



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

Judgment No. 2017-UNAT-712

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

JUDGMENT

Before: Judge Dimitrios Raikos, Presiding
Judge Deborah Thomas-Felix
Judge Rosalyn Chapman

Case No.: 2016-947

Date: 31 March 2017

Registrar: Weicheng Lin

Counsel for Mr. Krioutchkov: Self-represented

Counsel for Secretary-General: Nathalie Defrasne

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/052, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 4 May 2016, in the case of *Krioutchkov v. Secretary-General of the United Nations*. Mr. Vladislav Krioutchkov filed the appeal on 2 July 2016 and the Secretary-General filed his answer and cross-appeal on 25 August 2016. Mr. Krioutchkov did not file an answer to the cross-appeal.

Facts and Procedure

2. The following facts are uncontested:¹

... At the beginning of 2011, the Contractual Services Unit, Planning and Coordination Section (“PCS”), Division of Conferences Services (“DCS”), [United Nations Office at Nairobi (UNON)], launched the creation of [Job Opening (JO) 11-LAN-UNON-18526-R-NAIROBI for the post of Chief, Russian Translation Unit (RTU) (P-4), with UNON]. An internal email of 25 January 2011 indicated that the Chief, Translation and Editorial Services (“TES”), UNON, although “on assignment in Bangkok for the next six months”, would be the Hiring Manager for the Nairobi-based position, while the Chief, PCS, would be [the] “alternate Hiring Manager in order to facilitate actions required” on the JO.

... With effect from 29 January 2011, the Chief, TES, UNON, was temporarily assigned to the position of Chief, Conference Services Section, Economic and Social Commission for Asia and the Pacific (“ESCAP”), keeping a lien to his post in UNON, until he was officially transferred to ESCAP on 5 September 2011. Effective 9 March 2011, a Reviser of the RTU, UNON, was appointed as [Officer-in-Charge (O-i-C)], TES.

... In late February-early March 2011, the recruiters had correspondence with the O-i-C, TES, concerning the development of the above-referenced JO.

... On 17 April 2011, the above-referenced JO was advertised, with 18 June 2011 as the deadline for applications. The Applicant applied on 31 May 2011.

... On 22 June 2011, the candidates for the JO were released to the Chief, PCS.

... The Applicant and another candidate underwent a competency-based interview on 5 September 2011, although due to technical problems, the Applicant’s interview had to be resumed on 27 September 2011.

¹ Impugned Judgment, paras. 11-17.

... In October 2011, the panel submitted a signed “Report of the Departmental Panel”, recommending the other candidate—namely, the Reviser of the RTU, UNON, who had been appointed as O-i-C, TES—for the position, as the one candidate who “met all the criteria laid down in a most satisfactory manner”. Only at an undetermined posterior date was a “Comparative Analysis Report” filled in Inspira, reflecting the different competencies and ratings.

... Upon retirement of the then Chief, RTU, the same Reviser, RTU, who was already performing as O-i-C, TES, became O-i-C, RTU, UNON, from 1 November 2011 until 20 December 2011.

... By memorandum dated 20 December 2011, the Secretary, Central Review Committee (“CRC”), UNON, forwarded to the Chief, DCS, the minutes reflecting the discussion on the candidates for the JO at stake, requesting him to proceed with the selection of the candidate and, subsequently, to forward a written confirmation to the local human resources office to process the administrative details of the selection.

... On 22 December 2011, the Chief, DCS, selected the Reviser, RTU—then acting simultaneously as O-i-C, RTU, and O-i-C, TES, UNON—for the post of Chief, RTU, UNON.

... More than two years later, as of the beginning of 2014, Inspira continued to show that the post was under consideration. On 27 January 2014, the Applicant requested an update on the vacancy to the Director, Business Re-engineering Group, Umoja (United Nations [Enterprise Resource Planning (ERP)] Project), who forwarded his message to the Chief, RTU, UNON. The latter replied, on the same day, that he should “patiently wait for a selection decision”.

... On 17 April 2014, after sending two follow up emails, where he reiterated that he was inquiring about the post of Chief, RTU, the Applicant received an email response from a Human Resources Officer, Recruitment & Planning Section, Human Resources Management Service (“HRMS”), UNON, explaining that the selection process in question had been completed, the position filled “some time back” and that upon closing of a JO, Inspira sends an automated email to applicants, although that was not technically possible in the system earlier.

... The Applicant replied on 18 April 2014 reminding that Administrative Instruction ST/AI/2010/3 clearly requires the Administration to inform of the outcome of the selection process those candidates who were convoked for assessment but not selected for the post.

... On 29 April 2014, the Applicant requested management evaluation of the impugned decision. The decision was upheld by letter dated 10 June 2014 of the Under-Secretary-General for Management, on behalf of the Secretary-General.

... The Applicant filed [an] application [with the UNDT] on 18 July 2014. ...

3. The UNDT found several procedural irregularities which led to the impugned selection decision. Based on these irregularities, the UNDT ordered that the impugned selection decision be rescinded, or alternatively, that Mr. Krioutchkov be paid USD 2,000 as compensation in lieu of rescission. The UNDT set the amount by taking into account Mr. Krioutchkov's "chances of being selected, knowing that only two candidates were shortlisted and interviewed, but also that he was not recommended by the panel".² The UNDT also took into account "the difference between the salary [Mr. Krioutchkov] [wa]s paid at his current grade and step and his potential income after promotion as of December 2011, when the selected candidate took up his new functions"³ and the fact that, unsuccessful in his applications for promotion, he remained at the P-3 level at the time the Judgment was issued. Additionally, referring to *Hastings*,⁴ the UNDT limited the projection of the difference in salary to two years.

4. The UNDT awarded moral damages in the amount of USD 3,000. The UNDT found that the award was warranted "in light of the uncertainty and sense of neglect occasioned to the [Appellant] by the inordinate delay in communicating his non-selection and the unresponsive and dismissive-not to say mocking- attitude of the concerned UNON officials".⁵ The UNDT held that "although art. 10.5(b) of its Statute was recently amended with the aim of hardening the standard of proof of the non-pecuniary harm suffered, the new rule [did] not apply to the present case, by virtue of the principle of non-retroactivity of norms" because the amendment had not been "in effect at the time the application at bar was filed in 2014".⁶

Submissions

Mr. Krioutchkov's Appeal

5. Mr. Krioutchkov appeals the amount of compensation awarded by the UNDT in lieu of rescission of the impugned decision. He contends that had the UNDT properly relied on the Appeals Tribunal's findings in *Hastings*, the compensation awarded would have been based on "earnings", including "gross salary, [p]ost [a]djustment, [m]obility and [n]on-removal elements of mobility and hardship allowance as well as [d]ependency [a]llowance", rather than "salary";

² *Ibid.*, para. 82.

³ *Ibid.*

⁴ *Ibid.*, referring to *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109, para. 19.

⁵ Impugned Judgment, para. 84.

⁶ *Ibid.*, para. 85.

and would have also included the difference in the Organization's pension contribution. Thus, the correct amount should have included "the difference in earnings for two years ... and pension contribution[s] by the [O]rganization ... adjusted by the number of candidates (2)". The alternative compensation awarded would have therefore amounted to USD 46,353 instead of USD 2,000.

6. Mr. Krioutchkov clarifies that he does not appeal the award of moral damages.

7. Mr. Krioutchkov requests that the Appeals Tribunal hold an oral hearing.

The Secretary-General's Answer and Cross-Appeal

Answer

8. Mr. Krioutchkov has failed to establish that the UNDT erred by setting the amount of compensation in lieu of rescission of the impugned decision based on the difference between the salary he receives and the salary he might have received upon promotion. In its Judgment, the UNDT thoroughly considered the circumstances of the case and calculated the amount of compensation in lieu of rescission based on Mr. Krioutchkov's chance of success to be selected knowing that only two candidates were shortlisted and interviewed; the fact that he had not been recommended by the panel; and the difference between the salary he receives at his current grade and the potential salary that he would have received had he been promoted as of December 2011 when the selected candidate took up his new functions. The UNDT specifically referred to the Appeals Tribunal's finding in *Hastings* and limited the projection of the difference in salary to two years.

9. Mr. Krioutchkov has not demonstrated any error by the UNDT in basing the amount of compensation on salary instead of earnings. In fact, the compensation in lieu of salary is fully consistent with the Tribunals' jurisprudence. Accordingly, the Secretary-General asks that the Appeals Tribunal dismiss the appeal in its entirety.

Cross-Appeal

10. 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.⁷

11. The Secretary-General requests that the Appeals Tribunal grant his cross-appeal and vacate the UNDT's award of compensation for moral damages.

Considerations

Preliminary issue: Oral hearing

12. As a preliminary matter, Mr. Krioutchkov requests 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.

Amount of compensation in lieu of rescission

13. 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 in lieu of rescission of the impugned decision was inadequate. He specifically argues that according to the Appeals Tribunal's findings in *Hastings*, the compensation awarded should have been based on "earnings", including "gross salary, [p]ost adjustment, [m]obility and [n]on-removal elements of mobility and hardship allowance as well as [d]ependency allowance", rather than "salary"; and should have also included the difference in the Organization's pension contribution. Thus, the correct amount of the alternative compensation awarded would have amounted to USD 46,353 instead of USD 2,000.

14. We do not agree with these submissions. In our view, the UNDT correctly applied Article 10(5) of the UNDT Statute, which states:

⁷ Citing, *inter alia*, *Maiga v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-638.

... 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.

15. The UNDT's discretion under Article 10(5)(a) is constrained by the mandatory requirement to set an amount of compensation (no greater than that provided for in Article 10(5)(b) of the UNDT Statute) 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, the UNDT must set an amount of compensation in lieu of rescission or specific performance which the Secretary-General may elect to pay instead.⁸

16. The UNDT may award compensation for actual pecuniary or economic loss, including loss of earnings.⁹ 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".¹⁰ "Contemplating the particular situation of each claimant, it carries a certain degree of empiricism to evaluate the fairness of the 'in lieu compensation' to be fixed."¹¹ Relevant considerations in setting compensation include, among others, the nature of the post formerly occupied (e.g., temporary, fixed-term, permanent), the remaining time to be served by a staff member on his or her appointment and their expectancy of renewal,

⁸ *Verschuur v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-149, para. 48.

⁹ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 28, citing *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131.

¹⁰ *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 26, citing, *inter alia*, *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044, para. 20.

¹¹ *Mwamsaku v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-246, para. 29.

or whether a case was particularly egregious or otherwise presented particular facts justifying compensation beyond the two-year limit.¹²

17. In the instant case, the UNDT found that Mr. Krioutchkov's non-selection for the post of Chief, RTU (P-4), UNON, under JO 11-LAN-UNON-18526-R-NAIROBI, 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) of its Statute. In assessing the amount of compensation, the UNDT, as evidenced from paragraph 82 of the impugned Judgment, considered, *inter alia*, Mr. Krioutchkov's chances of being selected, "knowing that only two candidates were shortlisted and interviewed, but also that he was not recommended by the panel", as well as the "difference between the salary he [wa]s paid at his current grade and step and his potential income after promotion as of December 2011, when the selected candidate took up his new functions".

18. We find no fault with the UNDT's award of compensation of USD 2,000. 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 as of the relevant date, and following *Hastings*,¹³ limited the projection of the difference in salary to two years.¹⁴ Absent any error of law or manifestly unreasonable factual findings, the Appeals Tribunal will not interfere with the discretion vested in the UNDT to decide on the amount of compensation.

The UNDT's award of moral damages

19. The Secretary-General contends that the UNDT erred in law by awarding moral damages of USD 3,000 in contravention 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 where supported by evidence. As the amendment was in effect on 4 May 2016, when the UNDT issued the impugned Judgment, the UNDT erred by awarding compensation in the absence of evidence of harm suffered.

¹² *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 26, citing, *inter alia*, *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.

¹⁴ See similar approach in *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 30.

20. 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 law.¹⁵ Since Mr. Krioutchkov did not present evidence to sustain an award of moral damages, as required by the amended UNDT Statute, the UNDT made an error of law.

Judgment

21. Mr. Krioutchkov's appeal is dismissed. The Secretary-General's cross-appeal of the award of moral damages is granted. Judgment No. UNDT/2016/052 is affirmed, except for the award of moral damages, which is vacated.

¹⁵ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 32, citing *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684, para. 63 (full bench). See also *Tsoneva v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-713, para. 11.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Chapman

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar