



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

Judgment No. 2013-UNAT-379

**Andersson
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Inés Weinberg de Roca
Judge Rosalyn Chapman

Case No.: 2013-431

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Amal Oummih

Counsel for Appellant/Respondent: Paul Oertly

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/164, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 5 November 2012 in the case of *Andersson v. Secretary-General of the United Nations*. The Secretary-General's appeal was received on 7 January 2013. Mr. Ulf Joel Andersson answered on 11 March 2013.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact,¹ which are not disputed by the parties:

... [Mr. Andersson] joined the Office of the United Nations High Commissioner for Refugees ("UNHCR") in November 2002, at the P-2 level, on a fixed-term contract, which was extended several times until November 2005. In February 2006, [Mr. Andersson] was again recruited by UNHCR and has served, since then, on a fixed-term contract at the P-2 level.

... By inter-office memorandum IOM/FOM/075/2003, dated 3 November 2003, UNHCR promulgated the Rules of Procedure and Procedural Guidelines of the Appointments, Postings and Promotion Board ("APPB").

... By inter-office memorandum IOM/FOM/043/2010, dated 16 July 2010, UNHCR transmitted to its entire staff the promotions methodology applicable to the 2009 annual promotions session as established by the APPB. It also informed all UNHCR staff that the number of promotion slots for 2009 had been decided as follows:

P-5 to D-1: 10

P-4 to P-5: 10

P-3 to P-4: 40

P-2 to P-3: 35

Total: 95

... By inter-office memorandum IOM/FOM/068/2010 of 29 October 2010, the Director of the Division of Human Resources Management ("DHRM") informed all

¹ The findings of fact are taken from paragraphs 2 to 14 of Judgment No. UNDT/2012/164.

UNHCR staff that the 2009 annual promotions session would be held at the end of November 2010.

... The APPB convened from 23 November 2010 to 2 December 2010.

... By inter-office memorandum IOM/013-FOM/014/2011 of 1 March 2011, the High Commissioner published the list of promoted staff. [Mr. Andersson] was not among those promoted.

... On 14 March 2011, [Mr. Andersson] introduced a recourse before the APPB against the decision not to promote him at the 2009 annual promotions session.

... The APPB reviewed [Mr. Andersson's] request at its recourse session held from 16 to 19 May 2011. It found that there was no additional or new element allowing finding the recourse receivable. [Mr. Andersson] was consequently not recommended for promotion.

... By inter-office memorandum IOM/046-FOM/047/2011 of 25 July 2011, the High Commissioner announced the results of the recourse session. [Mr. Andersson] was not among the promoted staff members following the session.

... On 3 August 2011, [Mr. Andersson] received by email a copy of the minutes of the APPB deliberations regarding his recourse.

... On 26 August 2011, [Mr. Andersson] submitted to the Deputy High Commissioner a request for management evaluation of the High Commissioner's decision not to promote him to the P-3 level at the 2009 annual promotions session.

...

... [Mr. Andersson] filed his application with [the Dispute] Tribunal on 26 December 2011.

3. In Judgment No. UNDT/2012/164, the Dispute Tribunal found that during the 2009 annual promotions session, UNHCR had failed to adhere to the specified precise criteria set forth in inter-office memorandum IOM/FOM/043/2010, when Mr. Andersson was moved from one group to another in the second round of analysis on the basis of a criterion (performance) that was not enumerated in the said inter-office memorandum. The UNDT concluded that, if the APPB had followed the relevant procedure, Mr. Andersson would have had every chance of remaining in group 1, and would have had very high chances of being promoted. The UNDT thus ordered rescission of the decision not to promote Mr. Andersson or, in the alternative, payment to Mr. Andersson of CHF 10,000 "for the remuneration lost as a consequence of the non-promotion in 2009". In addition, the UNDT awarded Mr. Andersson CHF 4,000 for moral damages.

4. According to the Secretary-General, UNHCR subsequently rescinded the contested decision, and after reconsideration, promoted Mr. Andersson with retroactive effect, with the payment of backdated salary and emoluments amounting to USD 11,585.67.

Submissions

The Secretary-General's Appeal

5. The Secretary-General clarifies that he does not dispute the UNDT's order for rescission of the contested decision or, in the alternative, compensation in the amount of CHF 10,000. In the present appeal, he only challenges the UNDT's award of CHF 4,000 as compensation for moral damages.

6. The Secretary-General submits that the Dispute Tribunal erred in law by using the same essential element of Mr. Andersson's high chance of promotion as a basis to justify its award of CHF 10,000 in lieu of rescission as well as its award of CHF 4,000 for moral damages. This is "double-counting".

7. The Secretary-General also submits that the UNDT's award of moral damages as a remedy under the circumstances of the present case is legally unsustainable and contradicts the UNDT's own reasoning. The UNDT rejected Mr. Andersson's claim for compensation for material harm on the ground that he would suffer no material harm as a result of the initial non-promotion decision if he were to be promoted with retroactive effect. The Secretary-General believes that the UNDT should have applied the same reasoning to Mr. Andersson's claim for loss of opportunity, which loss has been fully made good by Mr. Andersson's subsequent promotion and payment of backdated salary and emoluments.

8. The Secretary-General maintains that the UNDT's approach in the present case is inconsistent with the guidance on damages set forth by the Appeals Tribunal in *Akyeampong*,² in which Ms. Akyeampong's additional request for moral damages was rejected. The Secretary-General notes that the circumstances in the present case are materially identical to *Akyeampong*.

² *Akyeampong v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-192.

9. The Secretary-General lastly submits that the UNDT erred in law by awarding compensation for moral damages in the absence of any evidence thereof. The Secretary-General notes that before the UNDT, Mr. Andersson made only fleeting reference to any moral damages suffered as a result of the contested decision. He did not provide any further argument, evidentiary foundation, or testimony or evidence.

Mr. Andersson's Answer

10. Mr. Andersson stresses that, contrary to the Secretary-General's assertion, he had made more than fleeting reference to his moral damages suffered, in both his pleadings and during the UNDT hearing. The recording of the UNDT's oral hearing shows that, when questioned, Mr. Andersson spoke of harm to his professional reputation, injury to his dignity and moral harm he experienced as a result of an unfair promotion procedure.

11. Mr. Andersson maintains that there was no double compensation, as the UNDT clearly awarded CHF 10,000 as an alternative compensation to rescission and not to also cover his claim for moral damages. There is no set way for the UNDT to assess damages for loss of chance of promotion. The UNDT was guided by the jurisprudence of the Appeals Tribunal in rescinding the non-promotion decision in respect of Mr. Andersson. Deference must be shown to the opinion of the trial judge as to how to determine damages in each particular case. As the Appeals Tribunal has held, the trial court was in the best position to assess damages. Mr. Andersson insists that his case is distinguishable from *Kamaß* and *Akyeampong*.

12. Mr. Andersson considers that the UNDT's finding of moral damages represents a finding of fact, to which deference should be shown. As the Secretary-General alleges no error of fact or of a manifestly unreasonable decision arising therefrom, the UNDT's finding of fact must be allowed to stand.

Considerations

13. The Secretary-General submits that the UNDT erred in "double-counting" by using the same element of Mr. Andersson's high chance of promotion to justify both its award of CHF 10,000 in lieu of rescission, as well as its award of CHF 4,000 for moral damages. We

³ *Kamal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-204.

reject this submission. The UNDT made it clear that the claim for moral damages relates to the reparation of an injury that could not be regarded as covered by the payment of CHF 10,000 awarded as an alternative to rescission. We are satisfied that when the UNDT, on the question of moral damages, took into consideration Mr. Andersson's high chance of promotion, it was merely in the context of the moral harm he had suffered by not being promoted.

14. The Secretary-General further submits that the UNDT erred in law by awarding compensation for moral harm in the absence of any evidence thereof. The Secretary-General alleges that Mr. Andersson made only fleeting reference in his UNDT application to any moral damage suffered as a result of the contested decision and did not offer any testimony or other evidence of moral damages. On the other hand, Mr. Andersson claims that he gave oral evidence to the UNDT of the harm to his professional reputation, injury to his dignity and moral harm suffered as a result of the unfair promotion procedure. Mr. Andersson states that this evidence is referred to in the UNDT Judgment as "the circumstances of this case".

15. We have listened to the recording of the oral hearing in which Mr. Andersson took part by way of telephone. The recording is not of good quality and often difficult to understand. However, there can be no question that Mr. Andersson gave evidence on the issue of moral damages. The following evidence is discernible from the recording:

Ms. Oummih: I can't speak about Mr. Andersson's moral damages. But I will ask you for your permission to allow me to ask Mr. Andersson if he wants to add anything on this particular issue, just moral damages – what has been going on. I would ask you for permission for him to be able just to make a brief statement about that.

Judge Cousin: Are you there, Mr. Andersson? Do you want to speak now?...

Ms. Oummih: With your permission, Your Honour....

Judge Cousin: Yes. You can ask him to continue...Madam, maybe you want to ask him again to continue, especially on moral damages, [inaudible]

Ms. Oummih: Mr. Andersson, can you hear me? OK. Please comment a little bit and perhaps provide the Tribunal with a statement...We will put aside material damages,...but in terms of moral prejudice or damages that you feel you have incurred as a result of non-promotion...

[Mr. Andersson asks if he understands the Judge's question correctly.]

Ms. Oummih: Yes. Absolutely. Exactly, in terms of your moral damages as a result of non-promotion.

Mr. Andersson is then heard to speak for at least 2 minutes without interruption, but unfortunately most of what he said was rendered unintelligible by the poor quality of the recording. All that can be made out is:

Mr. Andersson:from the non-promotion because you always talk about the 2009 promotion but had I been promoted in 2009 or subsequently in 2012 I would have been eligible for promotion, and the current way to do the non-promotion in 2009 if you calculate two years in terms of further competence issues into the system...in my (inaudible) years of international service..... I cannot [inaudible] my family.....

16. The rest of Mr. Andersson's evidence was mostly unintelligible. At the end of Mr. Andersson's evidence, Judge Cousin is heard to say: "Very good. Thank you. I believe we can stop here." Mr. Andersson was not asked any further questions on the issue of moral damages by way of explanation or otherwise, either by the Judge or by either counsel.

17. We are satisfied that Mr. Andersson did give evidence of moral damages at the oral hearing and we reject the Secretary-General's submission to the contrary.

18. We are further satisfied that the UNDT's award of moral damages was based on specific evidence and that when the UNDT referred to "the circumstances of this case" it was alluding to the oral evidence Mr. Andersson had given on the subject. In this regard, a fuller and clearer exposition by the UNDT of the facts and reasons on which its award for moral damages was based may well have dispensed with the need to appeal it.

19. Furthermore, the particular circumstances of the case support the conclusion that Mr. Andersson was the victim of a fundamental procedural violation which of itself may give rise to an award of moral damages.⁴

20. The UNDT was best placed to conclude from the evidence, records, or otherwise, whether or not a claim for moral damages was established. We find no error in fact or in law in its decision that the circumstances of the present case merited a compensatory award of moral damages.

⁴ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

21. On the issue of the level of compensation awarded, we do not find reason to differ from the UNDT's determination. The UNDT's moderate award of CHF 4,000 was well within its discretion and does not constitute an error in fact or law.

Judgment

22. The appeal is dismissed and the Judgment of the UNDT is affirmed.

Original and Authoritative Version: English

Done this 17th day of October 2013 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Chapman

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar