



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

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Judgment No. 2013-UNAT-290

**Mirkovic  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Richard Lussick, Presiding Judge Mary Faherty Judge Rosalyn Chapman
Case No.:	2012-318
Date:	28 March 2013
Registrar:	Weicheng Lin

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Counsel for Respondent/Applicant:	Self-represented
Counsel for Appellant/Respondent:	Simon Thomas

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/2012/030, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 24 February 2012 in the case of *Mirkovic v. Secretary-General of the United Nations*.

### **Facts and Procedure**

2. Ms. Djurdja Mirkovic joined the International Criminal Tribunal for the former Yugoslavia (ICTY) in October 1998. She was a Trial Support Assistant at the G-5 level when this case arose.

3. In August 2010, the ICTY General Service staff were invited to take the 2010 ICTY competitive examination for promotion from the General Service category to the Professional category (“G to P” exam), in various occupational groups. The written component of the exam was to take place on 1 December 2010. Staff members were informed of the eligibility criteria and were provided with relevant administrative issuances.

4. On 1 September 2010, Ms. Mirkovic applied to take the “G to P” exam in the Human Rights occupational group. She was informed, on 19 October 2010, that she was not eligible to take the exam because she did not meet the minimum academic qualifications and/or experience required for the Human Rights occupational group. By e-mail dated 22 October 2010, Ms. Mirkovic asked the Chief of the Examinations and Tests Section (ETS) of the Office of Human Resources Management (OHRM) for contact details of the Chair of the Central Examinations Board (CEB) for the purpose of an appeal. The Chief of the ETS directed Ms. Mirkovic to “send [her] appeal to [OHRM-GtoP@un.org](mailto:OHRM-GtoP@un.org)”. On 26 October 2010, another ETS staff member advised Ms. Mirkovic by e-mail that she “must send [her] appeal to [the above] e-mail address to be considered”.

5. Also on 26 October 2010, Ms. Mirkovic appealed to the Chair of the CEB for review of the decision on her ineligibility for the “G to P” exam in the Human Rights occupational group, and copied the Chief of the ETS. On 1 November 2010, she e-mailed the Chief of the ETS for an update on her appeal. On 8 November 2010, she telephoned the Chief of the ETS, who this time orally informed Ms. Mirkovic that applications for the “G to P” exam from ICTY staff were not reviewed by the CEB, and that, unlike other Secretariat staff, an ICTY staff member did not have the right to appeal a negative decision on his or her application for the “G to P” exam. The Chief of the ETS did not respond to Ms. Mirkovic’s e-mails for written confirmation of his oral decision.

6. The written component of the 2010 ICTY G to P exam was held on 1 December 2010.
7. On 5 January 2011, Ms. Mirkovic requested management evaluation of the oral decision that the Chief of the ETS took on 8 November 2010. She was informed, on 24 March 2011, that this decision should be reversed, as it contravened her right to be accorded the same or similar procedural safeguards as were accorded to similarly-situated staff members. Ms. Mirkovic was advised that, should she wish to appeal the ineligibility decision, she should appeal to the CEB within 10 days, which she did.
8. On 19 April 2011, the CEB informed Ms. Mirkovic of its decision to uphold the ineligibility decision of 8 November 2010.
9. Ms. Mirkovic appealed. In Judgment No. UNDT/2012/030, the UNDT rejected the Respondent's argument that Ms. Mirkovic's application against the oral decision of 8 November 2010 was not receivable. The UNDT concluded that Ms. Mirkovic's application was receivable because the 8 November 2010 decision was final, as it had the effect of precluding her from taking the "G to P" exam. The UNDT, however, agreed with the Respondent that Ms. Mirkovic's application was rendered moot by the subsequent reversal of the 8 November 2010 decision. Nonetheless, the UNDT continued: "[B]ecause the contested decision was reversed does not mean that [Ms. Mirkovic] is not entitled to claim compensation for the damage she may have suffered as a result of the unlawful decision." The UNDT found that Ms. Mirkovic's due process rights were violated by the oral decision of 8 November 2010 and that "any reasonable person in [Ms. Mirkovic's] situation ... would have suffered stress and emotional distress", which was compounded by the contradictory information that she received on 22 October and 8 November 2010 on her right to appeal and the failure of the Chief of the ETS to respond to her requests for written confirmation. In the view of the UNDT, "reversal of the unlawful decision *after* the exam had already taken place was not sufficient to repair the damage suffered by [Ms. Mirkovic]". (Emphasis in original). The UNDT awarded Ms. Mirkovic EUR 2,000 as compensation "for the violation of her due process rights and the moral injury resulting thereof".

10. The Secretary-General appealed on 24 April 2012, and Ms. Mirkovic answered on 21 June 2012. On 26 June 2012, Ms. Mirkovic wrote to the Registry about her receipt of EUR 2,000 and queried what impact this would have on her case before the Appeals Tribunal. On 27 June, the Registry advised Ms. Mirkovic to contact the payer regarding her enquiries, as it was not in a position to give legal advice.

11. In late January 2013, in preparing the cases for the 2013 Spring Session, the Registry contacted the Office of Legal Affairs (OLA) for clarification as to whether the Secretary-General wished to withdraw his appeal, given that the Organization had already paid the UNDT award. On 29 January 2013, OLA advised the Registry that the Secretary-General intended to continue his appeal, the payment of EUR 2,000 having been “an administrative error”. OLA indicated that “should [the Secretary-General’s] appeal be successful, recovery of this amount will be sought. Furthermore, in the event that the staff member should separate prior to the hearing of the matter by the UNAT, then what is effectively at this stage an overpayment of EUR 2,000 should be taken into account when any entitlements are reconciled.”

### **Submissions**

#### **Secretary-General’s Appeal**

12. The UNDT erred in finding that the 8 November 2010 decision caused moral injury to Ms. Mirkovic. It was not the 8 November 2010 decision that placed her in the situation of having had to prepare for the “G to P” exam. Her decision to expend time (on the weekends of 23 October, 30 October and 6 November 2010) and efforts studying for the exam was made prior to, and irrespective of, the 8 November 2010 decision.

13. The UNDT erred in fact and in law in finding that the Administration had provided Ms. Mirkovic with contradictory information that caused her additional stress. The Secretary-General maintains that on 22 October 2010, the Administration neither advised Ms. Mirkovic that she had a right to appeal nor gave her any encouragement that she would prevail on appeal. On that day, the Administration merely responded to Ms. Mirkovic’s request for contact information by sending her an e-mail address.

14. The Secretary-General maintains that the rules of the Organization do not require the Chief of the ETS to respond to Ms. Mirkovic in writing, after he had orally informed her of his decision.

15. The Secretary-General submits that Ms. Mirkovic was not entitled to compensation as the CEB ultimately confirmed that she was not eligible to take the “G to P” exam and that the shortcomings in the process did not affect the propriety of the outcome. The Secretary-General cites *Vangelova* and *Antaki* in support of his position.<sup>1</sup>

16. The Secretary-General also submits that the UNDT erred in awarding compensation for moral damages when no evidence, written or oral, for such damages was provided by Ms. Mirkovic. In his view, the UNDT’s award of compensation on the basis of a reasonable person standard in the absence of any evidence is inconsistent with the ruling of the Appeals Tribunal that requires specific evidence and not speculation.<sup>2</sup> Ms. Mirkovic could only have been compensated for the actual loss that she suffered, of which there was no evidence.

### **Ms. Mirkovic’s Answer**

17. Ms. Mirkovic submits that the UNDT properly found that the 8 November 2010 decision caused her moral injury. Contrary to the Secretary-General’s assertion, the 8 November 2010 decision caused her undue stress and emotional distress from that point forward because she had already expended time and effort for the exam. In other words, her emotional distress was “undergone and at the very least, aggravated” when she learned of the 8 November 2010 decision.

18. Ms. Mirkovic also submits that the UNDT properly found that the Administration had given her contradictory information about her right to appeal, resulting in moral injury. In this regard, she cites *Obdeijn* in support of the UNDT award for moral injury.<sup>3</sup> She also cites *Messinger* in support of her position that the UNDT’s factual findings deserved some degree of deference as the court of first instance.<sup>4</sup>

### **Considerations**

19. The UNDT found that Ms. Mirkovic’s application contesting the decision denying her the right to appeal to the CEB was moot, since such decision was reversed by the Secretary-General. However, the UNDT held that Ms. Mirkovic was still entitled to claim damages.

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<sup>1</sup> *Vangelova v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-172, para. 19; *Antaki v. Secretary-General of the United Nations*, Judgment No 2010-UNAT-095.

<sup>2</sup> *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

<sup>3</sup> *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201.

<sup>4</sup> *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

20. The UNDT found that Ms. Mirkovic was “entitled to be compensated for the violation of her due process rights and the moral injury resulting thereof” in the sum of EUR 2,000. This award of damages was predicated on the UNDT’s findings:

- (i) that Ms. Mirkovic’s due process rights were violated by the contested decision “and that any reasonable person in [Ms. Mirkovic’s] situation of preparing for a competitive exam, especially one that could have such a significant impact on her career, would have suffered stress and emotional distress”;
- (ii) that “the contradictory information received by [Ms. Mirkovic] on 22 October 2010 and 8 November 2010 on her right of appeal, and the subsequent failure of the Chief of the Examinations and Tests Section, OHRM, to respond to her requests for a written confirmation added to the stress and injury suffered”; and
- (iii) that “reversal of the unlawful decision *after* the exam had already taken place was not sufficient to repair the damage suffered by [Ms. Mirkovic]”. (Emphasis in original).

21. It can be seen from finding (i) that the UNDT took into account Ms. Mirkovic’s situation of preparing for the exam as a factor contributing to her emotional distress. However, her preparation took place in the period between 22 October 2010 and 8 November 2010,<sup>5</sup> that is, prior to the impugned decision. There was therefore no nexus between Ms. Mirkovic’s said situation and the impugned decision.

22. In finding (ii), the UNDT took into account two other factors which it considered as exacerbating the stress suffered by Ms. Mirkovic. The first factor was that Ms. Mirkovic received “contradictory information” on 22 October 2010, which, presumably, led her to believe that she had the right to appeal the decision on her ineligibility. In our view, no reasonable interpretation of the information provided to Ms. Mirkovic by the Chief of the ETS on 22 October 2010 could lead to the conclusion that he was affirming her right to appeal. The facts were that Ms. Mirkovic e-mailed the Chief of the ETS requesting that he provide her with the contact details of the Chair of the CEB, so that she could submit an appeal against the decision that she was ineligible

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<sup>5</sup> Ms. Mirkovic’s application to the UNDT, para. 19.

to take the exam. The Chief of the ETS merely provided her, as requested, an e-mail address to which she could send her appeal. Similarly, the information provided by the ETS staff member on 26 October 2010 went no further than informing Ms. Mirkovic that she would need to send her appeal to that e-mail address for it to be considered. Ms. Mirkovic was not told that she had a right of appeal. The UNDT's decision on this point is, therefore, not supported by the facts.

23. The second exacerbating factor found by the UNDT was the failure of the Chief of the ETS to respond to Ms. Mirkovic's request for written confirmation of what he had told her. Written confirmation was not necessary, since the information given to her orally on 8 November 2010 by the Chief of the ETS was sufficient for her to request management evaluation. In fact, although she never received written confirmation, she did later request management evaluation. Thus, any stress suffered by Ms. Mirkovic was a result of her own decision to request written confirmation when such was not necessary.

24. Accordingly, we find that the UNDT's decision to award compensation was flawed in that the reasons it gave for doing so were not well founded.

25. Nevertheless, we do not argue with the UNDT's finding that Ms. Mirkovic's procedural rights were violated. The Chief of the ETS, by telling Ms. Mirkovic that she could not appeal the decision on her ineligibility, deprived her, at least temporarily, of the right to present her appeal to the CEB.

26. It has been held by the Appeals Tribunal that 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.<sup>6</sup>

27. It should be remembered that Ms. Mirkovic was never eligible to sit for the exam in question. The impugned decision therefore had no consequences for her. It had no impact on her employment, nor did it deprive her of any opportunity. Even if the Chief of the ETS had given her the correct information, she had no chance of ever being able to sit for the exam.

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<sup>6</sup> *Obdeijn*, para. 42; *Hastings*, para. 19; *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009, para. 46.

28. Ms. Mirkovic may well have been disappointed and dissatisfied by what she had been told by the Chief of the ETS, but any hurt she may have experienced did not, in our opinion, rise to the level of compensable damages.

**Judgment**

29. In light of the foregoing, the appeal is allowed and the Judgment of the UNDT is set aside.



Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of March 2013 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Faherty

*(Signed)*

Judge Chapman

Entered in the Register on this 24<sup>th</sup> day of May 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar