



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

Judgment No. 2017-UNAT-713

**Tsoneva
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Richard Lussick Judge Martha Halfeld
Case No.:	2016-948
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Ms. Tsoneva:	Self-represented
Counsel for Secretary-General:	Amy Wood

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/049, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 3 May 2016, in the case of *Tsoneva v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 5 July 2016, and Ms. Valentina Tsvetkova Tsoneva filed her answer on 26 July 2016.

Facts and Procedure

2. The following facts are uncontested:¹

.... The Applicant joined [the United Nations High Commissioner for Refugees (UNHCR)] in September 2000 as Protection Officer at the P-3 level in Tbilisi, Georgia, and was granted an indefinite appointment under the 100 series of the former UN Staff Rules. In February 2003, she was assigned as Second Officer (P-3), still in Tbilisi. In April 2003, following a period of special leave with full pay of one month and three weeks, she was assigned as Second Officer (P-3) in Geneva, Switzerland, and, in January 2004, she was assigned as Supply Officer (P-3) in the Contracts Unit, Supply Management Service.

.... In December 2007, the Applicant was appointed as Senior Contracts Officer (P-4), in Geneva. On 1 November 2009, she was promoted to the P-4 level, effective the same day. In August 2012, she was temporarily assigned as Senior Contracts Officer to the Regional Bureau for Asia and the Pacific, in Geneva, and, in March 2014, she was temporarily assigned as Senior Legal Officer to the UNHCR Staff Council, still in Geneva.

.... Between 1 January 2015 and 31 July 2015, she was temporarily assigned as Policy Officer (Human Resources) with the Division of Human Resources Management ("DHRM"). In August 2015, she resumed her temporary assignment as Senior Legal Officer with the UNHCR Staff Council.

.... On 5 February 2014, the High Commissioner promulgated the Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2) ("Promotions Policy"). In essence, the Promotions Policy provides for the High Commissioner to make available a number of promotion slots to the P-4, P-5 and D-1 levels, and to award these to the most meritorious staff members based on recommendations made by a panel composed of senior UNHCR staff members, known as the Senior Promotions Panel ("SPP") insofar as promotions to the P-5 and D-1 levels are concerned, which follows three rounds of evaluation of eligible staff members.

¹ Impugned Judgment, paras. 3-25.

... On 4 April 2014, the DHRM informed the Applicant that she was eligible to be considered for promotion to the P-5 level during the 2013 Promotions Session. She was, therefore, advised to ensure completion of her personal appraisal document, also known as an “e-PAD”, and accuracy of all data contained in her fact sheet by 14 April 2014. This deadline was subsequently extended to 24 April 2014.

.... On 2 May 2014, the DHRM informed the Applicant that she had met the requirements to advance from the First Round to the Second Round of the Promotions Procedure.

.... From 30 June 2014 to 4 July 2014, the SPP members gathered in Geneva to conduct their individual comparative assessment of the candidates who had advanced to the Second Round. The individual rankings given by each SPP member were then aggregated by the DHRM, and consolidated lists of assessment rankings were compiled, separately, for female and male candidates.

... The six SPP members gave the Applicant the following “rankings” among the female candidates for promotion to the P-5 level: 66, 69, 85, 137, 151 and 154. The DHRM calculated that the arithmetic mean of the six individual rankings was 110.33 and established that the Applicant received a consolidated ranking of 129 out of 161 female candidates for promotion to the P-5 level. As her consolidated comparative ranking did not place her among the top 56 female candidates, the Applicant’s candidacy did not advance to the Third Round.

... On 4 July 2014, namely towards the end of the Second Round comparative assessment, the High Commissioner announced that 240 slots would be available for promotions to the P-4, P-5 and D-1 levels during the 2013 Promotions Session and, in particular, that 56 slots would be available for promotion from the P-4 to the P-5 level, which, he decided, would be equally shared between female and male staff members.

... By memorandum dated 17 October 2014 and distributed to all the UNHCR staff members via email on 20 October 2014, the High Commissioner published the list of promoted staff members. The Applicant was not among them.

... By email of 31 October 2014, the Applicant requested the DHRM to provide her with the minutes of the SPP meetings reflecting the evaluation of her candidacy for promotion.

... On 31 October 2014, the DHRM provided the Applicant with a copy of her fact sheet as reviewed by the SPP. The DHRM also reiterated the steps of the promotions process, as described in the Promotions Policy, and stated that “the Second Round individual evaluations by the six [SPP] Members ... resulted in an overall ranking that placed [her] outside the group of candidates who proceeded to the Third Round ... [which] corresponded to 200% of the number of slots allocated for promotions to the P-5 level”.

... By email of the same day, the Applicant reiterated her request to obtain “the minutes reflecting the recommendations of the [SPP]”.

... On 7 November 2014, the DHRM responded that there were no minutes of the Second Round evaluation as the candidates' comparative assessment was done individually by the SPP members, and recalled the process envisaged by the Promotions Policy as set out in its response of 31 October 2014.

... On 17 November 2014, the Applicant submitted to the Deputy High Commissioner a request for management evaluation of the decision not to promote her to the P-5 level.

... On 19 December 2014, the Applicant received an interim response informing her that her request for management evaluation was still under consideration. She did not receive any further response.

... The Applicant submitted her application with the Registry of [the Dispute] Tribunal via email on 29 December 2014 and, on 23 January 2015, she submitted it through the [Dispute] Tribunal's eFiling portal.

... The Respondent submitted his reply on 25 March 2015, after having been granted two extensions of time to do so.

... The Applicant filed additional observations on 13 April 2015 and, on 14 January 2016, she filed additional evidence.

... From 21 to 26 January 2016, the [Dispute] Tribunal held a hearing on the merits of the instant case, jointly with six other cases challenging contemporaneous decisions and raising similar issues, namely Cases Nos. UNDT/GVA/2015/132 (Natta), UNDT/GVA/2015/157 (De la Varga Fito), UNDT/GVA/2015/158 (Landgraf), UNDT/GVA/2015/163 (Spannuth Verma), UNDT/GVA/2015/165 (Rodriguez Viquez) and UNDT/GVA/2015/166 (Muftic). Four witnesses from the DHRM were heard: the Head of the Human Resources Policy and Planning Service, a Human Resources Officer in the Assignments and Promotions Section who served as the SPP Secretary for the 2013 Promotions Session, the Head of the Assignments and Career Management Service, and a Performance Management Associate in the Performance Management Unit.

... During the hearing on the merits, the Applicant adopted the submissions made on behalf of the six other applicants in the above-mentioned cases by the Counsel of the Office of Staff Legal Assistance, insofar as they were relevant to her case.

... On 29 January and 4 February 2016, the Respondent and the Applicant, respectively, filed additional submissions, with leave from the [Dispute] Tribunal.

... During the course of the proceedings, the Respondent filed a number of documents *ex parte*, which contain confidential information. The [UNDT] made all these available to the Applicant, with redactions as necessary and on an under seal basis.

3. The UNDT rendered its Judgment on 3 May 2016. It found the contested decision denying Ms. Tsoneva a promotion to the P-5 level unlawful due to a number of “significant procedural errors”² and ordered its rescission or, in lieu of rescission, compensation in the amount of CHF 6,000 plus interest. In addition, the Dispute Tribunal awarded damages for moral harm in the amount of CHF 3,000 plus interest. All other claims, in particular regarding specific performance or further compensation for pecuniary harm, were rejected.

4. The Secretary-General appealed the UNDT Judgment on 5 July 2016. Together with her answer filed on 26 July 2016, Ms. Tsoneva filed a “Motion for Confidentiality” contending that the concerned documents were “[c]onfidential by ... nature” and their distribution would “affect the professional future of other staff members”. She further submitted that these documents contained new evidence for moral damages which she sought to introduce in accordance with Article 10(1) of the Appeals Tribunal’s Rules of Procedure. By Order No. 275 (2017), issued on 11 January 2017, the Appeals Tribunal found that no exceptional circumstances within the meaning of Article 2(5) of the Appeals Tribunal Statute existed warranting the introduction of new evidence and thus denied her motion while ordering the redaction of references to the documents in her answer form and their removal from her answer.

Submissions

The Secretary-General’s Appeal

5. The Secretary-General submits that the UNDT erred on a question of law and exceeded its competence by finding that the amended version of Article 10(5)(b) of the UNDT Statute, requiring harm to be supported by evidence for an award of damages, was not applicable to the present case because Ms. Tsoneva had filed her application with the UNDT before the amendment entered into force. The UNDT’s holding contradicts the Appeals Tribunal’s jurisprudence, especially in *Jaber et al.*³ and *Maiga*.⁴ In these cases, the Appeals Tribunal vacated or refused awards of compensation based on the amended versions of the UNDT and Appeals Tribunal Statutes even though the applications had been filed before the amendment entered into effect. This case law is also fully consistent with the General Assembly’s position

² *Ibid.*, para. 180.

³ *Jaber et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-634, paras. 13 and 29-31.

⁴ *Maiga v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-638, para. 30.

vis-à-vis the Tribunals' authority, which is clearly restricted to the power vested in them by their respective Statutes.

6. He further argues that the UNDT erred in law by awarding compensation for moral damages without the required evidence of harm. Such an award contravenes the requirements set forth in Article 10(5)(b) of the UNDT Statute as well as the established jurisprudence.

7. The Secretary-General therefore respectfully requests that the Appeals Tribunal vacate the award of damages for moral harm ordered by the UNDT.

Ms. Tsoneva's Answer

8. Ms. Tsoneva submits that the UNDT did not err in law when it declined to apply the amended version of the UNDT Statute since its application would have violated the principle of non-retroactivity. The jurisprudence cited by the Secretary-General does not apply to the case at hand. Instead, there is "solid jurisprudence confirming the UNDT[']s power to determine [on] a case by case basis the appropriate remedy [including for neglect and emotional stress] after [an] assessment of the nature of the evidence and information brought to its attention during the trial process".

9. She further reminds the Appeals Tribunal of the moral implications of the contested decision, namely that she is close to retirement age and thus not likely to have another chance for promotion and that she feels her expertise and competency should be formally recognized.

10. Ms. Tsoneva therefore requests that the UNDT Judgment be affirmed and the appeal be dismissed in its entirety.

Considerations

11. The UNDT erred in law when it held that the amendment to Article 10(5)(b) of the UNDT Statute, which requires harm to be supported by evidence for an award of damages, was not applicable because Ms. Tsoneva had filed her application before the amendment entered into force. While the Appeals Tribunal has accepted the general principle against retroactivity, it has also repeatedly stated that, "[a]s 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 existing law.”⁵ Therefore, we hold that the UNDT erred in law by not applying the UNDT Statute as it existed at the time the Dispute Tribunal rendered its Judgment.

12. Ms. Tsoneva did not present specific evidence to sustain an award of moral damages as required by Article 10(5)(b) of the amended UNDT Statute.⁶ The UNDT, without any specific evidence, “inferred from the ... significant procedural breaches” that Ms. Tsoneva “has suffered ‘frustration’, ‘denigration’ and ‘emotional distress’”, which the UNDT based on the *Asariotis* jurisprudence.⁷ This reasoning cannot be supported by the law. We therefore find that the UNDT erred in law.

Judgment

13. The appeal is granted and the award of damages for moral harm ordered by Judgment No. UNDT/2016/049 is vacated.

⁵ *Gueben et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-692, para. 52; *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 32.

⁶ See *Maiga v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-638, para. 30; *Jaber et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-634, para. 31; *Hasan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-541, para. 24.

⁷ Impugned Judgment, paras. 219-220, citing *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

Original and Authoritative Version: English

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

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Halfeld

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

(Signed)

Weicheng Lin, Registrar