



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

Judgment No. 2013-UNAT-347/Corr.1

Appleton
(Appellant/Respondent on Cross-Appeal)

v.

Secretary-General of the United Nations
(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Luis María Simón
Judge Sophia Adinyira

Case No.: 2012-390

Date: 21 June 2013

Registrar: Weicheng Lin

Counsel for Mr. Appleton: George G. Irving
Counsel for Secretary-General: John Stompor

Reissued for technical reasons on 4 September 2013

1. On 14 August 2012, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) issued Judgment No. UNDT/2012/125 in New York in the case of *Appleton v. Secretary-General of the United Nations*. On 12 October 2012, Mr. Robert Appleton filed an appeal, and on 14 December 2012, the Secretary-General filed an answer and cross-appeal. Mr. Appleton filed his answer to the cross-appeal on 12 February 2013.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact, which the parties agree are correct:¹

... On 7 September 1994, the Secretary-General issued ST/SGB/273 (Establishment of the [Office of Internal Oversight Services] (OIOS)). On 18 January 1995, ST/AI/401 (Personnel arrangements for the OIOS) was issued to outline the administrative arrangements and the authority of the [Under-Secretary-General/OIOS (USG/OIOS)] in personnel matters.

... The Applicant joined the Organization on 3 October 2006, as the Deputy Director of the Procurement Task Force (“PTF”) in OIOS at the D-1 level on a fixed-term appointment with service limited to PTF. He was appointed as Director of the PTF/OIOS on 6 April 2007.

... On 17 December 2007, the Post, which is the subject of this case, was advertised under vacancy announcement number “07-ADM-OIOS-416258-R-NEW YORK (G)” in Galaxy (an online United Nations jobsite) in accordance with sec. 4 of the now abolished ST/AI/2006/3 (Staff selection system). The vacancy was also advertised externally in international publications, *The Economist* and *Le Monde*. The vacancy announcement elicited 73 candidates, including the Applicant. Five of the candidates were female.

... On 3 April 2008, the Secretary-General sent a memorandum to all Heads of Departments and Offices on achieving gender balance in the United Nations Secretariat. He requested that for appointments at the D-2 level and above, his office should generally be provided with a list of at least three qualified candidates, including at least one female candidate.

... An interview panel was established by the USG/OIOS to identify candidates for recommendation for the Post. The panel comprised the USG/OIOS as the Chair and three other members. The panel reviewed the candidates based on the evaluation criteria set out in the vacancy announcement and invited four candidates, including the Applicant, to participate in a competency-based interview in October 2008.

¹ Judgment No. UNDT/2012/125, paras. 9 to 42.

It found that only the Applicant met “all the qualifications and all the competencies required for the [Post]”.

... By memorandum dated 18 November 2008, the USG/OIOS submitted the interview panel’s recommendation to the [Special Review Group (SRG)] in which she noted that none of the female applicants had met the criteria required for the post.

... The Secretary of the SRG, namely the [Assistant Secretary-General of the Office of Human Resources Management (ASG/OHRM)], responded to the USG/OIOS on 26 November 2008 as follows, copied to the USG for Management, Ms. Angela Kane:

Subject: D-2 Director, Investigations Division.

Dear [USG/OIOS],

The [SRG] reviewed your submission regarding the above vacancy this morning. The SRG noted that there was no indication of wide circulation of the vacancy including advertisement in professional external magazines. The SRG further noted that the four candidates interviewed were of the same nationality. The submission of one recommended candidate and no female candidates is not in line with the Secretary-General’s policy.

Consequently, the SRG did not endorse the recommendation and requests re-advertisement of the [P]ost. In view of the specialised nature of the functions, the SRG recommends wide advertisement when re-circulating the [P]ost, in order to attract a wider pool of candidates including suitably qualified female candidates.

... The USG/OIOS replied on 26 November 2008 to the ASG/OHRM and the USG/DM clarifying the selection process, including that the Post had been advertised in *The Economist* and *Le Monde*. She asked the SRG to reconsider the case. The USG/OIOS explained that, “due to the fact that OIOS does not have sufficient staff at the D-2 level to constitute an appropriate OIOS Review Board, I have followed the precedent set by my predecessor in submitting D-2 level personnel decision to the SRG for approval”.

... By email dated 1 December 2008, the ASG/OHRM, in her capacity as Secretary of the SRG, responded to the USG/OIOS that she would circulate the additional information to the members of SRG for them to determine whether they wished to reconsider their position. On the same day, the USG/OIOS responded by email and reiterated her views.

... The ASG/OHRM, as Secretary of the SRG, informed the USG/OIOS on 2 December 2008 that the consensus among the members of the SRG was that the reasons previously articulated for requesting a re-advertisement of the subject post remained valid and that the SRG recommended re-advertisement of the Post.

... On 2 December 2008, the USG/OIOS addressed a Note to the Secretary-General copied to the Chef de Cabinet, submitting the Applicant as her selection and requesting his agreement for this appointment.

... On 31 December 2008, the Applicant's appointment with the United Nations expired and he separated from the Organization.

... On 1 January 2009, the Secretary-General promulgated ST/SGB/2009/2 [entitled "Senior Review Group" (SRG)].

... On 9 January 2009, the Wall Street Journal issued an article, "[United Nations] allows its Antifraud Task force to dissolve", in which the Applicant was referred to by name and a spokeswoman for the Secretary-General was quoted as stating that, "According to U.N. rules, there has to be some geographical choice, and women have to be part of the process".

... On 23 February 2009, the Report of the Independent Audit Advisory Committee ("IAAC") issued its report to the General Assembly as document A/63/737 (Vacant posts in the OIOS), urging immediate action to have vacant posts filled in a streamlined and expedited manner.

... By email dated 27 February 2009, the USG/OIOS requested re-advertisement of the post for thirty days.

... The vacancy was re-advertised on 2 March 2009, under vacancy announcement number "09-OIOS-420802-R-New York (G)" in Galaxy in accordance with sec. 4 of ST/AI/2006/3. The vacancy announcement stated that candidates who had previously applied would not need to re-apply. The announcement elicited a total of 68 eligible applicants, including the Applicant. Four applicants, including two females, were identified for an interview.

... On 3 March 2009, the General Assembly adopted A/RES/63/265 (Report of OIOS on its activities) expressing concern over the number of vacancies in OIOS and requesting the Secretary-General to fill them as a matter of priority.

... An interview panel was established by the USG/OIOS, comprising of herself as Chair and three other members, two of whom had been on the first interview panel. The panel invited four candidates to participate in a competency-based interview. Together with the four candidates from the previous selection exercise, a total of eight candidates were interviewed for the Post.

... In a Note addressed directly to the Secretary-General dated 19 June 2009, the USG/OIOS provided a detailed record of evaluation of the eight candidates, and requested his approval of the Applicant as the only candidate recommended for the Post.

... On 29 June 2009, the Chef de Cabinet forwarded the Note, including the record of evaluation of the candidates, to the SRG and requested them to “undertake an urgent review of this case before the Secretary-General takes his decision”.

... By email dated 15 July 2009, the ASG/OHRM, as Secretary of the SRG, communicated the SRG’s concerns to the USG/OIOS that, again, only one recommended candidate had been submitted for the Secretary-General’s consideration and approval. The SRG requested that four candidates prescreened by OHRM be interviewed and that three names, including at least one female, be provided.

... The USG/OIOS provided her response to the SRG’s concerns in a note addressed to the Secretary-General dated 5 August 2009. This note included an evaluation of the additional candidates that the SRG had requested be interviewed by the panel. The USG/OIOS stated that OIOS had carried out its own evaluation of the additional candidates referred to above, and set out the reasons why they were not invited to participate in the interview. The USG/OIOS also reiterated her request that the Secretary-General approve the appointment of the Applicant to the Post. The Chef de Cabinet forwarded this document to the SRG.

... The ASG/OHRM provided her comments on the USG/OIOS’s note of 5 August 2009 to the Chef de Cabinet on 9 September 2009. She stated, *inter alia*, that, based on OIOS’s review of the additional candidates, three had been improperly disqualified on the basis of their educational background and relevant work experience. She further noted that the educational qualifications and direct work experience of the only internal candidate, who had been performing the functions of the Post since August 2008, were not properly evaluated by OIOS. She therefore recommended that the internal candidate be given the fullest consideration in accordance with staff regulation 4.4.

... By a note addressed to the Chef de Cabinet dated 25 September 2009, the USG/OIOS provided a response to the ASG/OHRM’s comments. The USG/OIOS disagreed with the assessment of the additional candidates because, in her opinion, they did not meet the requirements for the Post which is why they were not shortlisted for an interview. With respect to the internal candidate, the USG/OIOS noted that he was interviewed and “given full consideration during the process”. The USG/OIOS also addressed a note to the Secretary-General dated 25 September 2009, reiterating her request for his approval to appoint the Applicant as her recommended candidate.

... On 18 February 2010, the SRG informed the Secretary-General that, in view of the fact that the USG/OIOS continued to recommend only one candidate, it was not in a position to make a recommendation on the case, noting that the SRG’s request for a recommendation of three candidates had been unsuccessful.

... By letter dated 18 March 2010, the Applicant asked to be informed of the outcome of the selection process. By letter dated 13 April 2010, OHRM informed the Applicant that the selection process remained ongoing, and that he would be informed once a decision had been made.

... On 29 March 2010, the Applicant submitted a request for management evaluation of the decision not to endorse his nomination for the post.

... On 14 July 2010, the USG/OIOS' appointment ended, and, on the same day, she submitted an end of assignment report to the Secretary-General.

... On 20 July 2010, the Washington Post issued an article entitled "Departing U.N. official calls Ban's leadership 'deplorable' in 50-pages memo". In connection with the Applicant not being selected for the Post, it quoted the Chef de Cabinet as stating that, "the Secretary-General fully recognizes the operational independence of OIOS" but that "does not excuse [the USG/OIOS] from applying the standard rules of recruitment". In his oral evidence, the Chef de Cabinet agreed that he had made several press statements regarding the USG/OIOS' end of assignment report, although he did not recall their exact context.

... On 23 July 2010, the Chef de Cabinet issued a statement to staff addressing the issues in the report of the USG/OIOS.

... On 14 September 2010, a new USG of the OIOS was appointed.

... On 3 November 2010, a new vacancy announcement was issued for the Post, which requested all candidates who had previously applied to submit a new application for the Post.

... On 5 November 2010, OHRM informed the Applicant that the previous vacancy announcement for the Post was cancelled and re-advertised in Inspira (the most recent United Nations online jobsite). The Applicant was also informed that "interested and qualified candidates should re-apply" for the new vacancy announcement. The Applicant did not re-apply before the closing date of the new vacancy announcement.

3. On 19 May 2010, Mr. Appleton was appointed Senior Legal Adviser and Interim Director of Investigations at the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) in Geneva. Before taking the position with the Global Fund, Mr. Appleton worked occasionally as a consultant.

4. On 30 July 2010, Mr. Appleton filed an application with the UNDT challenging "the decision of the Secretary-General to reject [his] nomination" for the Post. On 30 August 2010, the Secretary-General filed a reply contesting the receivability of the application and, pursuant to an order by the UNDT, the parties filed additional documents.

On 29 October 2010, the UNDT issued an Order on Receivability (Order No. 289 (NY/2010)), in which it determined that the application was receivable. Subsequently, on 13 December 2010, the Secretary-General filed a reply to the application.

5. An oral hearing was held before the UNDT on 21 and 22 March 2012. Several witnesses testified at the oral hearing, including Mr. Appleton.

6. The Dispute Tribunal issued Judgment No. UNDT/2012/125 on 14 August 2012. In the Judgment, the UNDT determined that : (1) the recommendations of Mr. Appleton for the post following both the first and second selection processes were lawfully done in compliance with the required administrative instructions; (2) the administrative decision to cancel the first vacancy announcement was unlawful; (3) the SRG's decisions in the first and second selection processes not to endorse the recommendations of Mr. Appleton as the only candidate for the post were unlawful; (4) in light of the SRG's failure to endorse the recommendations of Mr. Appleton for the post, the Secretary-General did not act unlawfully when he did not select Mr. Appleton for the post; (5) the Secretary-General breached his obligation to act in good faith when he did not timely notify Mr. Appleton that he was not selected for the post after the first and second selection processes; (6) Mr. Appleton should not be awarded compensatory damages; and (7) Mr. Appleton should be awarded moral damages in the amount of USD 30,000.

7. Mr. Appleton appeals the UNDT Judgment and particularly contests the failure of the Dispute Tribunal to award him compensatory damages in the amount of two years' net base salary for economic or pecuniary loss and non-pecuniary damages for the violations of his due process rights. The Secretary-General cross-appeals and requests that this Tribunal find the UNDT erred in awarding moral damages to Mr. Appleton.

Submissions

Mr. Appleton's Appeal

8. The UNDT erred on a question of law or erred on a question of fact resulting in a manifestly unreasonable decision when it failed to award compensatory damages for the Appellant's actual pecuniary or economic loss and for interference with his right to full and fair consideration for promotion. Mr. Appleton did not have full-time income for

seventeen months following his separation from service until he was hired by the Global Fund in May 2010, and this loss of income should have been compensated.

9. Mr. Appleton had a “very high” likelihood of being selected for the post, as the UNDT found. Despite this finding, the UNDT also determined that Mr. Appleton’s selection for the post was not a “foregone conclusion”. Considering the evidence, which showed that Mr. Appleton would have been selected for the post except for the SRG’s unlawful failure to recommend him, the UNDT made an error of fact resulting in a manifestly unreasonable decision when it failed to conclude that Mr. Appleton’s chance of promotion amounted to a legitimate expectancy. Alternatively, the UNDT erred when it failed to consider as a basis for awarding pecuniary damages that Mr. Appleton suffered a loss of opportunity to move to a better position when he was not selected for the post except for the SRG’s unlawful failure to recommend him. In short, Mr. Appleton was denied the opportunity for a career with the Organization, and that opportunity will likely never materialize again.

10. The UNDT made an error of law when it failed to award any compensatory damages on the ground that Mr. Appleton failed to mitigate his loss of income. Throughout the first and second selection processes, Mr. Appleton was encouraged to maintain his candidacy and given assurances that the selection process was on-going despite delays. There are very few comparable senior positions in investigations available within the Organization for which Mr. Appleton could have applied. And accepting an appointment outside the Organization would have required Mr. Appleton to withdraw his application for the post. In light of these considerations, Mr. Appleton mitigated his losses when he could by accepting short-term work as a consultant.

11. The UNDT made an error of law when it failed to award Mr. Appleton compensation “for the full extent of moral damages he suffered”. Although the UNDT awarded moral damages for the lack of timely notification “causing further delay and anxiety”, it also should have awarded moral damages for “the violation of his due process rights and the contractual right to fair consideration for the post to which he applied” and his “aggravated emotional stress from being mentioned by name in public pronouncements” while the selection process was ongoing.

The Secretary-General's Answer

12. Mr. Appleton has failed to establish that the UNDT made any errors warranting a “revision” of the Judgment to award compensation for pecuniary damages. Specific harm to the staff member must be shown for an award of compensatory damages. In the present case, the UNDT did not find that the Secretary-General acted unlawfully in not selecting Mr. Appleton for the post. Thus, the UNDT did not err in concluding that his selection was “not a foregone conclusion” or that he had no “legitimate expectancy” of selection and suffered no harm.

13. Mr. Appleton did not properly seek to mitigate his losses, as the UNDT determined. After Mr. Appleton was informed in March 2009 of the cancellation of the first vacancy announcement and the issuance of the second vacancy announcement, it was unreasonable for him to expect to be appointed to the post, and he should have been seeking alternative employment. Yet, Mr. Appleton failed to actively seek full-time employment until the end of 2009, although he did have some consultant work during this time.

14. Mr. Appleton is not entitled to compensatory damages for loss of opportunity for several reasons. First, both the post he held at the time he applied for the vacant post and the applied-for post were at the same D-2 level. Second, his separation from service was due to the expiration of his fixed-term appointment, and not his failure to be appointed to the vacant post. Third, since Mr. Appleton did not seek any other posts within the Organization, he cannot show that his failure to be appointed to the vacant post adversely affected his non-selection for any other post.

15. Mr. Appleton has failed to establish that the UNDT made any errors warranting a “revision” of the Judgment to increase the award of compensation for non-pecuniary damages. Mr. Appleton is wrong in stating that the UNDT did not award moral damages for the “aggravated emotional stress” stemming from the allegedly improper public pronouncements made while the selection process was ongoing. It did. Thus, grounds do not exist to increase the award of moral damages to Mr. Appleton.

The Secretary-General's Cross-Appeal

16. The UNDT erred in ruling that it is highly inappropriate for the Organization's high-level officials to comment publicly on a pending selection process. To the contrary,

high-level officials in the Administration may comment publically on administrative acts of staff members and may defend themselves to the press.

17. The UNDT erred in awarding Mr. Appleton compensation for non-pecuniary damages because of the public nature of the selection process. The UNDT improperly considered the “public nature” of the selection process as an adverse factor in awarding Mr. Appleton moral damages, especially since none of the public pronouncements identified him by name. For these reasons, the amount of moral damages awarded should be reduced.

Mr. Appleton’s Answer to Secretary-General’s Cross-Appeal

18. The UNDT’s award of moral damages in the amount of USD 30,000 was based on several factors, including the publicity generated by the Organization’s officials in the press regarding the selection process; the moral damages were not specific to such publicity. Thus, there is no merit to the Secretary-General’s cross-appeal, which challenges only the award of moral damages based on adverse publicity. Moreover, the cases cited by the Secretary-General to support his claim on cross-appeal, that the Organization’s officials may publically speak about administrative matters, do not pertain to a confidential selection process while it is underway. The former Administrative Tribunal has routinely admonished Administration officials that public statements about pending cases are improper and the victim is entitled to damages.

19. The Appellant seeks USD 3,000 in costs “for the services entailed in having to respond to the abuse of process reflected in the cross-appeal”.

Considerations

Compensatory Damages

20. “It is established jurisprudence that the Dispute Tribunal has authority to order compensation to a staff member for violation of the staff member’s legal rights under Article 10(5)(b) of the [Dispute Tribunal] Statute. Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury.”²

² *Nyakossi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-254, para. 18 (footnote omitted), quoting *inter alia*, *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095.

21. Under Article 10(5) of the UNDT Statute, the total compensatory damages the UNDT can award under subparagraphs (a), (b), or both, “shall normally not exceed the equivalent of two years’ net base salary” unless the UNDT orders higher compensation in “exceptional cases” and provides the reasons therefore.³ There is more than one method by which the trial court can assess compensatory damages, and it is up to that court to determine the method to employ in each case.⁴

22. Initially, the trial court is in a much better position than the Appeals Tribunal to assess the probabilities of appointment to a post.⁵ This Appeals Tribunal has held in *Ardisson* that, with regard to measuring the amount of compensation to be awarded: “[I]n determining compensation, the Dispute Tribunal should bear in mind two considerations. The first is the nature of the irregularity ... The second is an assessment of the staff member’s genuine prospects for promotion if the procedure had been regular.”⁶

23. In the present case, the Dispute Tribunal chose to use the following method to assess compensatory damages: “To assess the compensable harm to a candidate who has not been selected for a post, it is necessary to calculate the probability of the candidate being selected but for the breaches by determining his loss of chance of being selected.”⁷ It is entirely appropriate for the Dispute Tribunal to approach the issue of compensation under Article 10(5) by engaging in a consideration of Mr. Appleton’s likely prospects of success.

24. The UNDT then determined that “the chances of [Mr. Appleton] being selected for the Post were very high”. However, due to “the following unusual and particular circumstances of this case”, an award of compensation to Mr. Appleton was not warranted:⁸

³ *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131, para. 16, referring to *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

⁴ *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219, para. 22, referring to *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117.

⁵ *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

⁶ *Ardisson v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-052, para. 24.

⁷ Judgment No. UNDT/2012/125, para. 110, citing *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117; and *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

⁸ Additionally, the UNDT determined that Mr. Appleton should not be compensated for any pecuniary loss attendant to his relocation to Geneva for the Global Fund and for his choice to maintain residences in two countries (the United States and Switzerland).

(1) While there was a “high chance” Mr. Appleton would have been appointed, “that was not a foregone conclusion” and “[n]o staff member has a right to be selected even though he is the only recommended candidate”;⁹

(2) The “well-known differences of opinion between the USG/OIOS and the SRG” and the fact that Mr. Appleton

had received no formal notification about the status of his candidature should have put him on notice that there was a real prospect that he was unlikely to be appointed to the Post. This uncertainty was confirmed when the Post was re-advertised in March 2009. By then, he was no longer employed by the United Nations and should have anticipated that, as there would be no early resolution of the issues that was causing the delays to the selection process, he would need to find alternative regular employment;¹⁰

and

(3) Apart from some consultancy work, Mr. Appleton “did not start ‘in earnest’ a search for other full-time employment until he applied for a position with the Global Fund after the end of 2009 when he realized that the recommendation of his candidature for the Post would not be approved. ... [H]e failed to mitigate his losses until assuming the position with the Global Fund.”¹¹

25. In this regard, the Appeals Tribunal, by majority with Judge Chapman dissenting, finds that the Dispute Tribunal did not make an error of law or fact resulting in a manifestly unreasonable decision when it declined to award compensatory damages to Mr. Appleton. His appointment to the post was “not a foregone conclusion”, as the UNDT correctly found; thus, he had no expectation of being appointed. Moreover, Mr. Appleton’s fixed-term appointment was ending, and he was applying for a completely different position. As the UNDT also found, Mr. Appleton should have reasonably believed that it was unlikely he would be appointed to the post as of 2 March 2009, when the vacancy was re-advertised.

Moral Damages

26. On appeal, Mr. Appleton claims that the amount of moral damages awarded should be increased to reflect “the full extent of moral damages he suffered”. Specifically, he

⁹ Judgment No. UNDT/2012/125, para. 114.

¹⁰ *Ibid*, para. 115.

¹¹ *Ibid*, para. 117.

complains that the UNDT should have awarded moral damages to him for “the violation of his due process rights and the contractual right to fair consideration for the post to which he applied” and his “aggravated emotional stress of being mentioned by name in public pronouncements” while the selection process was ongoing.

27. “Generally, it is well within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case. The amount of moral damages awarded by the Dispute Tribunal may vary from case to case, as it should, depending on the factors considered by the Tribunal.”¹²

28. The UNDT listed the factors it considered in setting the amount of moral damages it was awarding to Mr. Appleton, stating:

[I]t is abundantly clear to the Tribunal that [Mr. Appleton] was the unwitting and blameless victim of an internal dispute between senior managers of the United Nations. His evidence and demeanor at the substantive hearing clearly demonstrated that he has been deeply distressed and frustrated by the lengthy, flawed and highly public selection process. In addition, [he] was not notified of the outcome of his application in a timely manner, causing further delay and anxiety. To compensate for these injuries, the Tribunal awards him USD 30,000.¹³

29. And the UNDT also awarded Mr. Appleton USD 30,000 “arising from the stress and anxiety caused by the violations of his rights under his employment contract by officials of the [Secretary-General]”.¹⁴

30. This Tribunal finds no error to the approach of the Dispute Tribunal in determining the amount of moral damages to award Mr. Appleton.

31. On cross-appeal, the Secretary-General raises two claims. The first claim is that “[t]he UNDT erred in ruling that it is highly inappropriate for high-level UN officials to comment publicly on a pending selection process”.¹⁵ The Secretary-General

¹² *Morsy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-298 (footnote omitted), para. 25, quoting *Cieniewicz v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-232.

¹³ Judgment No. UNDT/2012/125, para. 123.

¹⁴ *Ibid.*, para. 124.

¹⁵ Emphasis omitted.

specifically challenges statements made by the UNDT in paragraph 121 of the Judgment, wherein the Dispute Tribunal stated:

The Tribunal observes that it is highly inappropriate for high-level United Nations officials to comment publicly on a pending selection process, and that it is particularly inappropriate to identify the candidates involved even in response to public questioning. Such comments open the administration to criticism for wrongful influence in the selection process and may potentially be very harmful and damaging to the process as well as to the candidates.

32. This statement by the UNDT is not a ruling of any sort; rather, it is merely an explanation of why the Dispute Tribunal considered the “highly public selection process” as a factor in awarding moral damages to Mr. Appleton. As such, this claim cannot be considered separately from the Secretary-General’s second claim on cross-appeal, which challenges the UNDT’s consideration of the “highly public selection process” as a factor in awarding moral damages.

33. As to his second claim, the Secretary-General argues that the amount of moral damages awarded should be reduced because the UNDT made an error of law in considering as an adverse factor the “highly public selection process” or public comments by officials of the Organization about the selection process, while the process was ongoing. The Secretary-General contends that such public comments were legitimate conduct by high-level officials, who have an obligation to publically respond to questions or criticisms from the press and others and to defend the actions of the Administration. Since the Secretary-General does not challenge the UNDT’s consideration of the other factors listed as grounds for the award of moral damages to Mr. Appleton, such as delay, frustration, distress and anxiety, and such factors clearly support an award of moral damages,¹⁶ the Secretary-General’s claim comes to naught and the cross-appeal should be dismissed.

Costs

34. In his answer to the Secretary-General’s cross-appeal, Mr. Appleton requests that the Appeals Tribunal award him USD 3,000 in costs “for the services entailed in having to respond to the abuse of process reflected in the cross-appeal”. Although this Tribunal has found no merit to the Secretary-General’s cross-appeal, it does not find that the cross-appeal is frivolous or that its filing was an abuse of process. Thus, Mr. Appleton’s request for costs is denied.

¹⁶ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

Judgment

35. Mr. Appleton's appeal is dismissed, with Judge Chapman partially dissenting. The Secretary-General's cross-appeal is dismissed.

Original and Authoritative Version: English

Done in New York, United States.

(Signed)

(Signed)

(Signed)

Judge Chapman, Presiding

Judge Simón

Judge Adinyira

28 June 2013

28 June 2013

21 June 2013

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Partial Dissent on Appeal by Judge Chapman

1. I respectfully dissent from the majority's dismissal of Mr. Appleton's claim for compensatory damages.

2. The very purpose of compensation for actual pecuniary or economic loss "is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations".¹⁷ When Mr. Appleton lost the opportunity to be appointed to the D-2 level post, he suffered an actual financial loss. He had a "very high" chance of being appointed to the post except for the serious irregularities that took place during the appointment process. These serious irregularities were the unlawful administrative decision to cancel the first vacancy announcement and the unlawful refusals of the SRG to endorse the selection panel's two recommendations of him for the post, although the recommendations followed selection processes which fully complied with the required administrative instructions. In light of these considerations, compensatory damages should have been awarded to Mr. Appleton in accordance with the jurisprudence of the Appeals Tribunal. The Dispute Tribunal's failure to award him compensatory damages was an error of law and fact resulting in a manifestly unreasonable decision, which should be reversed.

3. As discussed in the majority opinion, the Appeals Tribunal has held that two considerations affect the measure of compensation to be awarded: (1) the nature of the procedural irregularity; and (2) the staff member's genuine prospects for promotion or appointment if the procedure had been regular.¹⁸ Regarding the first consideration, the UNDT determined that, after the selection panel lawfully recommended Mr. Appleton for the post following the first selection process, the following irregularities occurred: there was an unlawful administrative decision to cancel the first vacancy announcement; and the SRG unlawfully decided not to endorse the selection panel's recommendation of Mr. Appleton. The UNDT also determined that, after the selection panel lawfully recommended Mr. Appleton for the post following the second selection process, the SRG again unlawfully decided not to endorse the selection panel's recommendation of him.

¹⁷ *Iannelli v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-093, para. 14; *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059 (full bench), para. 10.

¹⁸ *Muratore v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-245; *Ardisson v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-052.

The Secretary-General does not appeal the UNDT's findings that these serious irregularities occurred.

4. Turning to Mr. Appleton's genuine prospects for appointment if the irregularities had not occurred, the UNDT determined that Mr. Appleton had a "very high" chance of being appointed to the post. Under the jurisprudence of the Appeals Tribunal, this ultimate conclusion, when made in conjunction with the findings of serious procedural irregularities, compel the award of compensatory damages based on loss of opportunity.¹⁹ For Mr. Appleton, "the loss of opportunity was more severe as it resulted in a loss of job security",²⁰ and even a possible career in the Organization. Instead, he was separated from service after his fixed-term appointment ended.

5. Yet, the UNDT did not award compensatory damages to Mr. Appleton, listing three reasons for not doing so. I find the reasons proffered by the UNDT to be specious. First, the UNDT's opinion that Mr. Appleton's appointment was "not a foregone conclusion" does not conflict with or change the ultimate conclusion that he had a "very high" chance of being appointed. Clearly, Mr. Appleton's appointment to the post depended upon the Secretary-General making the actual appointment. Second, differences of opinion among high-level officials regarding selection procedures are not unheard of and generally are not the cause for undue concern among professional staff when a staff member is the only person recommended for a vacant post.

6. Finally, the UNDT made an error of law and fact resulting in a manifestly unreasonable decision when it determined that Mr. Appleton should have reasonably believed, no later than 3 March 2009 when the vacancy was re-advertised, that it was unlikely he would be appointed to the post; thus, his duty to mitigate damages commenced. In making this error of law and fact, the UNDT failed to properly consider the following significant facts: as of 3 March 2009, the re-advertisement of the post clearly stated that the previous candidates (including Mr. Appleton) would continue to be considered for the post; as of 3 March 2009, the Administration had not advised Mr. Appleton that he did not get the appointment; subsequent to March 2009, the selection panel again interviewed Mr. Appleton and again recommended him as the only candidate for the post; and as late as April 2010, the Administration advised Mr. Appleton, in response to an inquiry from him, "that the selection process [for the post] was ongoing".

¹⁹ *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117; *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

²⁰ *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219.

7. Moreover, even assuming *arguendo* the UNDT correctly determined that Mr. Appleton reasonably should have known by 3 March 2009 that his appointment might not occur, he had no duty to mitigate damages *prior to* that date. At a minimum, under the UNDT's own rationale, compensatory damages should have been awarded to Mr. Appleton for the two months preceding March 2009: from the date of separation from service on 31 December 2008 until 3 March 2009.

8. A dissent is not the proper place for a complete discussion of the duty to mitigate damages or mitigation generally. Suffice it to say, the UNDT did not correctly analyze the duty to mitigate damages when it took an "all or nothing" approach to mitigation. Although a staff member must take reasonable steps to mitigate his or her loss, that does not mean the staff member's failure to *completely* mitigate his or her loss is a reason to refuse to award *any* compensatory damages. Rather, it may be a reason to reduce the award of compensation proportionately to the staff member's mitigation efforts.

9. In the present case, Mr. Appleton testified that he worked as a consultant after his separation from service, and such work certainly counts towards mitigation, albeit not *complete* mitigation. Mr. Appleton began "earnestly" searching for full-time employment at the time he applied for the position with the Global Fund, and his search for full-time employment also counts as mitigation. Prior to that time, as a high-level official with the Organization, Mr. Appleton could not have honestly or in good conscience represented to a potential employer that he was available for full-time work as an executive; he was waiting to be appointed to the post for which he had been lawfully recommended.

10. Mr. Appleton's various mitigation efforts required the Dispute Tribunal to make detailed factual findings regarding, *inter alia*, the nature and dates of his search for work and the nature and dates of and income from such work. All of these factors affect the amount of compensatory damages to be awarded. However, the Dispute Tribunal did not make such detailed factual findings since it erroneously determined mitigation was "all or nothing". Thus, it is not possible for me to set the exact amount of compensatory damages that should have been awarded to Mr. Appleton, and I would remand the matter to the Dispute Tribunal to determine that amount.

Original and Authoritative Version: English

Dated this 28th day of June 2013 in New York, United States.

(Signed)

Judge Chapman, Presiding

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar