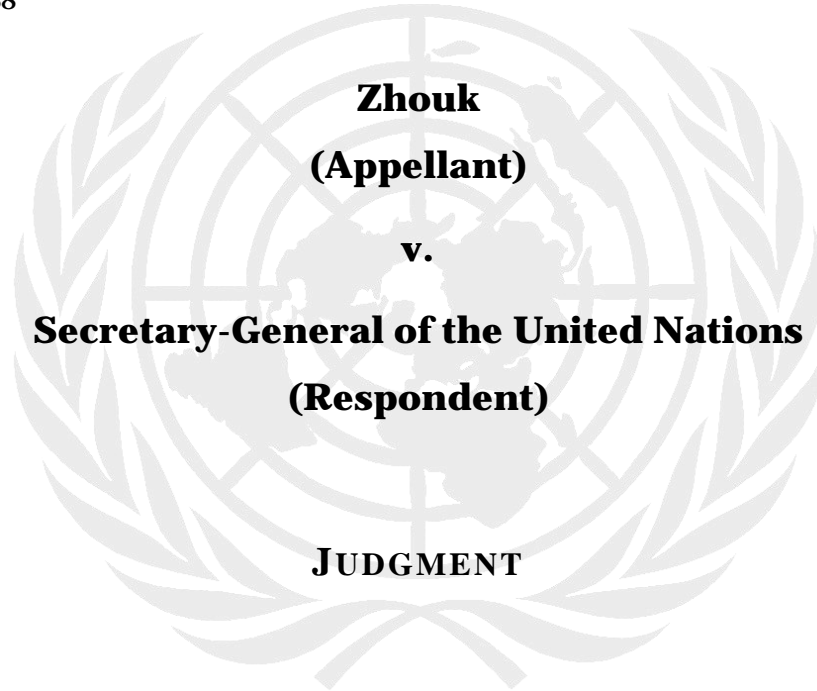




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-238



Before: Judge Sophia Adinyira, Presiding
Judge Kamaljit Singh Garewal
Judge Luis María Simón

Judgment No.: 2012-UNAT-224

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for Appellant: Self-Represented

Counsel for Respondent: Wambui Mwangi

JUDGE SOPHIA ADINYIRA, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Mr. Victor Zhouk against Judgment No. UNDT/2011/102 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 17 June 2011 in the case of *Zhouk v. Secretary-General of the United Nations*. On 1 August 2011, Mr. Zhouk appealed. The Secretary-General filed his answer on 23 September 2011.

Synopsis

2. The Dispute Tribunal has an unquestioned discretion and authority to order and quantify compensation under Article 10(5) of its Statute for violation of the legal rights of a staff member as provided under the Staff Regulations, Rules, and administrative issuances.

3. However, not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages. This Court will not approve the award of compensation when absolutely no harm has been suffered. Moral damages may not be awarded without specific evidence supporting the award.¹

4. In the instant appeal, even though the Dispute Tribunal found that a breach of Mr. Zhouk's procedural rights under ST/AI/1998/9 occurred, Mr. Zhouk did not provide evidence of any harm that he had suffered and consequently an order for compensation was not warranted.

5. The appeal is dismissed. The UNDT Judgment is affirmed.

Facts and Procedure

6. The UNDT set out the facts that were agreed upon by both parties in a Joint Statement in paragraphs 13 to 36 of its Judgment as follows:

¹ *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095; *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-114.

13. On 12 August 1989, the Applicant began his service with the Organization as an Associate Programmer/Analyst at the P-2 level under a 100-series three-year fixed-term appointment. As of 1 October 1991, the Applicant's fixed-term appointment was converted to a permanent appointment. The Applicant successfully applied for the SCU Post, to which he was promoted on 24 February 1997.

14. On 1 February 2000, Mr. James Brooks, the Chief of SCU, requested the reclassification of the SCU Post on the basis that the demands and responsibilities of functions had "steadily grown in scope and complexity in proportion to the demands placed on budgetary systems support for meeting the requirements of both Member States and offices within the Secretariat".

15. On 23 February 2000, Ms. Marianne Brzak-Metzler, the Chief of the Compensation and Classification Policy Unit ("CCPU"), in the Office of Human Resources Management ("OHRM"), responded that "the post remains classifiable under the title of Systems Analyst at P-3 level".

16. On 30 March 2000, Mr. Brooks updated the job description for the SCU Post and submitted another request for reclassification.

17. On 26 April 2000, Ms. Brzak-Metzler informed Mr. Brooks that her office had again reviewed the revised job description and that "the post remain[ed] classifiable under the title of Systems Analyst at P-3 level".

18. On 19 May 2000, at the request of Mr. Brooks, a desk audit of the SCU Post was performed under ST/AI/1998/9, sec. 1.1(d), by Mr. Bruce Shearhouse, Classification Officer, CCPU, in order to clarify whether the tasks which the incumbent performed were fairly reflected in the SCU Post's job description or whether they needed to be updated. On 25 May 2000, Ms. Brzak-Metzler reported the results of the desk audit to the Executive Office of the Department of Management.

19. On 26 May 2000, Mr. Brooks sent a modified request for the reclassification of the SCU Post to be reconsidered "in light of additional information that has been provided" (which comprised a modified request form, a sample user guide, a statement that funding was available for the SCU Post and the new post number for the SCU Post).

20. On 19 June 2000, Ms. Brzak-Metzler again responded that, after review of the functions of the SCU Post further to the submitted material, "the [SCU Post] remain[ed] classifiable at P-3 level".

21. In January 2006 (no date specified), the Applicant requested Ms. Sharon Van Buerle, Director, PPBD/OPPBA, to review the Applicant's job description.

22. By memorandum dated 30 January 2006, the Applicant's supervisor at the time, Ms. Thuy Basch, Chief of the SCU, sent a memorandum entitled "Revision of Job Description" to Ms. Van Buerle. This memorandum included a recommendation that the SCU Post remain at the P-3 level and that the job description be only updated to reflect the current duties and responsibilities of the position. Attached to the memorandum was a chart which compared the Applicant's 1995 job description with a revised job description. In other words, the Applicant's supervisor effectively decided not to make a reclassification request for the SCU Post under ST/AI/1998/9, sec. 1.1.

23. On 24 July 2006, the Applicant supplied his comments to the 30 January 2006 evaluation of his role, expressing his disagreement with Ms. Basch's conclusions. In these comments, the Applicant noted that his current job description was drafted over ten years previously, and that the scope of his responsibilities had changed significantly; the Applicant again requested that his job description be re-evaluated. 24. On 7 August 2006, Ms. Van Buerle wrote a memorandum to Ms. Brzak-Metzler (now Chief of the Conditions of Service Section ("CSS"), Human Resources Policy Service ("HRPS"), Division for Organizational Development ("DOD"), OHRM), attaching both the memorandum from the Applicant's supervisor of 30 January 2006 and the memorandum from the Applicant of 24 July 2006, asking for advice as to whether a desk audit was required.

25. From August to September 2006, a desk audit of the SCU Post was undertaken pursuant to ST/AI/1998/9, sec. 1.1(d).

26. On 27 October 2006, Ms. Brzak-Metzler sent a memorandum to Ms. Van Buerle, where she stated that "[b]ased on our review, we have determined that the [SCU Post] remains classifiable at the P-3 level".

27. On 15 November 2006, the Applicant sent an email to Ms. Brzak-Metzler, in which he expressed his concern regarding the actions discussed in the 27 October 2006 memorandum and asked for clarification as to whether the desk audit was performed under ST/AI/1998/9, sec. 1.1(d), and classification advice was given under ST/AI/1998/9, sec. 1.2, given, or whether the classification decision and analysis had been taken under ST/AI/1998/9, secs. 2.3 and 2.4. In the Applicant's view, for either action, the Administration had taken either action improperly and in the absence of documents specifically required by ST/AI/1998/9 (particularly a complete and up-to-date job description). The Applicant also noted that the point rating worksheet and the notes of the interviews had not been sent to the incumbent of the SCU Post, as required by ST/AI/1998/9, sec 2.4

... ..

28. On 15 November 2006, a Compensation Officer from CSS/OHRM confirmed by email that the notes of the desk audit interviews had not been provided to the staff member interviewed during the desk audit.

29. On 21 December 2006, having received no response from the Respondent, the Applicant filed a request for administrative review of the classification decision to the Secretary-General.

30. On 4 January 2007, the Administrative Law Unit (“ALU”), OHRM, acknowledged receipt of the request for review.

31. On 9 January 2007, Ms. Brzak-Metzler sent a memorandum to Ms. Adèle Grant, Chief of the Administrative Law Unit (“ALU”), OHRM, referring to the Applicant’s case. In that memorandum, she stated that a specific procedure for desk audits is not elaborated upon under ST/AI/1998/9 and that an appropriate process had been followed.

... ..

32. On 10 January 2007, ALU/OHRM sent its review of the administrative decision to the Applicant, noting that the comments provided by the Chief, CSS/OHRM, attached to the letter, “have addressed appropriately the issues you have raised in [the Applicant’s] letter”.

33. On 12 February 2007, the Applicant filed his application with the Joint Appeals Board (“JAB”).

34. On 5 April 2007, the Respondent filed his Reply which, for the first time, contained a point rating worksheet for the earlier reclassification of the post in 2000.

35. On 27 June 2008, the JAB issued Report No. 1997 concerning the Applicant’s appeal concluded (emphasis in original):

29. ...The Panel *unanimously* finds

a. regarding the 2000 classification decision;

i. Appellant, in his request for review to the Secretary-General, raised only the 2006, and not the 2000, classification decision; and

ii. Assuming, *arguendo*, that the 2000 decision was implicit in the request, he failed to submit the grievance in accordance with the time-limits stipulated by the Staff Rules [namely, former staff rule 111.2(a)] and showed no exceptional circumstances warranting a waiver [pursuant to former staff rule 111.2(f)]; and

b. that the JAB lacks competence over the subject matter of the 2006 classification decision.

30. Therefore, it *unanimously concludes* that the present appeal is not receivable.

36. By letter dated 11 September 2008, the Applicant was informed that the Secretary-General agreed with the findings and conclusions of the JAB and had decided not to take any further action in this matter.

7. In Judgment No. UNDT/2011/102, the UNDT found that the Respondent had breached Mr. Zhouk's procedural rights under ST/AI/1998/9, but that an order of compensation was not warranted as Mr. Zhouk had failed to provide evidence of any harm that he had suffered.

Submissions

Mr. Zhouk's Appeal

8. Mr. Zhouk submits that the UNDT, having determined that his rights were violated, erred in not ordering an appropriate remedy.

9. Mr. Zhouk submits that had the Administration taken appropriate action he would have most probably been appointed to the P-4 level. Consequently, the Administration's lack of action resulted in direct professional and financial damages. Mr. Zhouk recalls the holding of the former Administrative Tribunal that an appellant has "no obligation to show any specific damage in connection with the material consequences of the formal violation of [his] rights, since the violation in itself already constitutes sufficient damage to entail the Administration's responsibility and to constitute a basis for compensat[ion]".²

10. Mr. Zhouk submits that the five-year delay between the 2006 administrative decision and the 2011 Judgment resulted in extensive moral injury as well as lost opportunities. Mr. Zhouk cites the judgments of the former Administrative Tribunal and the Dispute Tribunal in support of his claim for compensation for the failure to properly classify his post.

11. Mr. Zhouk requests that the Appeals Tribunal modify the UNDT Judgment and award him two years' net base salary in compensation for the harm suffered from the misclassification of his post.

² Former Administrative Tribunal Judgment No. 1341, *Appellant* (2007), para. VI.

Secretary-General's Answer

12. The Secretary-General submits that while the UNDT determined that the Administration had breached Mr. Zhouk's due process rights by relying on an outdated job description, it was nevertheless correct in concluding that this error did not warrant an award of compensation. Indeed, the Secretary-General submits that the UNDT's findings are fully consistent with the jurisprudence of the Appeals Tribunal in *Wu* and *Antaki*, which held that "not every violation of due process rights will necessarily lead to an award of compensation".³

13. The Secretary-General notes that Mr. Zhouk cannot refer to the principle of equal pay for equal work expressed by the UNDT in *Chen*⁴ at this stage of the litigation as this argument was not presented to the UNDT even though it was or could have been known to the parties at that stage of the proceedings.

14. The Secretary-General contends that the issues identified by Mr. Zhouk do not establish that the UNDT erred in determining that no compensation should be awarded for the violation related to the post classification. The Secretary-General submits that Mr. Zhouk, as held by the UNDT, does not provide any evidence that he suffered actual financial and/or moral damages.

15. The Secretary-General submits that monetary compensation is not always the only available remedy and that it is therefore sometimes, as in this case where there is no evidence of harm, sufficient to find in favour of the Appellant.

Considerations

16. The Dispute Tribunal has an unquestioned discretion and authority to order and quantify compensation under Article 10(5) of its Statute for violation of the legal rights of a staff member as provided under the Staff Regulations, Rules, and administrative issuances.

17. However, not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages. This Court will not approve the award of compensation when absolutely

³ *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042, para. 33; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095, para. 20.

⁴ *Chen v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/068, para. 39.

no harm has been suffered. Moral damages may not be awarded without specific evidence supporting the award.⁵

18. In the instant appeal, though the Dispute Tribunal found that a breach of Mr. Zhouk's procedural rights under ST/AI/1998/9 occurred, he had not provided evidence of any harm that he had suffered and consequently an order for compensation was not warranted.

19. Mr. Zhouk simply stated he suffered harm following the advice not to reclassify the SCU post. He did not provide any evidence of harm to his career or to his morale.

20. The Dispute Tribunal held that "[n]o evidence exists that, if the breach has not occurred, a reclassification to the P-4 level would have resulted or, if the reclassification had taken place, that the Applicant would have been promoted to the P-4 level".⁶

21. We find no merit in this appeal.

Judgment

22. The appeal is dismissed. The UNDT Judgment is affirmed.

⁵ *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095 ; *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009 , *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-114.

⁶ *Zhouk v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/102, para. 65.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Simón

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar