



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

Judgment No. 2013-UNAT-309

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

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Sophia Adinyira
Judge Rosalyn Chapman

Case No.: 2012-344

Date: 28 March 2013

Registrar: Weicheng Lin

Counsel for Respondent/Appellant on Cross-Appeal: Self-represented

Counsel for Appellant/Respondent on Cross-Appeal: Paul Oertly/Simon Thomas

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations and a cross-appeal filed by Ms. Regina Asariotis against Judgment No. UNDT/2012/066, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 9 May 2012 in the case of *Asariotis v. Secretary-General of the United Nations*.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case read as follows:¹

... [Ms. Asariotis] entered the service of [the United Nations Conference on Trade and Development (UNCTAD)] at the P-4 level on 9 December 2001. On 1 September 2005, she was promoted to the P-5 level and became Chief of the Policy and Legislation Section of the Trade Logistics Branch, Division for Services Infrastructure for Development and Trade Efficiency (renamed the Division on Technology and Logistics (“DTL”) in early 2008).

... Vacancy announcement 07-ECO-UNCTAD-416118-R-GENEVA (G) for the D-1 post of Head of the Trade Logistics Branch was published on 26 November 2007. It had an application deadline of 25 January 2008.

... [Ms. Asariotis] applied for the post as a 30-day candidate on 24 December 2007.

... The Trade Logistics Branch consists of three sections, including the Policy and Legislation Section, headed by [Ms. Asariotis], and the Transport Section, headed by another P-5 level staff member.

... Upon the retirement of the Head of the Trade Logistics Branch on 31 January 2008, the Chief of the Transport Section was appointed Officer-in-Charge of the Branch on 1 February 2008, pending the selection of a new Head.

The first round of interviews and the recommendation for the disputed post

... On 10 March 2008, [Ms. Asariotis] was interviewed for the disputed post. Four other eligible internal 30-day candidates were also interviewed, including the Officer-in-Charge of the Branch. The interview panel consisted of three people, including the Director (D-2) of DTL, in her capacity as the hiring manager.

¹ The following facts are taken from Judgment No. UNDT/2012/066, paragraphs 3-30.

... By internal memorandum dated 14 May 2008, the Director of DTL recommended to the Secretary-General of UNCTAD that he select for the disputed post the Chief of the Transport Section, who was also serving as the Officer-in-Charge of the Branch. However, no action was taken on this recommendation.

... On 30 June 2008, the Director of DTL, who was the hiring manager, retired. A staff member was appointed to serve as Officer-in-Charge of the Division on 1 July 2008.

... [Ms. Asariotis] received no information on the selection procedure for the disputed post until May 2009, when she was informally advised that the selection procedure had been “put on hold.” According to the Respondent, the budget line item had been required for a priority placement of a staff member holding a permanent appointment until that individual’s retirement in June 2009. During this period, Galaxy, the online recruitment system, continued to indicate that the applications were under consideration.

... On 15 June 2009, a new Director of DTL was appointed.

... On 15 July 2009, the Director of DTL advised [Ms. Asariotis] that the disputed post would be re-advertised. However, as the information below indicates, she subsequently changed her mind with regard to that matter.

... On 28 July 2009, a temporary vacancy announcement for a period of from three to six months was issued for the disputed post, and [Ms. Asariotis] applied on 6 August 2009. She was interviewed, but the candidate who had served as Officer-in-Charge of the Branch since 1 February 2008 was selected. [Ms. Asariotis] was notified of this on 19 January 2010.

The second round of interviews and the recommendation for the disputed post

... From February to April 2010, there was a second round of interviews for the disputed post as advertised in November 2007, apparently further to the decision of the Director of DTL not to re-advertise the post as initially announced. [Ms. Asariotis] was interviewed once again on 30 March 2010, as were three of the four other candidates who had been interviewed in March 2008. Four 30-day candidates and eight 60-day candidates were interviewed in all. The interview panel was composed of three members, including the new Director of DTL, as the hiring manager.

... In June and July 2010, as she had received no information about the selection procedure, [Ms. Asariotis] wrote to the Officer-in-Charge of the Human Resources Management Section of UNCTAD to enquire about the progress of the selection procedure. The Officer-in-Charge replied on 5 July 2010 that the Director of DTL was finalizing the evaluations.

... On 12 October 2010, [Ms. Asariotis], who was still without news, wrote once again to the Officer-in-Charge of the Human Resources Management Section of UNCTAD, who answered the same day that the interview panel's recommendations had "recently" been submitted to the Secretary-General of UNCTAD for transmission to the Central Review Board [(CRB)], and that a decision would be taken by mid-November.

... The interview panel's evaluations indicate that it concluded that [Ms. Asariotis] did not fully meet the requirements for the post and had therefore not been recommended. The panel was of the opinion that only two candidates met the post criteria, the candidate who had been serving as Officer-in-Charge of the Service since February 2008 and one 60-day candidate.

... On 3 November 2010, the panel's recommendations were presented to the Geneva Central Review Board. The Board twice requested additional information with regard to: (i) the performance evaluations of the interviewed candidates, (ii) the reasons why it had taken more than three years to produce the recommendations, (iii) the reasons why one of the candidates had not been recommended despite her experience, (iv) some apparent inconsistencies between the panel's evaluation of the recommended candidate and his experience as described in his personal history profile, and, finally, the reasons why UNCTAD had not taken any measures to avoid having the Officer-in-Charge of the Branch serve as [Ms. Asariotis'] first reporting officer in 2008-2009 and 2009-2010 while they were both in competition for the disputed post. At its meetings of 15 December 2010 and 16 February 2011, the Board considered the information provided by UNCTAD.

... On 4 April 2011, [Ms. Asariotis] wrote once again to the Human Resources Management Section of UNCTAD, as she still had received no news. On 15 April 2011, she was informed that the selection procedure was still ongoing and that once it was completed she would be informed.

... By memorandum dated 7 April 2011, the Geneva Central Review Board informed the Under-Secretary-General for Management that despite additional information provided by the Director of DTL, it was not in a position to endorse the recommendations made by UNCTAD, as the selection procedure had been flawed. It recommended that the post be re-advertised.

The contested decision: Cancellation of the litigious vacancy announcement

... By memorandum of 14 April 2011, the Under-Secretary-General for Management requested the Secretary-General of UNCTAD to re-advertise the post.

... By email of 3 May 2011, the Director of DTL informed [Ms. Asariotis] that “in response to a request from the Senior Review Group” [sic], vacancy announcement No. 07-ECO-UNCTAD-416118-R-GENEVA (G), issued on 26 November 2007 in Galaxy, would be cancelled and re-issued in Inspira, the new online recruitment system, and she invited [Ms. Asariotis] to reapply.

... On 9 May 2011, in response to [Ms. Asariotis'] request for clarifications, the Human Resources Management Section of UNCTAD informed [her] that the decision to re-advertise the post had been taken by the Under-Secretary-General for Management in accordance with section 5.6 of ST/SGB/2002/6, the Secretary-General's bulletin on central review bodies.

... On 25 May 2011, [Ms. Asariotis] wrote to the Under-Secretary-General for Management and to the Secretary of the Geneva Central Review Board to request clarifications regarding the decision to cancel the vacancy announcement and to find out whether her name had been on the list of recommended candidates.

... On 26 May 2011, the Office of the Under-Secretary-General for Management replied to [Ms. Asariotis] that the Central Review Board had expressed concerns about delays in the selection procedure and the impact on other potential candidates, as well as on other issues that could not be revealed to [her]. It stated in addition that the Under-Secretary-General for Management had decided to re-advertise the position in view of the protracted nature of the evaluation and recommendation of candidates and that it could not reveal to [Ms. Asariotis] whether or not she had been recommended.

... On 22 June 2011, the Secretary of the Central Review Board replied to [Ms. Asariotis] that the Board had decided to refer the case to the Under-Secretary-General for Management under section 5.6(a) of bulletin ST/SGB/2002/6, having concluded that the procedures in effect had not been adhered to and that the evaluation criteria had not been consistently applied to all the candidates. Moreover, she stated that the Under-Secretary-General for Management had communicated to the Secretary-General of UNCTAD his decision to re-advertise the disputed post on 14 April 2011.

... On 1 July 2011, [Ms. Asariotis] submitted a request for management evaluation of the decision to cancel vacancy announcement 07-ECO-UNCTAD-416118-R-GENEVA (G) for the post of Head of the Trade Logistics Branch, after a selection procedure lasting nearly three and a half years.

... On 26 August 2011, the disputed post was re-advertised. [Ms. Asariotis] applied for this position.

... By letter dated 16 September 2011, received by [Ms. Asariotis] on 19 September, the Deputy Secretary-General informed [Ms. Asariotis] that the Secretary-General had decided to uphold the contested decision.

3. Ms. Asariotis appealed this decision to the Dispute Tribunal. By Order No. 49 (GVA/2012) of 7 March 2012, the Dispute Tribunal ordered the Secretary-General to produce the selection documents related to the interviews conducted in March 2008 and to explain why the selection procedure had been “interrupted” and then resumed, rather than cancelled, in 2009. The Secretary-General filed a submission in response to this Order, requesting that the UNDT not release to Ms. Asariotis certain documents related to the selection interviews conducted in March 2008. As a result, by Order No. 59 (GVA/2012) of 23 March 2012, the UNDT transmitted redacted documents to her.

4. In its Judgment No. UNDT/2012/066 of 9 May 2012, the Dispute Tribunal stated: “It is the task of the Tribunal to note the primary irregularities tainting the selection procedure up until it was officially terminated.” Thereafter, it proceeded to delineate these irregularities. It recalled that, whilst the Secretary-General has the “broad discretionary powers” to, *inter alia*, “suspend or interrupt a selection procedure for a post at any time, as long as a staff member has not been officially advised of his or her selection, he can nonetheless do this only when there are legitimate grounds to do so”. Despite the Tribunal’s Order for production of documents, “the Administration ha[d] not provided any legitimate grounds for suspending the selection procedure”.

5. Moreover, the UNDT found that the Administration had committed a procedural error | in holding a second round of interviews prior to the outcome of the first interviews and, furthermore, in failing to consider 30-day candidates prior to considering 60-day candidates, as required by administrative instruction ST/AI/2006/3, “Staff Selection System”, of 15 November 2006.

6. The Dispute Tribunal took note of the fact that the CRB refused to approve UNCTAD’s recommendations following the second round of interviews, “concluding that the procedures in force had not been followed and that the evaluation criteria had not been consistently applied to all the candidates”. The UNDT then found that, given “the numerous irregularities in the selection procedure ... the Under-Secretary-General for Management had to terminate the procedure”. Accordingly, it found that the impugned decision was lawful.

7. Notwithstanding the foregoing, the Dispute Tribunal considered that Ms. Asariotis was “entitled to maintain that if the selection procedure had been completed and if it had been free of procedural violations, there was a chance that she would have been selected for the vacant post” and to request compensation for damage suffered. It calculated that, as she had “approximately a 25 per cent chance of being selected, as the [Secretary-General’s] counsel acknowledged during the hearing”, she was entitled to compensation for the material damage incurred in “losing an opportunity for promotion”. The UNDT awarded CHF 10,000 on that basis.

8. The Dispute Tribunal determined that the Administration’s delays in informing Ms. Asariotis of the outcome of her application as well as the irregularities in the selection procedure caused her “great anxiety and resulted in significant moral damage, even though she ha[d] never claimed to have an illness resulting from the Administration’s actions”. As a result, it awarded her compensation in the amount of CHF 15,000.

9. The Secretary-General appealed this Judgment to the Appeals Tribunal on 9 July 2012, and Ms. Asariotis filed a cross-appeal together with her answer on 8 September 2012. The Secretary-General answered the cross-appeal on 9 November 2012.

Submissions

Secretary-General’s Appeal

10. The Secretary-General submits that the UNDT erred on a question of law and exceeded its competence in finding that Ms. Asariotis had lost an opportunity to be considered and in awarding compensation on that basis.

11. The Secretary-General further submits that the UNDT erred on questions of fact and of law in ordering moral damages.

12. Accordingly, he requests the Appeals Tribunal to vacate the award of compensation ordered by the Dispute Tribunal.

Ms. Asariotis' Answer

13. Ms. Asariotis submits that the UNDT correctly considered her loss of opportunity and awarded compensation on that basis. The Secretary-General admitted before the UNDT that she had a 25 per cent chance of being selected for the post; she thus contends that he should be estopped from now taking a different stance. She lost the opportunity to be considered in a selection exercise in which priority consideration is given to 30-day candidates and in which equally qualified women benefit from affirmative action. She also lost the opportunity to benefit from the advantage associated with inclusion on a roster.

14. Furthermore, the UNDT did not err in fact and law in awarding moral damages on the grounds that the Administration's delays in informing her of the outcome of the application, as well as the irregularities in the selection procedure, caused her great anxiety.

15. Ms. Asariotis requests that the Appeals Tribunal dismiss the Secretary-General's appeal.

Ms. Asariotis' Cross-Appeal

16. Ms. Asariotis contends that the UNDT erred procedurally, by failing to consider several of her legal arguments and in not fully reasoning its Judgment.

17. She further contends that the UNDT erred on a question of law in concluding that the cancellation of the staff selection process was lawful.

18. Ms. Asariotis submits that the Dispute Tribunal erred in law in not considering the harm caused by the hierarchical arrangements in place in the TLB, a competitor for the position having been Officer-in-Charge and her direct supervisor for an extended period of time.

19. Ms. Asariotis requests the Appeals Tribunal to "modify the [UNDT] Judgment" and award additional relief.

Secretary-General's Answer to the Cross-Appeal

20. The Secretary-General submits that the UNDT committed neither a procedural nor a legal error in concluding that the decision to cancel the selection process was lawful, and in declining to address the merits of the claims as to the Officer-in-Charge arrangements.

21. The Secretary-General requests that the Appeals Tribunal dismiss Ms. Asariotis' cross-appeal.

Considerations

The Appeal and Cross-Appeal

22. In the present case, the Secretary-General appeals the Judgment of the UNDT on the basis that the Dispute Tribunal erred on a question of law and exceeded its competence in finding that Ms. Asariotis had lost an opportunity to be considered for promotion and in awarding her compensation of CHF 10,000 on that basis. The Secretary-General further appeals the award of CHF 15,000 in moral damages.

23. Ms. Asariotis cross-appeals on the basis that the UNDT erred procedurally by failing to address the arguments made in her application as to why the decision of Management to cancel the staff selection process was unlawful. This error, it is claimed, materially affected the outcome of the case. Ms. Asariotis further contends that the Dispute Tribunal erred on a question of law by concluding that the decision by the Under-Secretary-General for Management to cancel the staff selection process was lawful.

24. Because of the nature of the cross-appeal, we will firstly address the issues raised therein, before considering the Secretary-General's appeal.

The Cross-Appeal

i) The claimed errors in procedure on the part of the UNDT

25. The Appeals Tribunal finds no merit in this ground of appeal. A review of the UNDT Judgment satisfies us that the UNDT was cognizant of the arguments Ms. Asariotis made vis-à-vis the Officer-in-Charge arrangements. Those arguments are clearly recited in paragraphs 39(b)(iii) and 39(b)(vii) of the Judgment. The approach of the Dispute Tribunal does not fall foul of the jurisprudence of the Appeals Tribunal in *Fröhler*². Moreover, we accept the Secretary-General's argument that it was not necessary for the Dispute Tribunal to address the Officer-in-Charge issue, given that the core contested decision, which grounded the

² *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141.

Dispute Tribunal's review, was the decision to cancel the selection process, notwithstanding the references at paragraphs 21 to 25 of Ms. Asariotis' application to the irregularities pertaining to the appointment of the Officer-in-Charge. Furthermore, we note that the process whereby the individual was appointed to the Officer-in-Charge position was the subject of two separate decisions by the Administration, on 1 February 2008 and 19 January 2010, respectively. Insofar as Ms. Asariotis takes issue with those decisions, she does so only on 1 July 2011 in her application to the Dispute Tribunal, well past the date by which the decisions should have been subject to management evaluation. Whatever about Ms. Asariotis' state of knowledge as to whether or not the individual who was appointed Officer-in-Charge on 1 February 2008 was a candidate for the vacancy, certainly, by the time the temporary post was filled on 19 January 2010, Ms. Asariotis knew that the person appointed as temporary Officer-in-Charge was, like her, a candidate for the temporary post.

26. While Ms. Asariotis states in her cross-appeal that the UNDT did not address her arguments in relation to the benefits she lost and the priority that would have been afforded to her as a female candidate,³ we do not find that the failure on the part of the UNDT to deal specifically with these issues manifestly affected the outcome of the case, in view of the UNDT's conclusion that the decision to cancel the vacancy announcement was lawful.⁴

ii) The claimed error in law on the part of the UNDT in concluding that the decision to cancel the vacancy was lawful

27. In requesting the Appeals Tribunal to address this issue, Ms. Asariotis points to the arguments she made at paragraphs 47 to 59 of her application before the UNDT. Her principal contention therein was that the cancelling of the vacancy selection process, following the observations of and the decision made by the CRB, amounted to a decision not to select her for the post or, at a minimum, place her on a roster of candidates pre-approved for similar functions.

28. At paragraphs 44 and 45 of its Judgment, the UNDT outlined in detail the flaws which attached to the selection process from the outset, and it gave due consideration to the approach adopted by the CRB, namely its refusal to accept the recommendation of UNCTAD that the post be filled by the selected candidate because of the substantial irregularities identified by the CRB

³ ST/AI/1999/9, entitled "Special measures for the achievement of gender equality".

⁴ See below.

and their resulting concerns. The refusal to endorse the recommended candidates effectively rendered the entire selection process a nullity and the Under-Secretary-General had no option but to cancel the vacancy and re-advertise the post.

29. At paragraph 47, the Dispute Tribunal stated as follows:

Thus, given the numerous irregularities in the selection procedure that began after the vacancy announcement No. 07-ECO-UNCTAD-416118-R-Geneva (G) was published 26 November 2007, the Under-Secretary-General for Management had to terminate the procedure, and the Applicant has no basis for complaint regarding the cancellation of the vacancy announcement of the disputed post. Accordingly, the contested decision is lawful.

30. We uphold this finding as correct in law. For the Appeals Tribunal to accept Ms. Asariotis' argument and hold otherwise would lend legitimacy to a selection process which the CRB, the Dispute Tribunal and indeed Ms. Asariotis herself agree was beset by irregularity from the outset. Ms. Asariotis suggests that the ensuing delay in the selection process from the time of its inception to its cancellation ought to be sufficient for this Tribunal to cast a cloak of legitimacy around the process and grant her the remedies she requested in her application. We do not find any legal basis for this proposition given the nullified status of the selection process. Insofar as Ms. Asariotis seeks a remedy for being caught up in a selection process tainted by irregularity, she was afforded such remedy when the process was cancelled and the vacancy re-advertised. In view of all of the foregoing, Ms. Asariotis' cross-appeal is dismissed in its entirety.

Secretary-General's Appeal

The award of compensation for loss of opportunity

31. While upholding the validity of the decision to cancel the selection process, the Dispute Tribunal nonetheless awarded Ms. Asariotis USD 10,000 for loss of opportunity, having assessed that she had a 25 per cent chance of being selected for the post at the second interview stage, given that four candidates were interviewed at that time.

32. The Secretary-General submits that the Dispute Tribunal's reasoning is legally flawed and that its reliance on *Hastings*⁵ is misplaced. The Secretary-General contends that a person loses an opportunity to be considered for a position when he or she is unlawfully determined to be ineligible for consideration and the selection process then proceeds without that person and results in the selection of another candidate. However, that is not what occurred in the instant case since no candidate was selected.

33. We are thus satisfied, having regard to the facts in the present case which led to the lawful nullifying of the selection process, that there was in effect no selection against which Ms. Asariotis' loss could be measured. In determining otherwise, the Dispute Tribunal erred in law and accordingly, we uphold the Secretary-General's appeal on this issue and the award of CHF 10,000 is set aside.

The award of CHF 15,000 by way of moral damages

34. The UNDT made an award of CHF 15,000 to Ms. Asariotis for "the Administration's delays in informing the Applicant of the outcome of her application and the irregularities in the selection procedure conducted by the Administration of UNCTAD [which] caused the Applicant great anxiety and resulted in significant moral damage". The Secretary-General contends, having regard to the reasoning of this Tribunal in *Antaki*,⁶ that the Dispute Tribunal should have applied similar reasoning in the present case and declined to award moral damages.

35. The Dispute Tribunal awarded moral damages "even though [Ms. Asariotis] ... never claimed to have an illness resulting from the Administration's actions".

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

- (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the

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

⁶ *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-096.

Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.⁷

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.⁸

38. Following the identification of the moral injury by the UNDT under (i) or (ii) or both, it falls to the Dispute Tribunal to assess the quantum of damages. This will necessarily depend on the magnitude of the breach that may arise under (i). With regard to (ii), it will depend on the contents of any medical or other professional report or evidence before the Dispute Tribunal.

39. It is the considered view of this Tribunal that the circumstances which pertained in the present case did not qualify for the Dispute Tribunal to invoke its statutory jurisdiction to award damages for moral injury under (i) or (ii) above. While the delays and deficiencies which attached to the selection process in this case were certainly lamentable, Ms. Asariotis was placed in no worse a situation than the other candidates for the post. There was no breach of her substantive contractual entitlements nor, given the nullified status which attached to the selection process by the time of her application to the UNDT, can it be said that her procedural entitlements were breached. Moreover, even if the UNDT were to compensate her for the delay

⁷ See *Abubakr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-272; *Charles v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-233; *Appellant v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-143.

⁸ See e.g. *Kozlov and Romadanov v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-228; *Marsh v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-205; *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076; *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

(applying (ii)) there was no medical evidence produced of illness arising from the Administration's actions. In all of those circumstances, the award of CHF 15,000 is set aside.

40. The Secretary-General's appeal is thus upheld.

Judgment

41. The Judgment of the UNDT is reversed to the extent set out above and its Judgment on the lawfulness of the decision to cancel the post is upheld.

Original and Authoritative Version: English

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

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Chapman

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

(Signed)

Weicheng Lin, Registrar