNDT erred in law in characterizing the Administration's notification of the selection decision to Wu as "very late". The applicable rules do not prescribe a particular timeframe for providing such notification; and the UNDT does not have the authority to prescribe an appropriate timeframe, as the authority to promulgate rules regarding the administration

of staff members lies with the Secretary-General. The UNDT therefore erred in law in holding the Administration to an unspecified standard that in fact does not exist under the rules of the Organization and in determining that the Organization failed to comply with such standard.

16. The Secretary-General further alleges that the UNDT erred in finding that the Administration caused Wu unnecessary stress as a result of the alleged delays in notification. Wu himself does not claim that he suffered emotional stress from not knowing the outcome of the selection process and the record established that he had constructive knowledge of the selection decision well before he received the written notification.

17. The Secretary-General therefore requests that the order for the payment of compensation to Wu be vacated.

Wu's Answer

18. Wu responds that the UNDT did not award exemplary or punitive damages, but took into account the neglect and his emotional stress and quantified them in terms of money. Wu contends that the damages awarded could have been greater had the UNDT taken into account the material loss he suffered from the non-selection given the difference in the post adjustment multiplier; and had it taken into consideration the fact that 30-day candidates were selected instead of him, a 15-day candidate, which damaged his professional reputation because it left the impression that Wu as a 15-day candidate was inferior in terms of his qualifications and abilities to the 30-day candidates.

19. Wu submits that he should have received a higher level of compensation. The review process of the selection decision has so far lasted for almost one and a half years and is expected to last at least another half a year before the Appeals Tribunal. It has exerted physical and psychological pressure on Wu, caused by the Administration's delinquency, for which Wu should also be compensated.

20. Wu contends that the principle of compensation to victims of violations of legal rights has been consistently confirmed and applied by the former Administrative

Tribunal and the UNDT. If the new internal justice system were to desist from this jurisprudence, it would run the risk of becoming ineffective.

21. In the present case, as the administrative decision was not and could not be quashed, its consequences have not been wiped out and the situation that would have existed if the decision had not been taken cannot be re-established merely by a judgment in Wu's favor. He therefore has to receive monetary compensation.

22. The Secretary-General's argument that the judgment in his favour constitutes a sufficient judicial remedy is incorrect because the administrative decision contested was not rescinded and Wu's right to be fully and fairly considered as a 15-day mark candidate was violated twice by the Administration, both in the present case and in a previous case two years ago.

23. Wu contests the Secretary-General's assertion that the award of compensation for emotional stress arising from delays in notifying him about the outcome of the selection process was based on errors of law and fact. Wu contends that the selection process was completed on 29 April 2008 and the two successful candidates were immediately notified. However, he was notified on 3 July 2008, more than two months later. This notification should be considered "very late" in any sense, whether compared with the notification given to the successful candidates or according to common sense.

24. Furthermore, the other unsuccessful 15-day mark candidate had not been notified of her non-selection because she had not appealed it. He himself was only notified in writing after he had filed his request for administrative review; so this notification obviously served as a patch to cover the lapses in the administrative procedures.

25. Wu submits that "[i]n view of the deliberate and systematic disregard and violation of UN rules and procedures as well as irregularities on the part of Programme Managers ... which entail financial losses to the Organization, the court may ask the Secretary-General to frame rules on financial responsibility by making those liable for such violations". He furthermore states that by appealing before the Appeals Tribunal every UNDT judgment that awards compensation to staff members, the Administration displays a pattern of abuse of process and squanders time, money, and resources of the

Organization. He requests that the Appeals Tribunal uphold the UNDT Judgment and issue further orders as appropriate.

Considerations

26. Wu's application before the UNDT was decided in his favour. Wu had successfully demonstrated that the decision not to select him was wrong. He was a candidate for lateral entry to the P-4 post of Chinese Reviser. He had been holding a P-4 post since September 2006. Wu was entitled to be considered as a 15-day candidate (P-4 level lateral). He could not be considered along with certain 30-day candidates (P-3 level promotional). UNDT concluded that "the decision not to select the Applicant for one of the posts advertised under vacancy announcement ... was tainted by procedural flaws". The Secretary-General is the appellant before us. The Secretary-General does not challenge the above decision but seriously contests the award of two months' net base salary as compensation.

27. A comparison of Article 10(1) of the statute of the former Administrative Tribunal and Article 10(5)(a) and (b) of the UNDT statute shows that there is hardly any difference between the two provisions though they are differently worded. Article 10(1) of the former Administrative Tribunal's statute reads:

If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time, the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his or her case, provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order.

28. Article 10(5)(a) and (b) of the UNDT statute stipulates:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission

of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

29. The statute of the former Administrative Tribunal did not specifically prohibit the award of exemplary or punitive damages. Therefore, the former Administrative Tribunal's award of compensation was not limited. Furthermore, under both statutes compensation can exceed two years' net base salary in exceptional circumstances, for reasons to be recorded.

30. The provisions of the UNDT statute lay down that when the UNDT orders rescission or specific performance of a decision, concerning appointment, promotion, or termination, it shall at the same time fix an amount of compensation. This compensation is the alternative relief, should the management decide not to rescind the contested decision or specifically perform the Tribunal's order. However, under the statute of the former Administrative Tribunal, the alternative relief of compensation was required to be announced in every successful case. This alternative is now restricted, under the UNDT statute, only to decisions concerning appointment, promotion, or termination. These are some of the modifications in the UNDT statute. The other major change is that the UNDT statute specifically bars the Dispute Tribunal from awarding exemplary or punitive damages under Article 10(7).

31. The Secretary-General's submission is that the award of compensation of two months' net base salary is an award for moral damages based on procedural non-compliance and is primarily punitive and, as such, constitutes an error of law. If the provisions of Article 10(5) and (7) of the UNDT statute are read together in a harmonious way, it will become clear that under Article 10(5)(a) in all cases of rescission or specific performance, without exception, the Tribunal must set an amount of compensation as an alternative. Further, the UNDT may award compensation under Article 10(5)(b). Therefore, by no stretch of the imagination can compensation which is properly awarded for loss or damage suffered by an applicant under Article 10(5)(a) or (b) be overruled because it is exemplary or punitive under Article 10(7).

32. We do not find any reason to re-examine the judgments of the former Administrative Tribunal in Judgment No. 1047, *Helke* (2002) and Judgment No. 1122, *Lopes Braga* (2003). We note, however, that the *Helke* case concerned a violation of the rules of procedure and guidelines of the JAB and there was not an extensive discussion of the nature of the compensation awarded. In *Lopes Braga*, a promotion case, there was a finding that the violation of the applicant's due process rights caused him irreparable harm. We find the submission of the Secretary-General regarding these authorities quite extraordinary because in *Ardisson*³ the Secretary-General's answer relies on *Lopes Braga* and indeed also on the UNDT Judgment in *Wu* impugned in this appeal in support of the submission that the amount of compensation had been correctly established. The Secretary-General's stand in the present appeal and in the answer filed in *Ardisson* are completely contradictory. Further, in the hearing before the UNDT the Secretary-General made a submission that a declaration recognizing the violation of Wu's rights would be appropriate compensation and that, should the UNDT consider that financial compensation was warranted, such compensation should be very modest. The Secretary-General now seeks to argue a different position on appeal, namely that the judgment in favour of Wu provides a sufficient judicial remedy and the award of compensation for moral damages is primarily punitive. It is not expected of the United Nations to raise such contradictory pleas. The United Nations should act as an ideal litigant and display a clear and consistent stand on all important issues. It is the ordinary litigants who take inconsistent and devious pleas because individual litigants have their self-interest in mind. They usually deviate from the truth and the correct interpretation of the law. The United Nations should be above reproach on this count.

33. Wu ultimately did not seek rescission of the decision not to appoint him as he was appointed to a P-4 level post of Chinese Reviser in Geneva a few months later. The UNDT awarded compensation to Wu under Article 10(5)(b) of the UNDT statute for non-pecuniary damage arising from the violation of his due process rights during the selection process. It is not disputed that compensation may be awarded for non-pecuniary damage. While not every violation of due process rights will necessarily lead to an award of compensation, the UNDT found in this case that Wu suffered damage, in the form of

³ *Ardisson v. Secretary-General*, Judgment No. 2010-UNAT-052.

neglect and emotional stress, for which he is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

34. The Secretary-General argues that the UNDT erred in awarding compensation on the ground that the delay in notifying Wu of the outcome of the selection process caused him stress. In his final observations to the JAB, Wu argued that he had suffered damage, including stress. The UNDT did not err in finding that Wu suffered stress based on this submission. In the absence of a specific timeframe in Administrative Instruction ST/AI/2006/3 for notifying unsuccessful applicants of a selection decision, the notification ought to be provided within a reasonable amount of time. Wu was advised in writing of the outcome of the selection process on 3 July 2008, after the successful candidates were appointed on 1 May 2008 and after he wrote to the Secretary-General on 17 June 2008 seeking administrative review of the decision not to appoint him. In arguing that Wu had constructive knowledge of the decision as from 5 May 2008, the Secretary-General seeks to take advantage of the Organization's failure to follow its own procedures. Accordingly, there was no error made by the UNDT in awarding compensation for the delay in notifying Wu of the selection decision.

Judgment

35. The appeal is dismissed and the UNDT Judgment is affirmed.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Painter

(Signed)

Judge Simón

Entered in the Register on this 17th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal