UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/006/ JAB/2007/050
Judgment No.:	UNDT/2010/040
Date:	5 March 2010
Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

KOH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Counsel for applicant:
H Esther Shamash, OSLA
Brian Gorlick, OSLA

Counsel for respondent:
Natalie Boucly, UNDP
Peri Johnson, UNDP

Introduction

1. On 20 November 2009 the Tribunal delivered judgment in relation to liability (UNDT/NY/2009/078), finding that the respondent had breached its contract of employment with the applicant and reserving the question of compensation, seeking further submissions on this aspect of the case. The facts are set out sufficiently in that judgment and do not need to be repeated except for some details. The applicant was a senior officer on an abolished post seeking other employment with the United Nations whilst on special leave without pay. He had entered into a separation agreement, one of the conditions of which was that United Nations Development Programme (UNDP) would assist him in specified ways to obtain another post. He had been a candidate for a large number of posts for which he was not selected. On the other hand, his evidence was (and I accept) that he was not suitable for many of these posts, because of the specialised nature of his qualifications as against the requirements of the positions. Two suitable vacancies were advertised, with the period for applications reduced from the two weeks minimum period specified in the relevant guidelines to seven days. In the circumstances (presently irrelevant) this precluded his making a timely application.

2. The applicant, in essence, lost the opportunity to compete for remunerative employment for which he was qualified. The question for determination is the value of this loss.

Applicant's submissions

3. The applicant submits that, had he been short-listed, there would have been three candidates for each of the two posts, and therefore he had a one in three chance of being selected for one of the posts. In all likelihood, the contract would have had been extended for an additional two years past its initial twelve month term, as has indeed happened.

4. So far as the likelihood of selection is concerned, under staff rule 109.1(c)(i) the applicant was entitled to have priority subject to "relative competence … integrity and to length of service". The applicant had been separated at the P-5 level, step X level after more than eighteen years of unblemished service and relevant experience in communication posts with UN agencies. There was no issue with his integrity. Of the four candidates in fact short-listed, three had fewer total years of service than the applicant, none had as much supervisory experience, one was not an internal candidate and the other three held only fixed-term appointments, although one of them was a displaced staff member.

5. The applicant's total after-tax earned income for the 48 months from 1 January 2006 to 31 December 2009 was the equivalent of USD72,860. If compensation is to be valued as a percentage of the relevant emoluments, earned income should be considered as mitigating only on a correspondingly proportional basis and only to the extent that it coincides with the timing and is proportional to the duration of the period for which compensation is to be considered.

6. Compensation should be calculated upon the basis that the applicant lost both his base salary and the post-adjustment for New York. Since 2003, the applicant's wife had been enrolled in a doctoral program at Columbia University in New York and was therefore obliged to remain there to complete her studies. The applicant and his wife could not relocate in the timely and planned manner that a normal retirement upon completion of his UN career in due course would have permitted. He did not have the right to employment in the United States outside the UN system and had to work in Singapore, thus being forced to maintain two households and travel frequently in the ensuing years between New York and Singapore.

Respondent's submissions

7. Although the respondent concedes that the applicant would have been short-listed for interview, the inherent uncertainties of his performance on interview and

the unknown qualities of the other candidates do not permit any assessment other than speculative as to his likelihood of success. Compensation cannot therefore be awarded upon the basis that the applicant would have been successful in being appointed to one of the posts. The applicant should be compensated only for the bare loss of the opportunity to be a candidate, in effect, for the procedural error.

8. Even though both posts are still funded, the applicant's compensation should be calculated upon the assumption that it was a one-year appointment, in accordance with the original vacancy notice. In addition to the substantial uncertainties surrounding the likelihood of the applicant's success in obtaining appointment, his performance in the job, personal choice about continuing, state of health and unforeseen personal accidents should be taken into account. The Organization itself may have initiated a procedure of termination under staff regulation 9.1 if any of the relevant circumstances arose.

9. So far as taking into account the applicant's earnings is concerned, not only his actual earnings, but those which he was able to make are relevant: *Dicantro* (1982) ILOAT 480, *In re Rosescu* (1980) ILOAT 431, *Dupuy* (1973) UNAT 174.

10. As part of the agreed separation reached with the applicant in May 2006, the applicant received a total of eighteen months termination indemnities together with a lump-sum covering his and the Organization's contributions to the pension fund for the twelve months from April 2006 until April 2007. Eighty percent of the termination indemnities were paid in May 2006 and the balance in May 2007. The separation agreement provided—

> You are bound by UNDP's policy with respect to re-employment for former staff members who leave the Organization under an agreed separation. Under this policy, staff members may not seek full time re-employment within the UN system. Employment is barred for the same number of months that termination indemnity plus in-lieu-of-notice, if applicable, have been received, unless there is a prorated return of the monies paid. The prorated return is established on a "one-to-one formula". One month of indemnity can be kept every

> month that has lapsed since the separation date (cob). No return of received indemnities is required if you are employed after the same number of months (maximum 21) has lapsed. You are obligated to inform UNDP of any re-employment within the UN system.

11. If the Tribunal decides to proceed on the basis that the applicant would probably have been appointed to one of the positions, the amount of termination indemnities already received should be taken into account. The likely date the applicant would have returned to employment, would be sometime in December 2006, given that this was an urgent recruitment. Thus the equivalent of about four to five months (December 2006 to April 2007) termination indemnities paid at eighty percent should be taken into account in any award of compensation: see *Purifoy* (1997) UNAT 810.

12. The applicant should be awarded no more than three months net base salary plus eight percent interest from October 2006 to the date of this judgment. This compensation would be in line with that usually awarded by the UN Administrative Tribunal (*Hain* (2009) UNAT 1458, *Sirois* (2004) UNAT 1190) where there is no bad faith, arbitrariness unfairness or repeated pattern of violations (*Karmel* (1998) UNAT 879, *Fagan* (1994) UNAT 679, *Thacker* (1998) UNAT 875, *Mucino* (1997) UNAT 840, 1326, *Zoubanov* (2007) UNAT 1326, *Perkin* (2008) UNAT 1353).

13. Compensation for procedural error, as distinct for loss of earnings, is almost invariably calculated by reference to base salary, rather than net salary, including post-adjustment.

The applicant's qualifications

14. The two positions for which the applicant should have been given the opportunity to apply were Chief, External Communications Team (P-5) and External Communications Team Coordinator (P-4). It is not in substantial dispute that the applicant's considerable experience and impressive performance evaluations made him a serious candidate for both of these positions. It is not necessary that I set them

out here. He had earlier failed to obtain the post of Head, Communications Unit (P-4) for which, also, his qualifications seemed to make him eminently suitable, for reasons which were identified on interview.

The UNAT jurisprudence

15. It is not useful in this case to analyse the judgments of the UN Administrative Tribunal, cited by the respondent. They do not contain any substantive discussion of the nature or attributes of compensation, let alone state any relevant principles. The compensation awarded in those cases reflects an overall conclusion as to the appropriate sum, mixing together the nature of the process failures and the extent of fault that caused the wrong decision. There is no focus on the extent, if any, of the appellant's economic loss and the manner in which it should be calculated. A distinct element of these decisions appears to contradict the requirement that punitive compensation should not be awarded.

16. A system of justice requires a rational approach, not only to fact-finding but also the measurement of compensation and, to my mind, this Tribunal needs to approach both these questions by applying reasonable and common sense principles rooted in the real world and as transparent as the process sensibly allows. I find myself, therefore, insufficiently informed by the judgments of the Administrative Tribunal cited by the respondent to apply their conclusions to the issues in this case.

Loss of a chance

17. I think it would be helpful to set out some general principles concerning the assessment of the value of the loss of a chance, since this aspect of compensation lies at the centre of this case.

18. The frequent inability of curial procedures to determine with certainty what has happened in the past, let alone what would have been or what will be, has given rise to a need for a number of subsidiary rules governing the determination of the loss

which a contracting party (here, the applicant staff member) has actually sustained by reason of a breach of contract for which compensation must be awarded. One such subsidiary rule is that the applicant bears the onus of establishing the extent of loss on the balance of probabilities. In many cases, proof of the full extent of the loss sustained will involve establishing an evidentiary foundation for positive and detailed ultimate findings upon the balance of probabilities. There are, however, cases where considerations of justice or the limitations of the curial method render ultimate findings, about what would have been or will be, impracticable or inappropriate. In such cases, compensation must be assessed on some basis other than findings about what would have ultimately happened if the breach had not occurred or about the precise ultimate implications of the situation which exists after the breach. In particular, it may be appropriate that damages be assessed by reference to the probabilities or the possibilities of what would have happened or will happen rather than on the basis of speculation that probabilities would have or will come to pass and that possibilities would not have or will not. If, for example, what the applicant has lost by reason of the respondent's breach of contract is a less than fifty percent but nonetheless real and hence valuable chance of being appointed in circumstances where the Tribunal can decide that a proportionate figure approximately reflects the chance of success but can do no more than speculate about whether, but for the respondent's breach, the applicant would have actually succeeded, it would affront justice to hold that the applicant was entitled to no compensation at all for the lost chance of attempting to obtain the appointment. In such a case, considerations of justice require that the applicant be entitled to recover the value of the lost chance itself and that the respondent not be allowed to take advantage of the effects of its own wrongful act to escape liability by pointing to the obvious, namely, that it is theoretically more probable than not that a less than fifty percent chance of success would have resulted in failure.

19. It is not only the positive value of a chance of a benefit which may, in appropriate circumstances, require to be taken into account in the assessment of damages for breach of contract. The loss involved in being subjected to a significant

possibility of future detriment may also, of itself, found an award of compensation. If, for example, an applicant's expectations of future promotion have been adversely affected or delayed by the breach but the Tribunal can do no more than speculate about what would in fact have occurred, the applicant may recover damages for that chance or possibility of future detriment even though the evidence would not sustain a finding that there is a more than fifty percent chance that the problem will, in fact, ensue.

20. No exhaustive comprehensive rule can be usefully formulated that defines the circumstances in which it is appropriate to assess compensation for a lost probability or possibility of benefit as distinct from the benefit itself. In this case, it is enough to say that compensation should be assessed on the former basis because, although the actual likelihood of the applicant's success is inherently uncertain and cannot be known, common sense enables an estimate of the approximate extent of his chances. Future or hypothetical events can only ever be predicted in terms of probability and it is not just, merely because the probability is less than fifty percent, or it cannot be found whether or not it is more than fifty percent, that they should be ignored.

21. The fact that, in determining what has actually occurred in the past, the Tribunal acts on the basis that a more than fifty percent probability is certain and a less than fifty percent probability is irrelevant does not provide any acceptable reason for adopting a similar approach to determining what will happen in the future or what would have happened in the hypothetical situation that something which has occurred had not. The determination of future and hypothetical events is more likely to involve unavoidable speculation than the determination of what has actually happened in the past and the approach that a fifty percent probability represents a dividing line between certainty and non-existence or irrelevance would inevitably lead to injustice and a degree of absurdity if applied to the hypothetical or the future.

22. It is a corollary of this approach that a greater than fifty percent chance that a future or hypothetical event will occur should not be treated as a certainty. The

award of compensation should reflect the degree of probability, whether more or less than fifty percent, that it will occur. In this case, once it can be seen that there is a real or significant chance that the applicant might have been selected, the Tribunal has the duty to compensate him for the loss of that chance, doing the best it can to measure the probability, else the only remedy available to him to right the respondent's breach will be unjustly denied.

23. (In stating the above, I have attempted to approach the issue from first principles. It is, of course, very rare that these days a truly new question arises. The problem of assessing compensation for the loss of a chance has been considered over many years in various jurisdictions but not, so far as counsel's researches have shown, by the UN Administrative Tribunal or the International Labour Organization Administrative Tribunal. I feel that candour requires me to acknowledge that much of the language of the above discussion is derived from the judgment of the High Court of Australia in *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1992) 174 CLR 64 to which I am (respectfully) much indebted. My belief is that the logic of the discussion is inherently persuasive and I have not adopted it for any other reason. It is often the case that rational systems solve similar problems in similar ways; and I would not like it to be wrongly assumed that I had attempted to reinvent the wheel.)

The evaluation of the applicant's lost chance

24. The principal difficulty facing the applicant is that, although there is extensive evidence about his own qualifications, little or nothing is known about the *curricula vitae* of other candidates against whom he would have competed had his application had been made in time. However, it is not argued for the applicant that he would have succeeded, rather that he had a substantial chance of success which was taken from him by the respondent's breach of contract. The concession by the respondent that he was suitable for appointment and therefore would have been short-listed is

candid and fair and, incidentally, gives a significant support to the applicant's contention.

25. An additional feature to be taken into account is that the evidence concerning the qualifications of the other candidates is very much within the respondent's sphere of knowledge and capable of having been relied on if it were thought that it could have assisted the respondent's case. No doubt questions of confidentiality would need to have been resolved but, at least, production of this material to the Tribunal would not have been problematic. Accordingly, I think that it is proper to infer that there is nothing in the documentary material relevant to the competing candidates which would have supported the respondent's case. This inference is reinforced by the fact that the respondent's submission in respect of the applicant's chances of success was confined to identifying the uncertainties attaching to the interview element of the process.

26. The applicant's assumption that his chance of success was, at least, the same as or similar to that of the other candidates was used to justify the commencement point that this chance was one in three. However, this leaves out of account, as it seems to me, the requirement to give him priority if he were evaluated as being equally, or nearly equally suitable as the other candidates.

27. Even if the evidence as to the other candidates were available, there would still be substantial gaps in the logical path to the precise determination of the applicant's chance of success, not only, of course, how he might have done on the interview compared to the other candidates, but also the particular attitudes of the members of the selection panel, both as to the requirements of the positions and the attributes of the candidates. However, the problem is not fundamentally a logical one. Rather, it is, the application of common sense in a realistic way, weighing up the various relevant elements without any pretence of arithmetical precision in order to produce a rational and, hence, just outcome.

28. In my opinion, the applicant had a real and substantial chance of appointment within a range oscillating fairly closely around the even mark. Since it is necessary to select the probability, I find that his chance of success was fifty percent.

29. The other relevant issue, so far as the appointment itself is concerned, is its likely duration. The respondent points to a number of features which make it uncertain that the applicant, if he were appointed, would have stayed for the three years he envisaged. He may have had to retire for health reasons or because of suffering some accident and steps might have been taken, at all events, to terminate him. There is no evidence that there are any issues with the applicant's health. Of course, accidents happen, and, if one were looking at a decade or more an allowance for this and other vicissitudes of life would need to be made and, in common law jurisdictions, conventionally is. However, over such a short period, I do not think that the chances of an accident which might have required the applicant to retire prematurely should be regarded as significant enough to enter the calculus of loss. So far as the possibility of termination under staff regulation 9.1(a) is concerned, the stipulated possibilities are the necessities of the service requiring abolition of the post, unsatisfactory service, incapacity, misconduct and vitiating anterior facts. The post has not been abolished and there is no reason to think that this is likely, the applicant's performance was consistently assessed as more than adequate and, *ex hypothesi*, it was assessed as within his capacity, there is no reason to question his health and no hint of the possibility of vitiating anterior facts. The possibility of termination can be dismissed as inconsequential.

30. So far as commencement is concerned, the appointment was an urgent one, the applicant had not settled back in Singapore, was actively seeking work, he had a home in New York and was obviously able to commence at short notice. The posts were advertised on 26 October 2006 with a seven days' application period. The commencement date should be seven days after the first selection (as distinct from the date the contract commenced) was in fact made. This information is not in the

evidence and should be supplied by the respondent within seven days and the agreed date notified to the Registry.

31. Accordingly, it seems to me, doing the best I can, that the applicant lost a fifty percent chance of obtaining employment paid at the P-5 level for the period from the date notified by the respondent in 2006 to 16 January 2010. The amount that he would have received was, of course, his full emoluments including post-adjustments, less the staff assessment. The applicant submitted an amount, but I am unsure that it reflects this sum. The parties have seven days to agree a figure and submit it to the Registry. In the absence of agreement each may submit a written submission with in the same period and I will determine the issue.

Deductions

32. The respondent's submissions in relation to the amounts paid on termination should be accepted. Essentially, this adjustment must be made to avoid double payment. However, the actual amounts which ought to be deducted for the period from commencement date to April 2007 are not disclosed in the evidence. The parties have seven days provide a figure. Failing agreement, written submissions must be filed within the same period, and I will determine the question.

33. There is no basis for supposing that the applicant had a greater capacity to earn an income than that which yielded the sum disclosed and, accordingly, no greater amount should be taken into account. I do not see any logical or just basis for reducing this adjustment simply because the applicant will not be compensated for the complete loss of the P-5 salary. The entire amount (net of taxes) earned by the applicant from commencement date to 16 January 2010 should be taken into account.

34. Article 10.5 of the Tribunal's statute limits the compensation normally to be awarded to two years' base salary, presumably of the applicant, or, where relevant, of the post wrongly denied. This amount is to be regarded as a quasi-jurisdictional limit and does not inform the assessment of compensation. If, at the end of the day, the

calculus of loss a greater figure, the Tribunal needs then to consider whether the case is exceptional before awarding that amount. If the case is not exceptional, the amount of two years' net base salary must be calculated and the compensation limited to that sum.

Loss of the right to work in New York

35. In *Kasyanov* (UNDT/2010/026), I stated the general rule that a legal right to appointment was a valuable right, the loss of which required compensation. In that case, the employee lost a right to appointment whilst here the applicant lost the right of candidacy.

36. The ability to gain one of the advertised positions carried with it the right to live in the US and, since it was located in New York, with his wife. The breach by the Organization of its contractual obligations had the result that the applicant could not live and work in the US and the necessity that he should work in Singapore followed. However, although this consequence was directly caused by the breach, the fact that he could not otherwise live and work in the US was not a fact within the (constructive) contemplation of the parties and, accordingly, was not a relevant consequence of the breach. That the applicant was in Singapore was a mere incidental fact and the lack of a move to New York was not a relevant result of the breach. This is quite different from the position in *Kasyanov* where the particular contractual obligation required a move from New York to Geneva. Accordingly, only nominal compensation is appropriate and I award the sum of USD2000 for the breach of the right itself.

37. This head of compensation is not the loss of income. It is the loss of the opportunity to work for the UN in New York in a worthwhile and significant role. This loss was a direct and foreseeable consequence necessarily within what I have called the constructive contemplation of the parties and payable because, as I explained in *Kasyanov,* compensation is not limited to mere economic loss. At the

same time, there is no substantial basis for distinguishing between the character and attributes of the employment he otherwise obtained or would be likely to obtain and the work envisaged with the UN.

Order

38. The parties are to submit the commencement date and figures as agreed within seven days of this judgment or, failing agreement, written submissions by the same date.

(*Signed*)

Judge Michael Adams

Dated this 5th day of March 2010

Entered in the Register on this 5th day of March 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York