



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

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Judgment No. 2017-UNAT-714

**Tsoneva  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Deborah Thomas-Felix, Presiding Judge Richard Lussick Judge Martha Halfeld
Case No.:	2016-949
Date:	31 March 2017
Registrar:	Weicheng Lin

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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/2016/067, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 2 June 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:<sup>1</sup>

.... By application filed on 29 December 2014 via email, and on 23 January 2015 via the [Dispute] Tribunal's eFiling portal, the Applicant, a staff member of the United Nations High Commissioner for Refugees ("UNHCR"), contests her non-selection to four posts advertised in the September 2013 and March 2014 Compendium of Vacant Positions, namely:

- a. Chief of Section (Procurement of Services) in Budapest, Hungary (P-5) (Job Opening ("JO") 9324 (Expert), Position No. 10018754) ("Position 1");
  - b. Senior Protection Officer in Kabul, Afghanistan (P-4) (JO 9508, Position No. 10014285) ("Position 2");
  - c. Senior Protection Officer (Internally Displaced Persons (IDPs)) in Kabul, Afghanistan (P-4) (JO 9353, Position No. 10020892) ("Position 3");
- and
- d. Senior Protection Officer in Quetta, Pakistan (P-4) (JO 8647, Position No. 10018015) ("Position 4").

...

.... The Applicant joined 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 Staff Rules. In January 2004, she was appointed to the position of Supply Officer (P-3) at the Contracts Unit, Supply Management Services, in Geneva, and, in December 2007, she was appointed as Senior Contracts Officer (P-4) within the same unit. In November 2009, she was promoted to the P-4 level.

... In August 2012, the Applicant's position as Senior Contracts Officer was discontinued and, from that time, she was placed on various temporary assignments in Geneva. More specifically, in August 2012, she was temporarily assigned as

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<sup>1</sup> Impugned Judgment, paras. 1-31.

Senior Contracts Officer to the Regional Bureau for Asia and the Pacific and, in March 2014, she was temporarily assigned as Senior Legal Officer to the Staff Council. Since 1 January 2015, she has been temporarily assigned as Senior Policy Officer with the Division of Human Resources Management (“DHRM”).

*Position 1: Chief of Section (Procurement of Services) (P-5) in Budapest*

.... Position 1 was advertised as an “expert position” internally on 15 April 2014 in the March 2014 Compendium of Vacant Positions up to December 2014 (“March 2014 Compendium”), as well as externally. It required, *inter alia*, solid experience in coordinating, managing and supporting procurement services, as well as in developing technical specifications for procurement services and in developing technically and legally complex service contracts.

.... After having received her application, DHRM placed the Applicant on the short-list of candidates submitted to the manager’s review, but the latter found her not suitable for the position, on the ground that “[she had] presented for a similar post as Chief of Section (Procurement of Goods) and did not impress the panel in interview” and “was consequently not shortlisted for further consideration”.

... Based on the manager’s assessment, DHRM did not recommend the Applicant for Position 1 as she did not “possess the required background or relevant experience for this position”, and recommended another internal candidate at the P-4 level for selection.

... DHRM’s recommendation was endorsed by the Joint Review Board (“JRB”) at its meeting between 25 to 29 August 2014.

... On 26 September 2014, the High Commissioner announced his decision on the selection for Position 1 in his Summary of Decisions on Assignments, and appointed the candidate recommended by DHRM to Position 1.

*Position 2: Senior Protection Officer (P-4) in Kabul*

... Position 2 was advertised internally on 15 April 2014 in the March 2014 Compendium. It required, *inter alia*, a strong protection background, as well as experience in protection matters relating to the reintegration of returning refugees and protection needs of IDPs, in addition to good management, coordination and diplomatic skills.

... DHRM placed the Applicant, who had applied to this position, on the short-list of candidates for Position 2 and sought “functional clearance” from the Division of International Protection.

... The Division of International Protection did not functionally clear the Applicant for Position 2 as she “ha[d] not held a protection or related function since 2003”.

... The concerned manager found that since the Applicant was not functionally cleared due to her lack of involvement in the last decade in protection issues, she was “not acceptable also for the office in Kabul”.

... Consequently, DHRM did not recommend the Applicant for Position 2 and recommended another internal candidate.

... DHRM's recommendation was endorsed by the JRB at its meeting between 25 to 29 August 2014.

... On 26 September 2014, the High Commissioner announced his decision on the selection for Position 2 in his Summary of Decisions on Assignments, and appointed the candidate recommended by DHRM.

*Position 3: Senior Protection Officer (IDPs) (P-4) in Kabul*

... Position 3 was advertised internally on 15 April 2014 in the March 2014 Compendium, as well as externally. Position 3 required, *inter alia*, a strategic protection background and supervisory experience, as well as experience with protection standards, operational procedures and protection delivery at the country level for matters relating to IDPs.

... DHRM placed the Applicant, who had also applied to this position, on the short-list of candidates and sought "functional clearance" from the Division of International Protection.

... The Division of International Protection did not functionally clear the Applicant for Position 3 as she "ha[d] not held a protection or related function since 2003".

... The concerned manager did not provide any comment on the Applicant's application.

... DHRM did not recommend the Applicant for Position 3, based on the fact that she had not been functionally cleared, and recommended another internal candidate.

... DHRM's recommendation was endorsed by the JRB at its meeting between 25 to 29 August 2014.

... On 26 September 2014, the High Commissioner announced his decision on the selection for Position 3 in his Summary of Decisions on Assignments, and appointed the candidate recommended by DHRM.

*Position 4: Senior Protection Officer (P-4) in Quetta*

... Position 4 was advertised internally on 7 October 2013 in the September 2013 Compendium of Vacant Positions up to June 2014, as well as externally. It required, *inter alia*, managerial skills in relation to Protection Units, Community Services Units and Field Teams, and ability to supervise more than 32 staff and to collaborate closely with government authorities, NGOs and other UN agencies.

... Based on her application to this position, DHRM placed the Applicant on the short-list of candidates and sought "functional clearance" from the Division of International Protection.

... The Division of International Protection did not functionally clear the Applicant for Position 4.

... The manager did not endorse the Applicant for Position 4 as she “lack[ed] experience in Protection, RSD [Refugee Status Determination], Resettlement and Field Protection that are required for this demanding post”, as well as field experience.

... DHRM did not recommend the Applicant for Position 4 and recommended another internal candidate.

... DHRM’s recommendation was endorsed by the JRB at its meeting between 22 to 28 March 2014.

... On 25 April 2014, the High Commissioner announced his decision on the selection for Position 4 in his Summary of Decisions on Assignments, and appointed the candidate recommended by DHRM.

... On 5 November 2014, the Applicant filed a request for management evaluation challenging her non-selection for Positions 1, 2, 3 and 4.

... On 29 December 2014, the Applicant filed her application before the Dispute Tribunal via email and, on 23 January 2015, she submitted it through the [Dispute] Tribunal’s eFiling portal.

3. The UNDT rendered its Judgment on 2 June 2016. It found the non-selection decision for Position 1 unlawful due to procedural errors. Further, the UNDT dismissed Ms. Tsoneva’s claims regarding Positions 2 and 3, on the basis that the presumption of regularity stood satisfied and that she failed to demonstrate that the applicable procedure had not been followed, or that her candidacy had not received fair and adequate consideration. With regard to Position 4, the Dispute Tribunal held that the application was irreceivable *ratione materiae* since Ms. Tsoneva had not filed for management evaluation of the contested decision. By way of remedy, the Dispute Tribunal ordered the rescission of the selection decision for Position 1 or, in lieu of rescission, compensation in the amount of USD 3,500. In addition, the UNDT awarded compensation in the amount of USD 3,000 for moral harm. All other claims 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 confidential pursuant to UNHCR’s internal procedures and that a waiver of confidentiality would put her at risk of retaliation and have a negative effect on her career. 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. 276 (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.*<sup>2</sup> and *Maiga*.<sup>3</sup> 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 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

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<sup>2</sup> *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.

<sup>3</sup> *Maiga v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-638, para. 30.

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 the award of damages, was not applicable because Ms. Tsoneva had filed her application before the amendment entered into force. While the Appeals Tribunal accepts the general principle against retroactivity, it has repeatedly stated that, “an award of damages takes place at the time the award is made, [and thus] applying the amended statutory provision is not the retroactive application of law. Rather, it is applying existing law.”<sup>4</sup> 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 any specific evidence to sustain an award of moral damages as required by the amended Statute.<sup>5</sup> By considering that Ms. Tsoneva “suffered emotional distress” as a result of a “fundamental breach of [her] substantive entitlement”<sup>6</sup> without any further evidence of harm as required by Article 10(5)(b) of the UNDT Statute, the UNDT made an error of law in its decision.

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<sup>4</sup> *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.

<sup>5</sup> 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.

<sup>6</sup> Impugned Judgment, para. 93.

**Judgment**

13. The appeal is granted and the award of damages for moral harm ordered by Judgment No. UNDT/2016/067 is vacated.



Original and Authoritative Version: English

Dated this 31<sup>st</sup> day of March 2017 in Nairobi, Kenya.

*(Signed)*

Judge Thomas-Felix,  
Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Halfeld

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

*(Signed)*

Weicheng Lin, Registrar