



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

Judgment No. 2016-UNAT-691

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

JUDGMENT

Before: Judge Sabine Knierim, Presiding
Judge Deborah Thomas-Felix
Judge John Murphy

Case No.: 2016-921

Date: 28 October 2016

Registrar: Weicheng Lin

Counsel for Mr. Krioutchkov: Self-represented

Counsel for Secretary-General: Carla Hoe

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Vladislav Krioutchkov against Judgment No. UNDT/2016/013, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 24 February 2016, in the case of *Krioutchkov v. Secretary-General of the United Nations*. Mr. Krioutchkov filed the appeal on 21 April 2016. On 24 June 2016, the Secretary-General filed both an answer to Mr. Krioutchkov's appeal and a cross-appeal. No answer to the cross-appeal has been received to date.

Facts and Procedure

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

... On 14 September 2012, a vacancy for a post of Russian Reviser (P-4), Russian Translation Section ("RTS"), Division of Conference Management ("DCM"), United Nations Office at Geneva ("UNOG"), was advertised under JO 12-LAN-UNOG-25120-R-Geneva (L) (JO 25120). The deadline for applications was 20 November 2012. The Job Opening ("JO") read, *inter alia*:

This post is located in the [RTS] in the [DCM]

...

the Reviser will be responsible for the following duties: ...

(emphasis added)

... The Respondent claims that, since its initial introduction in the Inspira system, the corresponding JO concerned two identical posts: one to become vacant on 1 December 2012, and the other on 1 August 2013. The JO did not indicate that it concerned two posts.

... The Applicant applied on 24 September 2012. Out of 40 applicants, five were screened as eligible: two from the roster of pre-selected candidates for similar positions—i.e., the Applicant and one other candidate—and three non-rostered candidates. The Applicant had an informal interview by phone on 18 December 2012 with the Hiring Manager alone.

... Upon recommendation of the Hiring Manager, dated 4 January 2013, the one rostered candidate other than the Applicant was selected on 7 January 2013. The selection memorandum signed by the Director-General, UNOG, indicated that

¹ The following text is taken from Judgment No. UNDT/2016/013, paragraphs 3-14.

“[DCM would] submit a different recommendation to fill post 500323 [the second post], which [would] be vacant on [1 August 2013]”.

... On 1 February 2013, after one of the non-rostered candidates had been found not suitable, the remaining two non-rostered candidates underwent a competency-based interview. The assessment panel recommended the two interviewed candidates—giving detailed comments based on their interviews—and the Applicant “as [a] rostered candidate without formal evaluation”. The Central Review Committee endorsed these recommendations on 18 April 2013.

... On 15 May 2013, the Hiring Manager recommended the three candidates, including the Applicant and the candidate eventually selected, while proposing for promotion one of the interviewed non-rostered candidates, who was indeed selected on 23 May 2013.

... By email dated 23 May 2013, the Applicant was informed that he had been placed on the roster of pre-approved candidates for potential consideration for future JOs.

... On 22 January 2014, the Applicant sent an email to the Chief, RTS, UNOG, requesting to be informed about the P-3/P-4 vacancies that had been advertised in 2013 in RTS. The Chief, RTS, replied on 30 January 2014 *inter alia* that no P-3 or P-4 positions had been advertised in 2013 in RTS.

... On 31 January 2014, the Applicant sent a follow-up email querying if any P-3/P-4 posts had been filled in 2013. In reply to this query, a Senior Human Resources Officer, Human Resources Management Service (“HRMS”), UNOG, confirmed by email of 1 February 2014 that a P-4 position of Russian Reviser had been filled effective 1 August 2013 as a result of JO 25120.

... In turn, by email of 3 February 2014 to said Senior Human Resources Officer, the Applicant indicated that it looked like a second round of selection for the same vacancy seemed to have taken place without any advertising, and asked what had happened after he had been rostered and a successful candidate had been appointed in January 2013; he also asked if any P-3 posts were filled without advertisement in the same year.

... In response, on 5 February 2014, the Senior Human Resources Officer, UNOG, confirmed that two posts were associated to the JO in question, that “both posts were filled as a result of the selection process initiated by JO 25120 for which [the Applicant was] fully considered”, and that “there was no ‘second round’ of interviews”.

... On 29 March 2014, the Applicant requested management evaluation of the decision “on the selection of [a] second candidate for the [JO] 12-LAN-UNOG-25120-R-GENEVA (L)”. The decision was upheld by letter dated 29 April 2014 of the Chief, Management Evaluation Unit, on behalf of the Secretary-General.

3. On 18 July 2014, Mr. Krioutchkov filed an application with the UNDT, contesting his non-selection, based on the non-advertisement of a second post under JO 25120, and the selection of a candidate without any competition under the said JO.

4. In Judgment No. UNDT/2016/013 now under appeal, the Dispute Tribunal made the following findings:

a) Mr. Krioutchkov was seeking to impugn his non-selection to the second post advertised under JO 25120. That was an appealable administrative decision.

b) Mr. Krioutchkov did not miss the time limits for the formal contestation of that decision when he filed his request for management evaluation on 29 March 2014, as he only learnt, on 5 February 2014, that a second selection decision had been taken under JO 25120 though the wording of the JO did not clarify the numbers of the posts included therein.

c) The lack of announcement of two posts under one JO was a fundamental irregularity that vitiated the recruitment process and the resulting selection decision as regards the second post.

5. Therefore, the UNDT ordered rescission of the “severely flawed” decision to fill the second post under JO 25120, or in the alternative, compensation to Mr. Krioutchkov in the sum of USD 5,000: USD 1,000 as the alternative compensation in lieu of rescission and USD 4,000 as non-pecuniary damages. The Dispute Tribunal clarified that as the application was filed before the General Assembly amended the UNDT Statute to require evidence to support the award of non-pecuniary damages, the amendment did not apply to Mr. Krioutchkov’s case. Consequently, the UNDT awarded USD 4,000 to Mr. Krioutchkov on the strength of the *Asariotis* Judgment that the Appeals Tribunal issued in 2013, which did not require evidence of moral damages if the breach was of a fundamental nature.²

² *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.

Submissions

Mr. Krioutchkov's Appeal

6. The UNDT erred on questions of law and fact, resulting in a manifestly unreasonable decision as its award of compensation was inadequate. Under *Gordon Pelanne* and *Hastings*,³ on which the UNDT relied, and in view of the compelling nature of his case, the Dispute Tribunal should have awarded Mr. Krioutchkov a greater monetary award, taking into account his 50 per cent of chance for promotion (as opposed to the UNDT's estimate of 33 per cent chance) and the lost earnings and entitlements including pension contributions.

7. Mr. Krioutchkov requests that the Appeals Tribunal award him a monetary compensation equivalent to 18 months' salary as per *Gordon Pelanne*, or the difference between P-3 and P-4 for two years, which should be adjusted by the number of short-listed candidates and his chance of promotion (either 33 per cent or 50 per cent), and a sum equivalent to the Organization's portion of his pension fund contributions. Mr. Krioutchkov also requests that the Appeals Tribunal leave the UNDT's award of USD 4,000 for moral damages "as is".

The Secretary-General's Answer

8. Mr. Krioutchkov has failed to identify any error on the part of the UNDT that would justify modifying the in-lieu compensation of USD 1,000 awarded. He merely disagrees with the total sum of compensation that the UNDT awarded him. This is not one of the five grounds for an appeal as set forth in Article 2 of the Statute of the Appeals Tribunal.

9. The findings by the former Administrative Tribunal in *Gordon Pelanne* are not binding on the UNDT or the Appeals Tribunal. Moreover, the facts in *Gordon Pelanne* are distinguishable from those of the present case. In the present case, Mr. Krioutchkov had the opportunity to compete for the second post and was fully and fairly considered.

³ Former Administrative Tribunal Judgment No. 914, *Gordon Pelanne* (1999); *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

10. Mr. Krioutchkov has failed to demonstrate any error by the Dispute Tribunal in basing the amount of compensation on salary instead of earnings. In fact, compensation in lieu of rescission based on salary is fully consistent with the jurisprudence of the Appeals Tribunal.

11. Mr. Krioutchkov has failed to establish that his chances of success to be selected for the second post were of 50 per cent or even 67 per cent.

12. The Secretary-General requests that the Appeals Tribunal dismiss the present appeal in its entirety.

The Secretary-General's Cross-Appeal

13. The Dispute Tribunal erred in law and in fact by finding that Mr. Krioutchkov had requested management evaluation within the prescribed time limit and that his UNDT application was therefore receivable. Mr. Krioutchkov applied to JO 25120 and was notified of his non-selection on 23 May 2013. He should have raised his concerns by requesting management evaluation within 60 days from 23 May 2013, because the time limit started to run on 23 May 2013, and not on 5 February 2014. The fact that JO 25120 did not specify two posts involved does not affect the precise moment in time when he received the notification. Mr. Krioutchkov tried to create a new opportunity to contest his non-selection almost one year after he had been notified of his non-selection.

14. The Dispute Tribunal erred in law by ordering rescission of the contested decision in respect of the filling of the second post. There is no link between the non-advertisement of the second post and the contested decision, as such irregularity identified by the UNDT had no negative consequences on the outcome of the selection process or Mr. Krioutchkov's non-selection. In other words, had the second post been advertised, the consequences for Mr. Krioutchkov would have been the same. Since the irregularity had no impact on Mr. Krioutchkov's candidature and the consideration for the second post, it was not of a fundamental nature.

15. The Dispute Tribunal erred in law by not applying Article 10(5) of the UNDT Statute as amended by the General Assembly and by awarding moral damages without the support of any evidence. Contrary to the UNDT's findings, the jurisprudence of the Appeals Tribunal provides for the applicability of the amendment to Article 10(5) of the UNDT Statute to cases

where the staff members' UNDT applications were filed prior to the entry into force of such an amendment.⁴

Considerations

Preliminary issue: Oral hearing

16. As a preliminary matter, Mr. Krioutchkov filed a request for an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute (Statute) and Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. In addition, we do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. Thus, the request for an oral hearing is denied.

Receivability of Mr. Krioutchkov's application

17. The Secretary-General submits that the UNDT erred in law and in fact by finding that Mr. Krioutchkov's request for management evaluation of 29 March 2014 was filed within the prescribed time limit of 60 days under Staff Rule 11.2(c), and that his application was therefore receivable. He is of the view that the application was not receivable as Mr. Krioutchkov was notified of his non-selection already on 23 May 2013, when he received confirmation by e-mail that he had not been selected for the position. The fact that JO 25120 did not specifically indicate that it covered two posts does, in his opinion, not affect the precise moment in time when he was notified of his non-selection. The Secretary-General also submits that the findings of the UNDT are not in accord with the legal framework, namely, Article 8(1)(c) and 8(3) of the UNDT Statute and Staff Rule 11.2(c), or the jurisprudence of the Appeals Tribunal.

18. These assertions do not put the findings of the UNDT into doubt. The UNDT, after analyzing and interpreting Mr. Krioutchkov's application, found that he was seeking to impugn his non-selection for the second post said to be covered by JO 25120 and that his application thus concerned an administrative decision open to judicial review. In examining the receivability of this application, the UNDT put weight on the fact that, by e-mail of

⁴ Citing, *inter alia*, *Maiga v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-638.

23 May 2013, Mr. Krioutchkov was informed about his non-selection for the first post advertised under JO 25120 (Post No. 500319), but not about his non-selection for the second post (Post No. 500323). It is clear from the reasoning in the Judgment that the UNDT regarded the non-selection for the first post and the non-selection for the second post as two different administrative decisions.

19. The Secretary-General, on appeal, has not addressed or examined the question as to whether there was one or two separate administrative decisions and the consequences for the receivability of the application. He merely states that “the fact that JO 25120 did not specifically indicate that the Position concerned two posts does not affect the precise moment in time when he was notified of his non-selection for the Position”. This allegation does not meet the standard of Article 2(1) of our Statute. The task of the Appeals Tribunal is to determine if the Dispute Tribunal has made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction. An appellant has the burden of satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal is defective. It follows that the appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective.⁵ This the Secretary-General has not done.

20. Apart from that, we agree with the Dispute Tribunal. Under the relevant legal framework, the notification of an administrative decision is the decisive act to trigger the time limit for a request for management evaluation.

Article 8(1) of the UNDT Statute reads as follows:

An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation ...

⁵ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, citing *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051 and *Al-Moued v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-458.

And Staff Rule 11.2(c) as set forth in ST/SGB/2011/1 reads:

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

The UNDT stated correctly that, regarding JO 25120, two separate administrative decisions were issued, one concerning the selection of a candidate for the first post No. 500319 in January 2013, and the other in respect of the selection of a candidate for the second post No. 500323 in May 2013.

21. The UNDT correctly applied the case law of this Tribunal in stating that time limits only started to run as of the moment where all relevant facts for a particular decision were known, or should have reasonably been known.⁶ There is also no error in its conclusion that, regarding his non-selection for the second post, Mr. Krioutchkov learnt only in the beginning of February 2014 that such an administrative decision had been taken. As neither the advertisement under JO 25120 nor the e-mail of 23 May 2013 revealed that there was a second post or that a second selection had taken place, he did not and could not have reasonably known that such an administrative decision had been issued. This case is thus distinguishable from *Ivanov*, where the applicant knew about his non-selection and tried to create a new opportunity by challenging the subsequent appointment of the selected candidate.⁷ It is also distinguishable from *Roig*, where the applicant was informed of the administrative decision not to appoint her and challenged the appointment of the selected candidate, and where we hold that the decision to appoint another candidate is not a second administrative decision which resets the applicable time limits.⁸ In Mr. Krioutchkov's case, there were two different selection processes resulting in two different selection decisions for two different posts. In order to trigger the statutory time limits for each selection decision, it is necessary for the Administration to notify the unsuccessful candidates of the issuance of each of such decisions.

⁶ See *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, para. 31, citing *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273.

⁷ *Ivanov v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-378.

⁸ *Roig v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-368, para. 19.

Did the UNDT err in law by ordering rescission of the contested decision in respect of the filling of the second post? Was the irregularity (the non-advertisement of the second post) of no fundamental nature because it had no impact on Mr. Krioutchkov's candidature and consideration for the second post?

22. The Secretary-General submits that the UNDT erred in law by ordering rescission of the contested decision because, whether or not the non-advertisement of the second post was inconsistent with Administrative Instruction ST/AI/2010/3 titled "Staff selection system", there was no link between any such irregularity and the contested decision. The irregularity had no consequence on the outcome of the selection process; in addition, the irregularity was not of a fundamental nature as it had no impact on Mr. Krioutchkov's candidature and consideration for the second post. In the view of the Secretary-General, the findings of the UNDT were not in accord with the well-settled jurisprudence of the Appeals Tribunal.

23. We find that the Secretary-General has misinterpreted the standard we have established in other cases where the selection process was tainted by (procedural) irregularities. In *Bofill*, we stated:⁹

The direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.

24. We uphold this standard. Following our jurisprudence, an irregularity in a selection process has no impact on the status of a staff member when he or she had no foreseeable chance of promotion; however, in a case where a staff member had a significant chance of promotion, the irregularity has a direct impact on the status of that staff member resulting in the rescission of the impugned decision. Applying these principles to the present case, it becomes clear that the UNDT has not erred in law by ordering the rescission of the selection decision for the second post. As the documentary evidence shows, Mr. Krioutchkov was not without a significant chance of promotion. On the contrary, out of the 40 applicants under

⁹ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174, para. 28. See also *Vangelova v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-172, para. 19.

JO 25120, he was among the three candidates recommended for the second post by the Hiring Manager.

Amount of compensation in lieu of rescission

25. Mr. Krioutchkov submits that the UNDT erred on a question of law and fact, resulting in a manifestly unreasonable decision as its award of compensation was inadequate.

26. In our view, the UNDT correctly applied Article 10(5) of the UNDT Statute, which states:

... As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

27. The UNDT's discretion under Article 10(5)(a) is constrained by the mandatory requirement to set an amount of compensation as an alternative to an order rescinding a decision on appointment, promotion or termination. Accordingly, pursuant to Article 10(5) of the UNDT Statute, where the UNDT rescinds a contested administrative decision concerning appointment, promotion or termination, it must set an amount of compensation in lieu of rescission or specific performance, which the Secretary-General may elect to pay instead.¹⁰

¹⁰ *Verschuur v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-149, para. 48.

28. The UNDT may award compensation for actual pecuniary or economic loss, including loss of earnings.¹¹ We have consistently held that “compensation must be set by the UNDT following a principled approach and on a case by case basis” and “[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case”.¹²

29. In the instant case, the UNDT found that Mr. Krioutchkov’s non-selection for the second post under JO 25120 was unlawful. The UNDT therefore rescinded the selection of the successful candidate and awarded compensation in lieu of such rescission pursuant to Article 10(5)(a) above.

30. We find no fault with the UNDT’s award of compensation of USD 1,000 as the UNDT considered the chances of success as well as the difference of net base salary between the one Mr. Krioutchkov received at his current grade and step and his potential income after promotion as of August 2013, when the second post became vacant, feeling compelled by *Hastings* to limit the projection of the difference in salary to two years.¹³

The UNDT’s award of moral damages

31. The Secretary-General contends that the UNDT erred in law by awarding moral damages of USD 4,000 in spite of the General Assembly’s amendment to Article 10(5)(b) of the UNDT Statute, which provides that compensation may only be awarded for harm when supported by evidence. As the amendment was in effect on 24 February 2016, when the UNDT issued the impugned Judgment, the UNDT erred by awarding compensation in the absence of evidence of harm suffered.

32. We vacate the award of moral damages, concluding that the Dispute Tribunal erred in law by not applying the UNDT Statute as it existed at the time it rendered its Judgment. As an award of damages takes place at the time the award is made, applying the amended statutory provision is not the retroactive application of law. Rather, it is applying the existing

¹¹ *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131.

¹² *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-528, para. 71, citing *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044, para. 20.

¹³ *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

law.¹⁴ Since Mr. Krioutchkov did not present evidence to sustain an award of moral damages, as required by the amended Statute, the UNDT in its decision made an error of law.

Judgment

33. Mr. Krioutchkov's appeal is dismissed.

34. The Secretary-General's cross-appeal of receivability and of the merits is dismissed; and his cross-appeal of the award of moral damages is granted.

35. Judgment No. UNDT/2016/013 is affirmed, except for the award of moral damages, which is vacated.

¹⁴ *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684, para. 63 (Full bench).

Original and Authoritative Version: English

Dated this 28th Day of October 2016 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Murphy

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar