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

Judgment No. 2016-UNAT-674

**Dube**

**(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations**

**(Appellant/Respondent)**

## JUDGMENT

| | |
|---|---|
| Before: | Judge Sophia Adinyira, Presiding<br>Judge Deborah Thomas-Felix<br>Judge Luis María Simón |
| Case No.: | 2016-886 |
| Date: | 30 June 2016 |
| Registrar: | Weicheng Lin |

| | |
|---|---|
| Counsel for Ms. Dube: | Robbie Leighton, OSLA |
| Counsel for Secretary-General: | Nathalie Defrasne |

**JUDGE SOPHIA ADINYIRA, PRESIDING.**

1. The Appeals Tribunal has before it an appeal by the Secretary-General of the United Nations of Judgment No. UNDT/2015/109, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 11 November 2015, in the case of *Dube v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 11 January 2016, and Ms. Sibuko Dube filed her answer on 11 March 2016.

## Facts and Procedure

2. This case arises from Ms. Dube's non-selection for the position of Programme Assistant on Social Policy and Economics at the GS-7 level with the United Nations Children's Fund (UNICEF), in Pretoria, South Africa.

3. In 2008, Ms. Dube began working for UNICEF in the Pretoria office as a Programme Assistant on Social Policy and Economics at the GS-6 level.

4. In 2011, a reclassification process was initiated whereby all of the Programme Assistant posts in the Pretoria office were reclassified from the GS-6 to the GS-7 level. The post encumbered by Ms. Dube was reclassified to the GS-7 level with effect from 31 March 2013. Following the reclassification of the post to the higher level, Ms. Dube was treated as a staff member who encumbered an abolished post under UNICEF's rules.

5. In a memorandum dated 22 September 2011 sent to Regional Directors, Headquarters Directors, and UNICEF Representatives entitled "Corporate support to Staff on Abolished Posts", the Deputy Executive Director-Management stated as follows:

> UNICEF has an obligation to make every effort possible to place staff members who are on abolished posts on other available posts for which they are suitable. ...
>
> If a staff member on an abolished post is one of the recommended candidates he/she would be given preference even if he/she is not the first recommended candidate unless strong reasons relating to relative competence and integrity dictate otherwise (see Staff Rule 9.6 (e)). Non-selection of a staff member on an abolished post should be justified in writing, explaining why the staff member who meets the minimum requirements for the post is not preferred and how his or her core and functional competencies as assessed in the staff selection process did not match those required for the post. Please ensure that your hiring managers are fully aware of these policy provisions as outlined in Section 9 of CF/AI 2010-001 on Separation from service.

6. On 27 December 2012, Ms. Dube applied for the new position of Programme Assistant on Social Policy and Economics at the GS-7 level. Ms. Dube passed the written examination and she was one of three candidates invited to a competency-based interview. Ms. Dube's interview took place on 12 February 2013. The Selection Panel assessed four competencies during each interview, and also asked each candidate a technical question.

7. In its assessment of Ms. Dube, the Selection Panel rated her as "developing proficiency" for two competencies, Working with People and Drive for Results, and "proficient" for two competencies, Communication and Following Instructions and Procedures. The Panel rated her as "highly proficient" for Technical Expertise.

8. The Selection Panel found two candidates suitable for the position, including Ms. Dube. The Panel considered that the other candidate, who was an external candidate, was the most suitable candidate. However, the Panel recommended Ms. Dube for the position, taking into account that she encumbered an abolished post and the contents of the 22 September 2011 memorandum.

9. The Selection Panel noted that Ms. Dube's "developing proficiency" rating for the Working with People competency was consistent with her rating for the same competency in her 2011 and 2012 performance evaluation records (PERs). The Panel qualified its recommendation of Ms. Dube for the position by recommending that: she engage in a formal development and mentorship programme; her participation in the programme be a condition of the renewal of her appointment for one year; and further renewal of her appointment after one year be dependent on her progress under the programme.

10. The Local Central Review Body (LCRB) reviewed the Selection Panel's recommendation. The LCRB supported the recommendation of Ms. Dube, however it indicated that the Panel should make a clear recommendation whether she was suitable for the position or not. The LCRB expressed reservations about the Panel's recommendation to insert limitations in her appointment.

11. The Selection Panel clarified that it considered Ms. Dube to be suitable for the position, noting again the fact that she encumbered an abolished post and the contents of the 22 September 2011 memorandum.

12. The LCRB reviewed the matter again, and endorsed the Selection Panel's recommendation. The LCRB stated that Ms. Dube should be offered a two-year fixed-term appointment without any conditions, and that UNICEF's usual performance management procedures should apply.

13. The selection recommendation was sent to the UNICEF Country Representative to make the final selection decision in her capacity as the Approving Authority. In a note, the Approving Authority asked the Selection Panel to clarify why it had found Ms. Dube suitable for the position given her rating of "developing proficiency" for two competencies during the interview, and her rating of "developing proficiency" for the Working with People competency in her 2011 and 2012 PERs.

14. After reviewing its assessment of Ms. Dube again, the Selection Panel found that she was not suitable for the position. The Panel revised her rating for the competency of Drive for Results from "developing proficiency" to "highly proficient" as it was consistent with her PERs for the last two years and most likely a better reflection of her competency. The Panel maintained her rating of "developing proficiency" for the competency of Working with People, noting that it was consistent with her rating for the same competency in her two most recent PERs. The Panel also noted that Working with People was a core competency required for the GS-7 position and there had been little or no improvement in Ms. Dube's performance in relation to this competency over the past two years. Consequently, the Panel recommended that the sole suitable candidate be selected for the position.

15. The LCRB approved the Selection Panel's revised recommendation. The Approving Authority accepted the LCRB's recommendation, and selected the recommended candidate. On 6 March 2013, Ms. Dube was informed that she was not selected for the position. On 31 March 2013, she separated from service.

16. In her application dated 18 July 2013, Ms. Dube appealed the non-selection decision. On 19 August 2013, the Secretary-General filed his reply to the application.

17. The Dispute Tribunal held a case management discussion on 4 November 2014. At the case management discussion, Ms. Dube agreed to withdraw her allegation that the Approving Authority's inquiry with the Selection Panel was unlawfully motivated. By Order No. 249 (NBI/2014), the Dispute Tribunal decided to hear the case on the papers.

18. On 11 November 2015, the Dispute Tribunal issued Judgment No. UNDT/2015/109, which found the non-selection decision unlawful. The Dispute Tribunal found that there was a substantial procedural irregularity, as the Approving Authority had departed from the staff selection procedures by asking the Selection Panel why it had recommended Ms. Dube for selection. The Approving Authority had the following options available to her under the staff selection procedures: to approve the LCRB's recommendation; to return the case to the LCRB for further review with reasons; or to not agree with the LCRB, make a selection decision, and inform the LCRB of the reasons for the decision. The procedures did not provide for the Approving Authority to seek clarification from the Selection Panel.

19. The Dispute Tribunal also found that the Approving Authority exerted undue influence on the Selection Panel. The Tribunal noted the principle that the person responsible for making the final selection decision shall not intervene in the evaluation of the candidates, citing the Appeals Tribunal's jurisprudence in *Verschuur*.[1] The Approving Authority directly approached the Selection Panel to procure a reversal of its recommendation, and her intervention led to the Panel revising its recommendation.

20. The Dispute Tribunal awarded Ms. Dube compensation of two years' net base salary at the GS-7 level for her loss of opportunity to be selected for the position, noting that she had a "100% chance" of being selected for the position and receiving a two-year appointment. The Dispute Tribunal awarded her moral damages of three months' net base salary at the GS-6 level for the exercise of undue influence by the Approving Authority. The Dispute Tribunal also awarded interest on the total sum of compensation.

## Submissions

### The Secretary-General's Appeal

21. The Dispute Tribunal erred in law by finding that the Approving Authority breached UNICEF's staff selection procedures. In view of the contradictions between the Selection Panel's assessment of Ms. Dube and its recommendation to select her, the Approving Authority chose not to approve the LCRB's recommendation, in accordance with the staff selection procedures. Further, under the terms of the 22 September 2011 memorandum, the Approving Authority was required to give Ms. Dube preference unless "strong reasons

[1] *Verschuur v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-149.

relating to relative competence and integrity dictate[d] otherwise". The purpose of the Approving Authority's request for clarification from the Selection Panel was to determine whether there were strong reasons not to select Ms. Dube.

22. As the Approving Authority was on notice of the inconsistencies and contradictions in the Selection Panel's assessment of Ms. Dube and its recommendation to select her, it was procedurally correct, reasonable, and within her discretion to seek clarification from the Selection Panel prior to making the selection decision.

23. The Dispute Tribunal also erred on a question of fact by finding that the Selection Panel's ultimate recommendation was the result of pressure exerted on it by the Approving Authority. There was no evidence before the Dispute Tribunal to support a finding of undue influence. The documentary evidence regarding the selection process does not support the inferences drawn by the Dispute Tribunal concerning the Approving Authority's motivation for seeking clarification from the Selection Panel. The inconsistencies and contradictions in the Selection Panel's assessment and recommendation were self-evident. The Dispute Tribunal's finding was based on mere speculation.

24. Also, the Dispute Tribunal erroneously applied the Appeals Tribunal's jurisprudence in *Verschuur*. That case is distinguishable on the facts. In *Verschuur*, the individual responsible for taking the selection decision had asked the selection panel to provide a shorter list of candidates of appointable calibre, therefore clearly interfering with the evaluation of the candidates.[2] In this case, the Approving Authority asked for clarifications regarding the Selection Panel's assessment, not modifications of the assessment.

25. Further, the Dispute Tribunal erred by making findings on an issue that was outside the scope of the application. Ms. Dube withdrew her allegation that the Approving Authority's request for clarification from the Selection Panel was unlawfully motivated at the case management discussion. The Dispute Tribunal departed from the scope of the case by making a finding that the Approving Authority exercised undue influence, and it denied the Secretary-General the opportunity to address this issue before making its adverse finding.

[2] *Ibid.*, para. 42.

26. The Dispute Tribunal erred in awarding compensation to Ms. Dube. The award of two years' net base salary at the GS-7 level for loss of opportunity was not supported by evidence that Ms. Dube was unemployed for the two-year period following her separation from service. The Dispute Tribunal failed to apply the Appeals Tribunal's jurisprudence on awarding compensation for loss of salary, in particular the need to take into account an applicant's gainful employment after separation.[3] In addition, the award of three months' net base salary at the GS-6 level for undue influence was flawed as Ms. Dube did not adduce any evidence of harm. Finally, there are no exceptional circumstances warranting an award above the cap of two years' net base salary under Article 10(5) of the Dispute Tribunal Statute. The award of compensation appears to be of a punitive nature, in contravention of Article 10(7) of the Dispute Tribunal Statute.

27. The Secretary-General requests the Appeals Tribunal to vacate the UNDT Judgment in its entirety. In the alternative, he requests that the award of compensation be reduced.

**Ms. Dube's Answer**

28. The Dispute Tribunal correctly found that the Approving Authority breached UNICEF's staff selection procedures. The Secretary-General raises a new argument on appeal to justify the non-selection decision. In his reply to the application, the Secretary-General did not rely upon the 22 September 2011 memorandum as the basis for the Approving Authority's request for clarification from the Selection Panel. Having failed to rely upon the memorandum before the Dispute Tribunal, the Secretary-General is precluded from raising it for the first time on appeal.

29. In any event, the 22 September 2011 memorandum did not provide a basis for the Approving Authority to request clarification from the Selection Panel of its assessment of Ms. Dube. The Panel's assessment did not provide sufficient grounds to justify not giving Ms. Dube preference for the position. The Approving Authority was seeking a review of Ms. Dube's suitability for the position.

[3] *Mwamsaku v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-246, para. 24; *Mushema v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-247, para. 24.

30. The Approving Authority was bound to follow UNICEF's staff selection system, and the 22 September 2011 memorandum is subordinate to the promulgated rules and directives on staff selection. The staff selection system does not include a procedure for the Approving Authority to seek clarification from the Selection Panel. Her action was therefore *ultra vires* and constituted a serious procedural breach.

31. The Dispute Tribunal did not err in fact by finding that the Selection Panel's ultimate recommendation was the result of the Approving Authority's intervention. The matters raised by the Approving Authority had already been addressed by the Selection Panel following the LCRB's initial review of the selection process. The Selection Panel's subsequent decision that Ms. Dube was not suitable for the positon was solely attributable to the Approving Authority's intervention.

32. Even if the Dispute Tribunal erred in finding that the Approving Authority exercised undue influence on the Selection Panel, the finding did not change the outcome of the case. The Dispute Tribunal made a separate finding of procedural irregularity, which was sufficient to vitiate the non-selection decision.

33. The Dispute Tribunal did not make findings that were outside the scope of the application. The Dispute Tribunal did not find or imply an unlawful motive on the part of the Approving Authority. Rather, the Dispute Tribunal's findings offered an explanation for her actions.

34. On compensation, the amendment to Article 10(5) of the Dispute Tribunal Statute in General Assembly resolution 69/203 does not apply to this case due to the principle that changes in the law cannot be retroactive. The loss of opportunity suffered by Ms. Dube was clearly established by the facts of the case. In the alternative, Article 10(5) of the Dispute Tribunal Statute, as amended, does not prevent the award of damages for a patent breach of her rights in accordance with the Appeals Tribunal's jurisprudence in *Asariotis*.[4]

35. The Dispute Tribunal did not err in awarding Ms. Dube compensation of two years' net base salary for loss of opportunity. Ms. Dube's employment history in the two-year period subsequent to her separation from service is not relevant to the calculation of damages. However, should the Appeals Tribunal find that Ms. Dube's earnings ought to

[4] *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, paras. 36-38.

have been taken into account, the issue of compensation ought to be remanded back to the Dispute Tribunal. Alternatively, the Appeals Tribunal may take into account the evidence of her earnings to determine the appropriate award of compensation. Ms. Dube annexes additional documentary evidence to her appeal to demonstrate that her earnings during the period from March 2013 to March 2015 were approximately USD 12,256 gross and USD 9,643 net.

36. Finally, the Dispute Tribunal did not err in awarding moral damages of three months' net base salary. The Dispute Tribunal identified a fundamental breach of Ms. Dube's rights in the form of the Approving Authority's intervention in the selection process. Ms. Dube requested moral damages in her application and her non-selection led to stress and turmoil. The award of compensation was not punitive in nature. The award was reasonable and in line with the prevailing jurisprudence.

## Considerations

*Did the UNDT err in finding that the Approving Authority breached UNICEF's staff selection procedures?*

37. In considering the arguments made on appeal in this case, we recall our jurisprudence on how the UNDT should exercise its powers of judicial review in relation to matters of appointments and promotions.

38. In *Ljungdell*, we referred to the discretion which vests in the Administration in the following terms:[5]

> ... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

[5] *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30, citing *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216 and citations therein.

39. In *Abbassi*, we emphasized that:[6]

> ... [I]n reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.
>
> ... The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

40. In *Rolland*, we stated:[7]

> ... The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion.
>
> ... All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.
>
> ...
>
> ... There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

41. UNICEF's selection process consists of three main steps and is briefly summarized in Section 2.3 of CF/EXD/2009-008 (Staff Selection Policy), which simply states:

> Selection panels shall assess the candidates' relative suitability for the post, and recommend one or more suitable candidates[.] ... Central Review Bodies shall review these recommendations, subject to the provisions of section 7. The Executive Director

[6] *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, paras. 23 and 24.
[7] *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20, 21 and 26.

> has delegated the authority to make the final selection decision on the basis of geographic location, category and function of the respective post[.]

42. The UNDT carefully analyzed the legal framework governing UNICEF's selection process in these clear terms:[8]

> ... It is clear from this provision that there are three different levels in the UNICEF selection process. The first level is specifically provided for under section 1.5 and is the assessment of shortlisted candidates by a selection panel which will conduct an oral interview among other things. The Panel is responsible for deciding on the list of recommended candidates. The said Panel is established, in the case of recruitments in the general service category in country offices, by the Deputy Country Representative or Chief of Operations.
>
> ... The second level in the process is the review by the CRB or LCRB in the case of general service posts such as in this case. The LCRB reviews the selection process carried out by the Panel. The purpose and scope of this review is to ensure that the Panel complied with provisions of the United Nations Staff Regulations and Rules; applicable UNICEF policies, including the Staff Selection Policy; and the evaluation criteria as stipulated in the vacancy announcement.
>
> ... Section 5.1(b) of CF/EXD/2009-009 clearly stipulates that when the LCRB has questions or doubts regarding the proper application of the applicable procedures by the Panel, it shall request the necessary information and if the questions and doubts are resolved[] to its satisfaction[,] it shall send the recommendations of the Panel to the Approving Authority and inform him/her that applicable procedures were followed.
>
> ... If on the other hand, its questions and doubts are not resolved after obtaining additional information, the LCRB shall inform the Approving Authority that the applicable procedures were not followed while transmitting the Panel's recommendation.
>
> ... Under section 7.3, when the LCRB finds that the applicable procedures were not followed, it shall state its reasons and recommend to the Approving Authority to return the case to the Selection Panel for re-evaluation or cancel the selection process and re-advertise the post.
>
> ... The third and final level is that of the Approving Authority. Section 7.4 of CF/EXD/2009-008 provides that in all cases, the recommendations of the LCRB shall be given due consideration by the Approving Authority.

[8] Impugned Judgment, paras. 71-79.

> ... The Approving Authority may approve the recommendation of the LCRB as provided for in section 8.2 of CF/EXD/2009-008 and section 5.5 of CF/EXD/2009-009 and go on to make a selection decision.
>
> ... Section 8.2 provides that the Approving Authority shall normally select the highest-ranking candidate from the Selection Panel's list of recommended candidates or another person from the same list and shall document the reasons why he or she deviated from the ranking order.
>
> ... Under section 5.5, instead of approving the LCRB's recommendation, the Approving Authority may return the case to the LCRB for further review giving reasons. Another option was not to agree with the LCRB and make a selection decision and inform the LCRB of the decision made and the reasons for making it.

43. The Secretary-General submits that the Dispute Tribunal erred in law by finding that the Approving Authority breached UNICEF's staff selection procedures. The Secretary-General submits further that, in view of the contradictions between the Selection Panel's assessment of Ms. Dube and its recommendation to select her, the Approving Authority chose not to approve the LCRB's recommendation, in accordance with the staff selection procedures. The purpose of the Approving Authority's request for clarification from the Selection Panel was to determine whether there were strong reasons not to select Ms. Dube.

44. The UNDT in our opinion effectively and correctly dismissed these submissions in this manner:[9]

> ... [At] paragraph 33 of the Secretary-General's Reply, he submitted that the Approving Authority acted exactly as expected of her by choosing not to agree with the LCRB, made a selection decision and informed the LCRB of it giving reasons.
>
> ... Clearly these submissions taken together are either confused or lacking in honesty in so far as they misrepresent the true state of the applicable law. Section 5.5(c) as already stated above provides that where the Approving Authority chooses not to agree with the LCRB, the only option open to him or her was to make a selection decision and inform the LCRB of it while giving reasons for doing so. The Approving Authority in this instance did not act in accordance with any UNICEF legislation or Executive Directive on recruitment selection.

[9] *Ibid*., paras. 82 and 83.

45. The UNDT went on to make the following findings:[10]

> ... It is agreed on all sides that the Selection Panel conducted an assessment of shortlisted candidates, found two candidates suitable and recommended [Ms. Dube] for selection in view of the memorandum of the Deputy Executive Director even though the other recommended candidate was ranked higher than her.
>
> ... The facts also show that the LCRB endorsed the recommendation after it had resolved certain questions and doubts that had arisen from the Panel's recommendation. It is not contested that the Approving Authority did not approve the recommendations of the Selection Panel and the LCRB for the selection of [Ms. Dube].
>
> ... The facts further show that the said Approving Authority did not return the case to the LCRB for further review or disagree with the said LCRB and make a selection decision as provided for by section 5.5 of CF/EXD/2009-009.
>
> ... Instead, the Approving Authority avoided the LCRB and directly queried the Selection Panel as to why it had recommended [Ms. Dube] for selection in spite of its finding that she was rated as "Developing Proficiency" in two areas of competency.
>
> ... There is no contest that this action on the part of the Approving Authority constituted a substantial procedural breach or irregularity. She had clearly deviated and departed from the clear requirements of UNICEF's Staff Selection Policies and resorted to her own arbitrary methods.

46. We note that the Secretary-General, apart from merely repeating arguments which did not succeed before the UNDT, has failed to demonstrate to this Tribunal the errors of fact or law in the UNDT's findings.

47. Section 5.5 of CF/EXD/2009-009 (Central Review Bodies) sets out the options available to the Approving Authority in making the final selection decision as follows:

> The approving authority may:
>
> (a) approve the CRB's recommendations;
>
> (b) return the case to the CRB for further review, giving his/her reasons; or
>
> (c) choose not to agree with the CRB's recommendation, make his/her decision and inform the CRB of his/her decision, and the reasons thereof.

48. We agree with the UNDT's findings that the Approving Authority's request for clarification from the Selection Panel was not in accordance with the staff selection procedures in Section 5.5 cited above. This request obviously resulted in the Selection Panel

[10] *Ibid.*, paras. 84-88.

changing its recommendation, which was unfortunate in view of the 22 September 2011 memorandum from the Deputy Executive Director-Management of UNICEF, addressed to Regional Directors, Headquarters Directors and UNICEF Representatives, which reminded them of the policy regarding the preference to be given to a staff member encumbering an abolished post contained in CF/AI/2010-001 (Separation from Service).

49. Section 9 of CF/AI/2010-001, which governs termination of appointment for reasons of abolition of post or reduction in staff, provides, in part, as follows:

> 9.8 A post is "suitable" if the staff member on an abolished post has the core and functional competencies required for the post, as assessed in the respective staff selection process (see CF/EXD/2009-008 on Staff Selection).
>
> ...
>
> 9.10 Equally suitable candidates on abolished posts will be retained in service in the following order of preference:
>
> (a) staff members holding permanent appointments;
>
> (b) staff members holding continuing appointments;
>
> (c) staff members holding fixed-term appointments.
>
> If two or more staff members on abolished posts within the same category are under consideration, the most suitable candidate will be selected.

50. With regard to Section 9 of CF/AI/2010-001, the 22 September 2011 memorandum stated that:

> If a staff member on an abolished post is one of the recommended candidates he/she would be given preference even if he/she is not the first recommended candidate unless strong reasons relating to relative competence and integrity dictate otherwise (see Staff Rule 9.6(e)). Non-selection of a staff member on an abolished post should be justified in writing, explaining why the staff member who meets the minimum requirements for the post is not preferred and how his or her core and functional competencies as assessed in the staff selection process did not match those required for the post.

51. Even though this memorandum was for guidance purposes only and did not amend or supersede the staff selection procedures, it provided guidance on the Approving Authority's exercise of discretion for the purposes of UNICEF's obligation to give Ms. Dube preference as a staff member encumbering an abolished post under

Section 9.10 of CF/AI/2010-011. The memorandum did not provide a basis for the Approving Authority to request clarification from the Selection Panel concerning its recommendation of Ms. Dube for the position.

52. As the Approving Authority did not agree with LCRB's recommendation, she ought to have followed any of the two options open to her under Section 5.5(b) or (c) of CF/EXD/2009-009 rather than go directly to the Selection Panel for clarification of its recommendation.

53. From the foregoing, we hold that the UNDT correctly found that the Approving Authority breached UNICEF's staff selection procedures. The breach constituted a substantial procedural breach or irregularity resulting in the loss of opportunity of continued employment with UNICEF for Ms. Dube, who was encumbering an abolished post.

54. We find no merit in the Secretary-General's appeal against the UNDT Judgment.

*Did the UNDT err in awarding compensation for loss of opportunity and moral damages?*

*1) Compensation for loss of opportunity*

55. The UNDT in awarding compensation for loss of opportunity held:[11]

> The Tribunal awards the Applicant compensation amounting to two years' net base salary at the GS7 Programme Assistant level for the loss of opportunity caused by the failure by the UNICEF Administration to follow its own guidelines, rules and procedures since were it not for these failures, the Applicant had a 100% chance of selection for the said post and a two-year contract.

56. It seems that the procedural irregularities were the determining factors used by the UNDT to award a maximum of two years' salary to compensate Ms. Dube for the net salary that she would have earned had she not lost the opportunity to be selected for the position of Programme Assistant on Social Policy and Economics at the GS-7 level.

57. The Secretary-General appeals against the award of two years' net base salary and submits that the UNDT erred by not taking into account Ms. Dube's earnings after her separation from service. This is a legitimate ground of appeal.

[11] *Ibid*., para. 113.

58. In the present case, the UNDT awarded Ms. Dube two years' net base salary to compensate her for her real loss of salary resulting from the loss of opportunity of a two-year contract with UNICEF.

59. There is a drawback in this approach as the UNDT failed to take into account other factors such as the staff member mitigating his or her loss, or taking up a better position, or earning income in the period between the date of separation and the date of judgment.[12]

60. We take note that the Secretary-General raised the issue in his reply to Ms. Dube's application before the UNDT.[13] Though the UNDT did not take oral evidence at the hearing, we are of the view that for proper case management, the UNDT should have ordered Ms. Dube to disclose any income she may have earned during the period, just as our jurisprudence requires.

61. We further take note that Ms. Dube in her answer to the Secretary-General's appeal exhibited documents showing that the income she earned between March 2013 and March 2015 totaled approximately USD 12,256 gross and USD 9,643 net.

62. Ordinarily, Ms. Dube ought to have sought leave from the Appeals Tribunal before filing this further evidence. We have consistently held that all evidence is to be submitted to the first instance Tribunal, and that we will not admit evidence which was known to the party and could have, with due diligence, been presented to the UNDT.[14]

63. The Appeals Tribunal may receive additional evidence in exceptional circumstances, in accordance with Article 2(5) of the Appeals Tribunal Statute:

> In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. Where this is not the case, or where the Appeals Tribunal determines that a decision cannot be taken without oral testimony or other forms of non-written evidence, it shall remand the case to the Dispute Tribunal. The evidence under this paragraph shall not include

[12] *Supra*, note 3.
[13] Impugned Judgment, para. 40 b.
[14] *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097, para. 17; *Ihekwaba v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-083, para. 16; *Zhang v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-078, para. 24; *Shakir v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-056, para. 12.

> evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.

64. In this case, this Tribunal is asked to determine if the compensation awarded for loss of opportunity was fair, adequate, and reasonable, or if it was in need of a downward revision. The new evidence introduced by Ms. Dube demonstrates that between March 2013 and March 2015, she earned a total income of approximately USD 12,256 gross and USD 9,643 net.

65. We find that there are exceptional circumstances that allow this Tribunal to receive the additional documentary evidence, which would affect the outcome of the case. It is in the interest of justice and the efficient and expeditious resolution of the proceedings for the additional documentary evidence to be received, as it would enable the Appeals Tribunal to establish Ms. Dube's earnings during the relevant period and set the appropriate award of compensation.

66. We will accordingly receive this new evidence under Article 2(5) of the Appeals Tribunal Statute. Taking this evidence into consideration, we come to the conclusion that the compensation awarded by the UNDT is on the high side and therefore was in error.

67. We will therefore allow the appeal of the Secretary-General and vary the award of compensation of two years' net base salary by deducting the sum of USD 9,643, Ms. Dube's net earnings during the two-year period following her separation from service.

*2) Moral Damages*

68. The Secretary-General contends that the award of three months' net base salary at the GS-6 level for undue influence was flawed as Ms. Dube did not adduce any evidence of harm.

69. We uphold this submission, as Ms. Dube withdrew the allegation that the Approving Authority was improperly motivated and therefore no evidence was led on this issue.

70. From the foregoing, the Secretary-General's appeal succeeds on the issue of moral damages.

## Judgment

71. The Secretary-General's appeal on the merits is dismissed. The Judgment of the UNDT on the merits is affirmed.

72. We allow the Secretary-General's appeal against compensation to the extent that the award of two years' net base salary at the GS-7 level for loss of opportunity is varied by reducing the award by the amount of USD 9,643. The award of three months' net base salary at the GS-6 level for moral damages is also set aside.

73. The interest due on the remainder of the compensation awarded to Ms. Dube is to be calculated from the date of the UNDT Judgment.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

| *(Signed)* | *(Signed)* | *(Signed)* |
|---|---|---|
| Judge Adinyira, Presiding | Judge Thomas-Felix | Judge Simón |

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar