



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

Judgment No. 2021-UNAT-1095

**Marius Mihail Russo-Got
(Appellant/Respondent)**

v.

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

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Martha Halfeld Judge Graeme Colgan
Case Nos.:	2020-1418 & 2020-1419
Date:	19 March 2021
Registrar:	Weicheng Lin

Counsel for Mr. Russo-Got: Self-represented

Counsel for Secretary-General: André Luiz Pereira de Oliveira

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Russo-Got, a former Project Manager on a fixed term appointment (“FTA”) at the United Nations Office for Project Services (“UNOPS” or the “Administration”), challenged the decision of the Administration for non-selection for the position of ERP/SAP Project Manager (VA/2018/B5011/16266). In its Judgment No. UNDT/2020/077 (the “Judgment”), the United Nations Dispute Tribunal (the “Dispute Tribunal” or “UNDT”) granted his application in part. It held that UNOPS had not minimally shown the staff member had been given a full and fair consideration for the post and awarded 20 per cent of the net-base salary he would have obtained had he been selected, but refused to award moral damages. Both the staff member and the Secretary-General appeal the Judgment.

2. This is one of a series of judgments to be issued by the Appeals Tribunal (“Appeals Tribunal” or “UNAT”) deciding Mr. Russo-Got’s grievances relating to the loss of his United Nations employment. For continuity, the same Judges are deciding each of these cases. In this Judgment, however, we deal only with the appeals against the UNDT’s decision regarding his non-selection for the Project Manager position. For reasons below, we dismiss the appeals of both parties and affirm the Dispute Tribunal’s Judgment.

Facts and Procedure

3. Mr. Russo-Got served as a Project Manager at the P-3 level at UNOPS on an FTA through 31 July 2018. On 29 June 2018, he was informed that his post would be abolished. On 27 July 2018, he filed a request for management evaluation of the abolition of his post and the non-renewal of his FTA.

4. On 1 August 2018, Mr. Russo-Got and UNOPS reached a settlement agreement. Under that agreement, UNOPS undertook to “send to [Mr. Russo-Got] all vacancy announcements for the UNOPS projects” during the period (1 December 2018-31 January 2019). Mr. Russo-Got undertook to “submit his applications for those vacancies that he is interested in.” He also agreed that UNOPS would have no obligation, financial or otherwise, towards him in respect of the claims that he had raised in his management evaluation request. While the settlement agreement was marked confidential, Mr. Russo-Got submitted it as part of his application to the Dispute Tribunal in the case on appeal.

5. To facilitate the implementation of the settlement agreement, the Chief of Regional Technology Center of Americas agreed to take Mr. Russo-Got under his supervision for six months from 1 August 2018 to 31 January 2019. An *ad hoc* position was created for this purpose. But there was no further funding available to support that position beyond 31 January 2019.

6. Between 17 August 2018 and 30 August 2018, UNOPS circulated a vacancy announcement (“VA”) for ERP/SAP Project Manager at the P-4 level under an FTA for one year subject to extension.

7. Mr. Russo-Got submitted his application on 21 August 2018 but did not hear from UNOPS regarding the status of his application, until after he was separated from service with UNOPS upon the expiry of his FTA on 31 January 2019.

8. By e-mail dated 28 March 2019, the UNOPS Human Resources informed Mr. Russo-Got with regret that he had “not been selected on this occasion” (the “contested administrative decision”).

9. On 3 April 2019, Mr. Russo-Got requested a management evaluation challenging the decision not to select him for the ERP/SAP Project Manager post. There was no response from UNOPS.

10. On 6 May 2019, Mr. Russo-Got filed an application with the Dispute Tribunal to contest his non-selection for the ERP/SAP Project Manager position.

11. In its Judgment, the Dispute Tribunal granted the application in part and ordered that Mr. Russo-Got be paid 20 percent of the net base salary that he would have obtained had he been selected for the relevant post including by having his pension adjusted accordingly.

12. The Dispute Tribunal noted that four candidates had been shortlisted during the initial screening, but Mr. Russo-Got was not one of them. It also noted the lack of any contemporaneous written record to show why Mr. Russo-Got had not been shortlisted for further review. Rather, the Secretary-General submitted *ex post facto* evidence, namely, an e-mail dated 6 June 2019, in which an unnamed individual with the title of “Lead, Solution Design and Delivery (UMOJA UE2-SCM)” explained why “we could not shortlist” Mr. Russo-Got. The Dispute Tribunal dismissed this evidence because it had not

been prepared as part of the review of Mr. Russo-Got's application but was produced for the sole purpose of litigation with an *ex post facto* explanation. The Dispute Tribunal viewed the irregularities during the initial screening as grave and found that the Administration had failed to minimally show that Mr. Russo-Got's candidature had been fully and fairly considered for the ERP/SAP Project Manager position.

13. In awarding pecuniary damage for the violation of the right to a full and fair consideration, the Dispute Tribunal found that since four candidates had been shortlisted, Mr. Russo-Got would have had a 20 percent chance (one out of five) of getting selected for the ERP/SAP Project Manager position if he had joined the field of the shortlisted candidates. Consequently, the Dispute Tribunal awarded 20 percent of the net base salary for the P-4 ERP/SAP Project Manager for one year. The Dispute Tribunal declined to award non-pecuniary damage because the moral harm described in the medical record was related to "separation anxiety" caused by his separation, rather than by his non-selection.

14. On 26 July 2020, Mr. Russo-Got appealed the UNDT Judgment to the Appeals Tribunal while the Secretary-General appealed the same the following day.

Submissions

Case No. 2020-1418

Mr. Russo-Got's Appeal

15. Mr. Russo-Got requests that the Appeals Tribunal reverse the fact findings of the Dispute Tribunal or remand the case to the UNDT for additional fact findings. He also requests that the Appeals Tribunal rescind the decisions not to select him for the ERP/SAP Project Manager position. In terms of compensation, Mr. Russo-Got seeks restitution of his salary and associated benefits from 31 January 2019 to the date of his reappointment, moral damages, partial reimbursement of the cost for his medical treatment, legal costs, and moral damages for a lost career opportunity and the harm caused by UNOPS' failure to assist him in finding an alternative position.

16. Mr. Russo-Got contends that the Dispute Tribunal committed five errors pursuant to Article 2 of the UNAT Statute. First, it erred in not finding an abuse of power on the part of UNOPS, which tainted the selection process with bias, as a certain candidate had

been favored from the start of the selection process to the detriment of the other candidates. Second, it erred in not finding that Mr. Russo-Got's candidature had not been fully and fairly considered despite the finding in the Dispute Tribunal's Judgment at paragraph 32 that the Secretary-General had not been able to minimally show his candidature had been fully and fairly considered. Third, the Dispute Tribunal further erred in awarding him pecuniary damage in the amount of 20 percent of salary of the contested post for one year when he was entitled to a minimum exemplary pecuniary damages of 24 months' net base salary to place him in the position in which he would have found himself had the violation not taken place. Fourth, the Dispute Tribunal erred in not awarding him non-pecuniary damage, in disregard of his medical evidence of severe depression, anxiety and stress. Finally, the UNDT erred in not finding that UNOPS had failed to treat Mr. Russo-Got transparently and with dignity and, moreover, had violated his basic right to be reassigned to a suitable position as it had done for his colleagues.

The Secretary-General's Answer

17. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Russo-Got's appeal.

18. The Secretary-General submits that Mr. Russo-Got has failed to demonstrate any error in fact or law on the part of the Dispute Tribunal to warrant a reversal of its Judgment. He has failed to demonstrate with any meaningful evidence that the selection process for the ERP/SAP Project Manager post was tainted by bias or improper motive or that his candidature was not fully and fairly considered. He has not provided any evidence in support of his allegation that UNOPS had favored any of the shortlisted candidates.

19. The Secretary-General also submits that Mr. Russo-Got has failed to demonstrate that the Dispute Tribunal erred in affixing its monetary award at 20 percent of net base salary for the ERP/SAP Project Manager post for one year with pension adjustment. The Secretary-General maintains that the matter of abolition of his post that Mr. Russo-Got raises in this connection is the subject of another UNAT proceeding and has no bearing on the calculation of the monetary compensation in the present case. Mr. Russo-Got cites several ILO Administrative Tribunal Judgments whose factual circumstances were not present in his case. He makes a general reference to the alleged

violation of some indeterminate international administrative law without pointing to a particular provision that UNOPS has allegedly violated.

20. The Secretary-General further submits that Mr. Russo-Got has failed to demonstrate that the Dispute Tribunal erred by declining to award him any moral damage on the ground that he had failed to show the required causality between the illegality and the suffered harm.

21. The Secretary-General maintains that all other submissions by Mr. Russo-Got are mere repetition of the arguments that he made before the Dispute Tribunal. By repeating the same arguments, Mr. Russo-Got is rearguing his case and is requesting that the Appeals Tribunal reconsider his original UNDT arguments *de novo* and to come to a different conclusion.

Case No. 2020-1419

The Secretary-General's Appeal

22. The Secretary-General requests that the Appeals Tribunal vacate the monetary compensation that the UNDT awarded to Mr. Russo-Got.

23. The Secretary-General submits that the UNDT erred in making a monetary award in favor of Mr. Russo-Got, because there was no evidence showing that he had a foreseeable chance of being selected for the contested position. The Dispute Tribunal had access to the information provided by Mr. Russo-Got, which did not reflect a consistent and relevant focus or area of expertise that directly aligned with the requirements of the VA. In contrast, the shortlisted candidates were able to accurately demonstrate their relevant experience in project management and their extensive knowledge and relevant background in deploying and implementing ERP/SAP systems and solutions for multinational context.

24. The UNDT erred in finding without any supporting evidence that Mr. Russo-Got had shown that he had had a foreseeable chance of being selected for the ERP/SAP Project Manager position. The evidence to the contrary showed that he was clearly less qualified than the four shortlisted candidates. Furthermore, there was no evidence of discrimination against Mr. Russo-Got during the initial screening process.

Mr. Russo-Got's Answer

25. Mr. Russo-Got requests that the Appeals Tribunal dismiss the Secretary-General's appeal in its entirety.

26. Mr. Russo-Got notes that, as pointed out by the Dispute Tribunal, the Secretary-General acknowledged in his closing statement that Mr. Russo-Got had stated in his job application that he possessed all the required work experience for the position but subsequently argued that those experiences were inadequate or not appropriately substantiated, in the context of the judicial proceedings.

27. Mr. Russo-Got submits that, contrary to the Secretary-General's assertions, the Dispute Tribunal correctly found that he had a foreseeable chance of being selected for the contested position based on the evidence, and that, by excluding him at the initial phase of the selection process, UNOPS failed to accord his candidacy a full and fair consideration. The UNDT made a correct award of compensation in his favor.

Considerations

28. The central issues in these appeals are whether the Dispute Tribunal erred on a question of law or fact resulting in a manifestly unreasonable decision in finding that Mr. Russo-Got's candidacy had not been given full and fair consideration and if so, what is the appropriate remedy for this failure of consideration.

The Dispute Tribunal's Findings on the Selection Process

29. The Appeals Tribunal has consistently held that the Secretary-General or the Administration has broad discretion in staff selections.¹

30. In judicially reviewing administrative decisions regarding staff selections, the Tribunal's role is not to substitute its own decision for that of the Administration, but to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent, and non-discriminatory manner.²

¹ See Article 101(1) of the United Nations Charter and Staff Regulations 1.2(c) and 4.1.

² See *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932, paras. 13-15 (internal citations omitted).

31. In so doing, the factors to be considered are: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; (2) whether the staff member was given full and fair consideration; and (3) whether the applicable Regulations and Rules were applied in a fair, transparent, and non-discriminatory manner.³

32. The Appeals Tribunal jurisprudence provides that there is a “presumption of regularity” that official acts have been regularly performed. This presumption arises if the management can minimally show that staff member’s candidature was given a full and fair consideration. Thereafter, the burden of proof shifts to the staff member who must show through “clear and convincing evidence” that s/he has been denied a fair chance of promotion or selection.⁴

33. In this instance, the Dispute Tribunal reviewed the selection process and the reasons proffered by the Secretary-General in not shortlisting Mr. Russo-Got for the position in question. Not keeping a written record of the contested administrative decision with reasons for the shortlisting process was held to be irregular. In making this finding, the Dispute Tribunal relied on the Appeals Tribunal’s jurisprudence regarding the need for timely reasons for non-renewals of fixed-term or temporary appointments.⁵ The Dispute Tribunal applied the reasoning of this jurisprudence in reviewing the shortlisting decision. The lack of a contemporaneous written record of the decision to shortlist and the lack of reasons for the shortlisting decision undermine the ability of a staff member to challenge that decision. Without this record, the staff member is unable to challenge the decision and the tribunal conducting a judicial review is unable to adequately review the decision and its reasons. The Dispute Tribunal rejected the *ex post facto* evidence⁶ provided by the Secretary-General as a rationale for the short-listing decision. The rejection of this evidence was within its discretion as the first level, fact finding tribunal and there is nothing to indicate that this discretion was exercised erroneously.

³ See *Savadogo v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2016-UNAT-642, para. 40 (internal citations omitted).

⁴ *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, paras. 12-14, *inter alia*, quoting *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21 and 26.

⁵ Here, the Dispute Tribunal cited *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201 and *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960.

⁶ The e-mail of 6 June 2019 prepared by a “Lead, Solution Design and Delivery (UMOJA UE2-SCM)”.

34. The Dispute Tribunal identified other procedural errors such as the lack of the identification of the maker of the contested administrative decision and the flawed reasons and justification for the decision. For the latter, the Dispute Tribunal correctly found the *ex post facto* evidence on the short-listed candidates did not explain why Mr. Russo-Got had not been short-listed compared to the candidates who had been.

35. The Secretary-General, in his appeal, submits there was no supporting evidence for the Dispute Tribunal's finding that Mr. Russo-Got had shown he had a foreseeable chance of being selected for the position. We disagree. The Dispute Tribunal had relevant evidence of the qualifications and experience of the Appellant and of the short-listed candidates, along with the requirements of the position in question. They also had evidence of the procedural errors and irregularities as identified above. This evidence with the errors and irregularities supported the Dispute Tribunal's findings of fact that lead to the justifiable conclusion that, had the irregularities not occurred, Mr. Russo-Got had a foreseeable and significant chance of selection given his qualifications.⁷

36. We find that the Dispute Tribunal did not err in finding that the Secretary-General or the Administration had failed to minimally show that Mr. Russo-Got's candidacy had been given full and fair consideration in the selection process. Both parties substantively appeal the remedy the Dispute Tribunal imposed in the matter.

Remedies imposed by the Dispute Tribunal

37. The Dispute Tribunal awarded Mr. Russo-Got pecuniary damages, though it declined to award him non-pecuniary, moral damages.

38. In terms of the pecuniary damages, Mr. Russo-Got seeks an increase while the Secretary-General seeks the Dispute Tribunal's award be vacated.

39. It is an established principle that "compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both. ... A breach of staff member's rights, despite its fundamental nature, is thus not sufficient to justify such an

⁷ See *Ross v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-926, para. 48.

entitlement. There must indeed be proven harm stemming directly from the Administration's illegal act or omission for compensation to be awarded.”⁸

40. In the present case, after the Dispute Tribunal determined the illegality (namely the lack of full and fair consideration of the Appellant in the selection process), the Dispute Tribunal determined there was harm resulting from this illegality. It quantified the loss based on Mr. Russo-Got's loss of chance at 20% of the net base salary that he would have obtained had he been selected for the post. We are not persuaded by the arguments put forward by both Mr. Russo-Got and the Secretary-General on the issue of the pecuniary damages awarded. Had the interview process been properly regulated, the Dispute Tribunal assessed Mr. Russo-Got's chances of being selected for the post as one in five, as four candidates had been short-listed, and he would have been the fifth. In our view, the approach adopted by the UNDT was reasonable and we reject the argument that the Dispute Tribunal should have placed Mr. Russo-Got in the position of having been successful in obtaining the post (and awarded him 24 month's salary), or that the UNDT's conclusion was inconsistent with the facts on the foreseeable chance of selection as found by the Dispute Tribunal.

41. As stated by the Appeals Tribunal in *Lutta*, “[t]here is no set way for the trial court to set damages for loss of chance of promotion. Each case must turn on its facts. And this Court will generally defer to the trial court's discretion.”⁹ As such, in the absence of errors of fact or law by the Dispute Tribunal, we defer to its discretion in awarding and quantifying the pecuniary damages.

42. Regarding non-pecuniary damages, the Dispute Tribunal held that the medical evidence before it provided evidence of harm related to Mr. Russo-Got's separation from the Organization rather than from the specific non-selection for this position and the identified irregularities of the selection process. In making this determination, we find the Dispute Tribunal did not commit an error in fact that resulted in a manifestly unreasonable decision. It rightly concluded that the required causality between the illegality (in the non-selection) and the suffered harm had not been sufficiently proven by the medical evidence provided. The medical certificates Mr. Russo-Got submitted suggest his separation anxiety was related to “job loss, relocation, separation, and retaliation by his former employer”, and his

⁸ *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, paras. 20-21.

⁹ *Lutta v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-112, para. 1.

stress buildup was related to “the loss of a job, a death in family, work stress or ongoing worry about finances”. As such, the medical evidence does not support the required nexus or causal link between the anxiety and stress and the non-selection and the contested administrative decision.

43. In conclusion, we find no fault with the Dispute Tribunal’s reasoning on the award of damages.

Judgment

44. We dismiss the appeals of both parties and affirm Judgment No. UNDT/2020/077.

Original and Authoritative Version: English

Dated this 19th day of March 2021.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Colgan
Auckland, New Zealand

Entered in the Register on this 22nd day of April 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar