UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/085/ JAB/2009/049
Judgment No.: UNDT/2011/094
Date: 1 June 2011
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

SPRAUTEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Salman Haq, UNOPS

Introduction

1. On 6 May 2010, the United Nations Dispute Tribunal (Judge Adams) issued *Sprauten* UNDT/2010/087, which joined together for purposes of determining liability two separate appeals of the Applicant: Cases Nos. UNDT/NY/2009/085/JAB/2009/049 (Case 1 regarding a portfolio manager post) and UNDT/NY/2009/118 (Case 2 regarding a Johannesburg post).

2. On 19 April 2011, the United Nations Appeals Tribunal ("the Appeals Tribunal") issued its appellate judgment *Sprauten* 2011-UNAT-111, in which it annulled the Dispute Tribunal's Judgment of 6 May 2010 regarding Case 2 and rejected the Applicant's claims therein regarding the Johannesburg post.

3. The present Judgment on Compensation shall deal with Case 1, wherein the Dispute Tribunal held that United Nations Office for Project Services ("UNOPS") was in breach of its contractual obligations to the Applicant for the portfolio manager post for which the Applicant had applied.

4. As of 27 July 2010, the present case was reassigned to this Tribunal, following Judge Adams' departure from the Tribunal.

5. Since the issuance of Judgment No. UNDT/2010/087, the parties have filed and served several written submissions, including under directions provided in Orders Nos. 207 (NY/2010) and 251 (NY/2010) by the sitting Tribunal. This Judgment is based on these submissions, as well as on the case record and determinations of Judgment No. UNDT/2010/087.

Relevant facts

6. The Applicant joined UNOPS in 1988 and served in various capacities at the L-4 level until his separation from the Organization in February 2009 (this separation would have been as a result of developments in Case 2 regarding the so-called

Johannesburg post). Until July 2004, the Applicant served on a 200 series contract under the former Staff Regulations and Rules, but his position was abolished and instead he worked on other short-term and temporary appointments.

7. In January 2006, it was decided to move the UNOPS headquarters from New York to Copenhagen, which entailed the reorganisation of many positions within UNOPS. The post encumbered by the Applicant as a portfolio manager in the Mine Action Unit, North American Office, was to be abolished by 31 March 2007.

8. On 17 January 2007, the Applicant applied for the P-4 post as Portfolio Manager (Mine Action) in Copenhagen ("the Post").

9. The Post would have been a lateral transfer for the Applicant within UNOPS and did not represent a promotion.

10. The major client of UNOPS in the area of mine action was the United Nations Mine Action Service ("UNMAS") in the United Nations Secretariat.

11. The selection panel for the Post comprised four members: the chairperson who was not from UNOPS, but was from UNMAS; a technical expert from UNOPS; a Staff Council representative from the United Nations Population Fund ("UNFPA"); and a human resources expert from UNFPA. It appears that an additional, unidentified person was also present at the interview; only her first name was mentioned and her role in the interview process is unclear.

12. Four candidates were short-listed, including the Applicant, who was interviewed on 6 February 2007, along with two other candidates. On 31 May 2007, the Applicant was informed that a candidate other than the Applicant was selected for the Post, which led the Applicant to appeal against the non-selection decision, as he considered that the process had been tainted by irregularities and that he had not been fully and fairly considered for the Post.

13. The prior Tribunal made the following conclusion in Judgment No. UNDT/2010/087 regarding the Applicant's non-selection:

> 83. As to case 1—
>
> The [selection] panel recommendation cannot stand and the decision of the [Appointment and Promotion Board], based as it was upon a fatally flawed process, was in breach of the applicant's contractual rights to have his candidacy adequately and properly considered.

14. The reasons supporting the Tribunal's conclusions were, in essence, that the applicable UNOPS rules for conducting the interviews for the Post (Selection Policy for 2006 Transition Process, UNOPS/AI/DHRH/2006/4, 28 April 2006) had not been followed. Specifically: (1) an UNMAS staff member was incorrectly appointed as chair of the selection panel, rather than a person from "the division/unit of the vacant post", i.e., from UNOPS (the UNMAS chair was also a friend of the ultimately-successful candidate, although this fact did not directly bear on the Judgment in *Sprauten* UNDT/2010/087); and (2) a human resources panel member had incorrectly participated in the voting process. The irregularities led the Tribunal to conclude that:

> 74. There were thus two substantial and unwarranted departures from the Policy, one of which significantly undermined the integrity of the panel's conclusions and the other which simply should not have occurred. They were not merely formal in character but had substantive effect on the outcome.

Applicant's compensation submissions

15. The Applicant makes the following contentions:

> a. While his failure in May 2007 to secure the Post did not represent an immediate loss of earnings (the Post was at the same level of remuneration as the Applicant was then receiving), not securing the Post represented "the loss of a meaningful career opportunity including the job security of a P-4 position and conversion to a 100 series contract" (the Applicant from July 2004 until

his separation in February 2009 was on a series of short-term and temporary appointments);

b. Once the Applicant was served in January 2006 with notice that the post on which he was then sitting would be abolished by 31 March 2007, the failure to secure the Post in May 2007 "had a considerably more long term tangible impact". The Post was fixed-term and "continuing in nature", according to the Applicant. Rather than being appointed to this "secure" position on the Post, the Applicant remained unassigned and was offered only temporary postings thereafter, while the real possibility of termination hung over him;

c. The loss of opportunity for the Post must be a factor in determining appropriate compensation. But for the violations found by the prior Tribunal, the Applicant "stood a real and significant chance of being selected, being a core staff member of UNOPS whose post (containing similar functions) had been abolished and who had more seniority than the other finalist";

d. This is not a case of lost compensation, but rather is one of compensating for a quantifiable loss of the "right to be fairly considered and [the] resulting loss of opportunity".

16. The Applicant seeks compensation in the following categories:

a. Loss of the job security of a P-4 position and conversion to a 100 series contract (compared to the temporary contracts he had been employed on), i.e., the possibility of separation hung over the Applicant's head;

b. Loss of a meaningful career opportunity, e. g., candidacy for a post as Deputy Team Leader/Programme Support Officer (P-4) (VA/2009/NAO/MAC/P4/01-10) with an application deadline of 10 January 2010; for the due process violations found by the prior Tribunal, the Applicant seeks a compensation award of one year's net base salary;

c. Moral damage to the Applicant's career, including damage to his professional status and his reputation; the Applicant seeks one year's net base salary in this category;

d. Exceptional compensation for health-related reasons causally-related to the loss of opportunity; the Applicant was on certified sick leave (clinical depression) for 14 months, between August 2007 and October 2008;

e. Costs to cover legal and administrative expenses associated with bringing the two claims before the Tribunal.

17. In his submission of 7 September 2010, the Applicant adds a claim for two years' net base salary concerning "his entitlement to a standard enhanced separation package of 18 months termination indemnity base salary" as "[t]his compensation was never paid since the UNOPS argued (wrongly) that he had been offered a post but had rejected it".

Respondent's compensation submissions

18. The Respondent makes the following contentions:

a. The matter of compensation should be determined according to *Koh* UNDT/NY/2010/040, in which calculation of "loss of chance" is calculated according to a determination of probabilities;

b. To determine this loss of chance, the likely duration of the contract (had the Applicant been the successful candidate), less compensation that actually was earned, less amounts paid to the Applicant upon termination all must be considered;

c. Two compensation scenarios apply, depending upon the duration of the Applicant's employment under the Post (a contract of two years in duration versus a contract of five years in duration);

d. The mathematical formula for quantifying the compensation owing to the Applicant in this case is as follows:

Foregone Income *= % Loss of Chance [A] X Likely Duration of Contract [B] X Yearly Salary for Duration of Contract [C]*

Compensation **=** *Foregone Income – Deductions [D]*

Consideration

Which doctrine—"loss of opportunity" or "loss of chance"—applies to determine compensation in this case?

19. In making their respective submissions on compensation, the Applicant and the Respondent cite different doctrines with different calculations of compensation.

20. The Applicant relies on the "loss of opportunity" doctrine, as illustrated by the Applicant's 7 September 2010 submission on compensation (emphasis added):

> 9. Quantifiable losses *as well as loss of a right to be fairly considered and resulting loss of opportunity* all represent compensatory factors (*Koh* UNDT/2010/040 and *Kasyanov* UNDT/2010/026). It is not necessary for the Applicant to prove he would have been selected [the Respondent's argument], *since this is not a promotion case but a lateral assignment and the Applicant is not submitting he was entitled to the benefits of lost emoluments*. Since it is clear from the established facts that he was one of two finalists and that prejudice affected the outcome, *it is somewhat academic to speculate about possible alternative outcomes, since they do not address the identified violation of the Applicant's rights*. In [*Abbasi* UNDT/2010/055], the Tribunal awarded compensation of twelve months net base pay for loss of opportunity due to discrimination and an additional $30,000 for distress. In the present case, the Applicant's situation was far more precarious. He was facing termination for abolition of post and was left unassigned as a result of the flawed process. As a consequence, he had to undergo a protracted period of uncertainty requiring medical treatment following these events and never effectively resumed his career with UNOPS. In light of these particular circumstances, the Respondent's theoretical calculations are inapplicable.

21. The Applicant cites *Abbasi* UNDT/2010/055 and the "loss of opportunity of being appointed" (and associated damages, including being distressed by the experience: see *Abbasi*, para. 47) as the measure of his damages. According to the Applicant, compensation in the *Abbasi* sense is not being made for economic loss of income, but compensation is rather for a more intangible loss of opportunity in the workplace.

22. As well, the Applicant has phrased his request for compensation in this case in terms of (a) "loss of job security" of a P-4 position and conversion to a 100 series contract (compared to the temporary contracts that the Applicant had been employed on), (b) "loss of career opportunity", and (c) "loss of chance" of being selected for the position.

23. The Respondent, on the other hand, cites *Koh* UNDT/2010/040, where "loss of chance" appears to be a measure of lost income to the staff member, calculated as the probability of the "percent chance of obtaining employment" (*Koh*, para. 35). The Tribunal notes that *Koh* (para. 2) also has phrased the issue as one of lost opportunity (emphasis added):

> The applicant, in essence *lost the opportunity* to compete for remunerative employment for which he was qualified.

24. In *Chen* UNDT/2010/068, as in *Koh*, loss of opportunity and loss of chance appear to have been used interchangeably within the same judgment (emphasis added):

> 54. … The failure to apply the same job classification to the applicant's post as applied to posts with the same job description has deprived the applicant *of her rightful opportunity* to be considered for promotion. …
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> 55. The applicant submitted that due to the failure to implement the P-4 classification she *has lost the chance for promotion* which would have been available to her after five years at the P-4 level. The evidence also speaks of her frustration and disappointment at the inequality of treatment she had to endure for so long and her

> humiliation at having to manage staff who were at the same level as her. ...
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> …
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> 57. I hold that the date for assessing compensation for the difference between what she actually earned and what she would have earned at the P-4 level should be calculated from the date she made her request in August 2006. …

25. Since the "loss of chance" and "loss of opportunity" terms have not been consistently used within Dispute Tribunal jurisprudence and since the Applicant and the Respondent ostensibly have cited different doctrines in support of their respective positions, the Tribunal will review the case law applying these doctrines to determine whether any useful principles may be articulated.

"Loss of chance" approved by the Appeals Tribunal

26. The "loss of chance" doctrine has been cited with approval by the Appeals Tribunal in *Hastings* 2011-UNAT-109 and *Lutta* 2010-UNAT-112.

27. In *Hastings* UNDT/2009/030 and UNDT/2010/071 (Judgment on remedies) (on which *Hastings* 2011-UNAT-109 was based), the Applicant had applied to the Secretary-General for an exception to be made to administrative instruction ST/AI/2006/3 (Staff selection system) to allow her to apply for a D-2 position that was more than one level higher than her P-5 personal grade; the Applicant was not granted the exception and *Hastings*, thus, was a non-promotion case.

28. At the time of the application, Ms. Hastings was working in the acting position for which she wished to apply (which was at the D-2 level) and she was receiving a D-1 special post allowance. The Dispute Tribunal decided that the Respondent's decision not to allow an exception (under ST/AI/2006/3 which provided that staff members shall not be eligible to be considered for a position more than one level higher than their personal grade) was unlawful, and that Ms. Hastings was entitled to compensation.

29. In *Hastings* 2011-UNAT-109, the Appeals Tribunal cited with approval the Dispute Tribunal's ruling in UNDT/2010/071 (Judgment on remedies), saying (emphasis in original):

> 2. Compensation for loss of a "chance" of promotion may sometimes be made on a percentage basis, but where the chance is less than ten per cent, damages become too speculative. The trial court is in the best position to assess those damages. Except in very unusual circumstances, damages should not exceed the percentage of the difference in pay and benefits for two years.
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> …
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> 17. The UNDT was not substituting its judgment on personnel matters—the problem here was that the Administration had believed, incorrectly, that no exception was legally possible. That belief *precluded* discretion. If the Administration had allowed that exceptions could be made, but in its discretion decided not to make an exception in this instance, we doubt a case could be made against that decision. But that is not what happened—an error of law precluded the exercise of discretion, and deprived Hastings of the chance of promotion.

Dispute Tribunal jurisprudence regarding "loss of chance"

30. Within Dispute Tribunal jurisprudence, language incorporating the "loss of chance" concept was first referenced in *Kasyanov* UNDT/2010/026, a non-selection case regarding a lateral move at the P-4 level. The Tribunal in *Kasyanov* appears to have adopted the Respondent's submission that the question of compensation should be measured as a loss of chance of being selected ("3. … Therefore, the applicant's loss is a 50 per cent chance of being selected and any award of compensation should be reduced by 50 per cent").

31. The award in *Kasyanov* compensated for the "breach of a right to a particular decision having a direct impact on a staff member's employment situation" (*Kasyanov* UNDT/2010/026, para. 26). The inquiry focused on the significance of the breach for the staff member in respect of his or her employment situation, "including the impact on his or her career prospects and the ordering of his or her

life" (*id*). The Tribunal in *Kasyanov* appears to have placed the compensation award in the category of compensation for procedural violations and cited *Wu* UNDT/2009/084, *Nogueira* UNDT/2009/088, *Xu* UNDT/2010/002 and *Allen* UNDT/2010/009.

32. What can be discerned about "loss of chance" from *Kasyanov* is that it was interpreted as compensation of a non-pecuniary or non-economic nature, and that it compensated the "legal right to appointment". A mathematical formula was not employed to determine the compensation figure, and the award was modest in nature (USD25,000).

33. *Kasyanov* was not a pure "loss of chance" case for, in addition to awarding compensation of a non-economic nature ("the impact on his or her career prospects and the ordering of his or her life to the extent to which these consequences are foreseeable, in short, the value of the right to him or her", *Kasyanov* UNDT/2010/026, para. 26), the Tribunal also compensated for: (a) the applicant's legal right to appointment as a valuable right warranting compensation of USD25,000 (*ibid.*, paras. 27-28); (b) actual damages for economic loss amounting to the difference in emoluments payable from February 2008 to February 2010, namely USD22,932 (*ibid*., para. 36); (c) injury to career prospects for the delay in receiving a lateral transfer, in the amount of USD12,000 (*ibid.*, para. 41); and (d) USD20,000 as an alternative to partial specific performance of recording a lateral move in Mr. Kasyanov's personnel records (paragraph 48).

34. In *Kasyanov* 2010-UNAT-076, the Appeals Tribunal modified the Dispute Tribunal's award for injury to career prospects and for partial specific performance, but kept intact the Dispute Tribunal's compensation award for compensation for non-pecuniary damage arising from the violation of his rights during the selection process (i.e., the loss of chance compensation award).

35. The Appeals Tribunal in *Kasyanov* specifically approved the award of compensation for non-pecuniary damage and clarified that such an award does not

amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing (*Kasyanov* 2010-UNAT-076, para. 30). The Appeals Tribunal simply revised the award from USD25,000 to two months' net base salary.

36. The "loss of chance" concept next was further developed in *Koh* UNDT/2010/040, a case concerning the abolishment of a post and the violation of a settlement agreement to assist the applicant in finding new and suitable employment. In *Koh*, the Dispute Tribunal characterised the loss as the "opportunity to compete for remunerative employment for which [the applicant] was qualified" (*Koh*, para. 2).

37. The *Koh* judgment contrasted two concepts that are important to differentiate.

38. The *Koh* Tribunal first discussed a standard compensation measure for breach of contract under common law where the goal of compensation is to place the successful plaintiff in the same position as if the contract had been performed (also known as expectation damages) (see, e.g., *Kasyanov* UNDT/2010/026, para. 18). This would particularly occur in non-promotion and non-selection cases where it is found that a staff member has been wrongfully denied a post and thereby has suffered direct *economic* loss from the breach (lost wages and benefits attached to the post). *Koh* referred to this category of damages as compensation resulting from the loss of "the benefit itself" (*Koh,* para. 20). The lost "benefit" would be the lost contract and attendant salary and emoluments of the post.

39. Contrasted with loss of "the benefit itself" in *Koh* is the "lost probability or possibility of a benefit" (*Koh,* para. 20), which would be compensation of a *non-economic* nature and which would not be measured against the contract emoluments and benefits. As observed in *Kasyanov* UNDT/2010/026 and as argued by the Applicant in this case, such non-economic harm could consist of: (a) the impact on a staff member's career prospects; (b) the ordering of his or her life; (c) the loss of job security of a P-4 position and conversion to a 100 series contract; and (d) the

resulting distress experienced as a result of the wrongful failure to properly consider the Applicant's candidacy for the Post.

40. This Tribunal interprets the *Koh* discussion as one that makes a distinction between compensation for actual economic loss ("the benefit itself"), as opposed to compensation for non-economic loss (the "lost probability or possibility of a benefit") ("he had a substantial chance of success which was taken from him by the ... breach of contract"), (*Koh,* para. 24). The contrast between these two types of loss has been succinctly summarised by the Applicant in this case: "It is not necessary for the Applicant to prove he would have been selected since this is not a promotion case, but a lateral assignment and the Applicant is not submitting he was entitled to the benefits of lost emoluments".

41. Nevertheless, in *Koh* the Tribunal followed this loss of chance discussion to create a mathematical formula that an "award of compensation should reflect the degree of probability, whether more or less than fifty percent, that [the applicant's selection] will occur" (*Koh*, para. 22):

> 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.
>
> …
>
> 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. …

42. The mathematical number determined under *Koh* to be the loss of chance was applied against the full emoluments, including post adjustment, less the staff assessment (*Koh* UNDT/2010/040, para. 36). This approach creates the impression that "loss of chance" in the *Koh* sense was to be compensation for lost earnings ("the benefit itself"), rather than for the intangible loss of the "opportunity to compete for remunerative employment for which [the applicant] was qualified" (i.e., for the

intangible loss of the breach of the procedural right at issue in *Koh*). The *Koh* mathematical application of "loss of chance" in this sense would appear at odds with the application of the "loss of chance" doctrine in *Kasyanov*.

43. A staff member who has lost an opportunity for a lateral move does not normally have any economic loss resulting from lost earnings, as the move would carry with it identical benefits and emoluments (although exceptions may possibly occur). For the Applicant in this case, the Post would have been a lateral move for within UNOPS and did not represent a promotion case.

44. The assessment of probabilities in *Koh* took into account the nature of the procedural breach, the number of candidates competing for the position, and the duration of the contract. This Tribunal parenthetically notes that to assess probabilities by reference to other candidates competing for a post presents its own problems—how is a tribunal to obtain reliable information regarding competing candidate qualifications, when such information may be confidential? One must query whether the mathematical formula posited in *Koh* creates actual certainty in assessing compensation damages for "lost chance", or whether the formula only creates the appearance of certainty, with actual uncertainty in the application of the formula as a result.

Is loss of chance a compensation doctrine or a liability determination doctrine?

45. The "loss of chance" concept was further elaborated in *Bertucci* UNDT/2010/080, a case of non-appointment. (The Tribunal recognises that the Appeals Tribunal in *Bertucci* 2011-UNAT-121 annulled UNDT/2010/080 and UNDT/2010/117, but the principles articulated in UNDT/2010/080 regarding loss of chance nevertheless are useful for discussion herein.)

46. In *Bertucci* UNDT/2010/080, the Tribunal there appeared to move away from the *Kasyanov* concept (loss of chance as non-economic compensation for breach of procedural rights) in two respects. The *Bertucci* application of loss of chance (a)

appears to be applied as a liability doctrine for determining *whether* recovery on the merits should occur, and (b) also applied as a compensation doctrine for determining the measure of damages for the "loss of the Applicant's chance of appointment" (para. 43).

47. In *Bertucci*, the Tribunal stated, in part (emphasis added):

> 43. … The starting point must be the opinion of the Tribunal that the applicant had a *real and significant chance of appointment*. Thus, if by some calculation the chances of appointment were, say, less than ten per cent, the Tribunal should, I think, step back and ask, as a matter of commonsense, is this chance such that in the real world its loss should be compensation or is it, in reality, practically non-existent, and thus to be disregarded. On the other hand, if the chance of appointment were, say of the order of ninety per cent, it would, to my mind, be necessary to step back and *ask whether this made appointment practically certain, in which event the ten percent discount applied by calculation should be disregarded*. In other words, the artificial precision of the numbers must reflect and not disguise the practical, commonsense realities which they are an attempt to denote.
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> 44. It seems to me that, in the circumstance here (hopefully never to be repeated) the only fair inference which can in justice be drawn is that which is most favourable to the applicant, thus that he was indeed the outstanding candidate and, had all necessary and proper things been done, would have been so likely to have been appointed that his *compensation should be awarded on the basis that he would have been appointed*. ...
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> 45. The compensation for economic loss should be calculated, therefore, upon the basis that the applicant would have been appointed to the post of [Assistant Secretary-General, Department of Economic and Social Affairs] had his contractual entitlements been satisfied. ... The amount that should be awarded for compensation for economic loss should be two years' emoluments including post adjustment for New York, plus medical and dental insurance contribution, less assessment and pension contribution. I will order the parties to make submissions on the appropriate calculation of this sum.

48. By saying that the applicant stood a "real and significant chance of appointment" and that "compensation should be awarded on the basis that [the applicant] would have been appointed", the Tribunal in *Bertucci* appeared to apply

the "loss of chance" doctrine as a liability doctrine to determine whether a staff member should recover on his/her claim (as well as a compensation doctrine for determining the size of the staff member's recovery). If "loss of chance" were interpreted and applied as a liability determination doctrine, that would carry with it significant implications for the standard of proof required in order to prevail on a claim.

49. Under Appeals and Dispute Tribunal case law, in order to prevail on a claim, the party must prove the claim by clear and convincing evidence or by a preponderance of evidence (see, for example, either *Rolland* 2011-UNAT-122 or *Azzouni* 2010-UNAT-081). When burden of proof language is translated into percentages, this would mean that a litigant prevails on a claim whenever the reliable evidence, or quantum of proof, is at least greater than or equal to fifty per cent.

50. Although clearly limited in scope as a compensation judgment, *Hastings* UNDT/2010/071 contains language that, if not understood in proper context, might be interpreted as being applicable for purposes of determining liability (emphasis added) :

> 37. I conclude that the applicant has suffered material loss as a result of the unlawful decision of the administration. I calculate her loss on the basis that realistically she had an eighty percent chance of having an exception granted in her favour. Next, given her qualifications and experience, she had a very high chance of being shortlisted and passing the written test. I assess that chance at one-hundred percent. Then she had a fifty percent chance of getting recommended for final interview. From that stage she would have been in competition with three other candidates which reduced her chance of selection by twenty percent. *In summary, I find that she had a ten percent chance of being successful in her application for the D-2 post of Executive Secretary*.
>
> 38. The Tribunal therefore orders that:
>
> a. The respondent is to pay the applicant USD5,000 for compensation for her distress.

> b. The respondent is to pay to the applicant ten percent of the difference between the salary she actually carries and that she would have received in the D-2 position on a continuous basis. The payments are to commence on the date the successful candidate started in the D-2 position and continue until the date of the applicant's mandatory retirement. The respondent is also to pay the Applicant 10 percent of any additional allowances and benefits she would have received at the D-2 level including adjustment of her pension contributions and consequent retirement benefits.

51. Again, under the compensation judgment of *Hastings* 2011-UNAT-109, the Judgment contains "loss of chance" language that, if read and understood out of context, might be incorrectly interpreted and applied as a liability doctrine for determining whether a staff member should recover on his/her claim:

> 2. Compensation for loss of a "chance" of promotion may sometimes be made on a percentage basis, but where the chance is less than ten per cent, damages become too speculative. The trial court is in the best position to assess those damages. Except in very unusual circumstances, damages should not exceed the percentage of the difference in pay and benefits for two years.

52. In *Lutta* 2010-UNAT-117, the Appeals Tribunal announced that in a non-promotion case, the Dispute Tribunal is not bound by the percentage method articulated in *Hastings* 2010-UNAT-109, but that for failure to observe procedural rights resulting in loss of chance, the Dispute Tribunal may make its own determination of damages (emphasis in original):

> 1. There 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.
>
> 2. Though the trial court "refused to speculate" on the exact percentage of chance, it did award three months' net base salary. We find no fault with the trial court's reasoning, and affirm the Judgment.
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> …
>
> 14. While the UNDT "refused to speculate" on Lutta's exact chances for the promotions, it did award him three months salary for the "loss of chance". The Secretary-General does not appeal this

> decision—only Lutta challenges it, contending that the trial court was required to assess the percentage chances that he would have been selected. Not so. While this Court has approved that procedure as *one method* of assessing damages [footnote deleted], we respect the opinion of the trial judge as to how to determine damages in each particular case [footnote deleted].

53. Following *Hastings* 2010-UNAT-109, and any suggestion in *Bertucci* UNDT/2010/080 notwithstanding, "loss of chance" is a compensation doctrine only, intended to measure damages for procedural violations. "Loss of chance" is not intended to determine whether recovery on the claim should occur. The Appeals Tribunal in *Hastings* 2010-UNAT-109 eliminated recovery where the "chance" of promotion is "less than ten percent". This phraseology does not suggest that the Appeals Tribunal was somehow modifying the standard of proof required to prevail on a claim down *to* ten percent.

54. The "loss of chance" doctrine applies in non-promotion and non-selection cases *where* there is more than one candidate *and where* it is not possible to say with certainty that any one of the candidates would have been appointed to the post.

55. Where a clear determination can be made that one candidate should have been selected, that does constitute a liability determination, and the measure of damages is the value of the lost contract benefits and emoluments to the staff member, which would constitute compensation of an economic nature.

56. The distinction between the two types of cases is illustrated by the difference in compensation awarded: loss of chance compensation is the Tribunal's best estimate of the value of the "loss of chance" (a general measure), while compensation for wrongful denial of a post is exact and is based on the contract benefits and emoluments. Reference is made to *Tolstopiatov* UNDT/2010/147 (Judgment on liability) and *Tolstopiatov* UNDT/2011/012 (Judgment on compensation).

57. Two possible methods exist for calculating non-economic damages for procedural violations: the *Hastings* approach of examining the salary and benefits, or the *Lutta* approach of determining compensation according to the facts of each case.

The *Hastings* approach does not represent actual compensation for lost salary and benefits itself, but is one of two methods of calculating loss of chance non-economic compensation for procedural violations.

58. From a review of the case law on loss of chance, the phrase "loss of chance" appears to have been misunderstood as a compensation measure requiring an examination of the likely duration of the contract (had the applicant been the successful candidate), less compensation that actually was earned, less amounts paid to the applicant upon termination, as reflected in the mathematical formula tendered by the Respondent in this case:

> ***Foregone Income*** *= % Loss of Chance [A] X Likely Duration of Contract [B] X Yearly Salary for Duration of Contract [C]*
>
> ***Compensation*** **=** *Foregone Income – Deductions [D]*

59. Being compensation of a non-economic nature for violation of procedural rights, the loss of chance does doctrine is not concerned with "foregone income", since there is no foregone income to calculate.

60. In cases of lateral transfer, there is no "foregone income" to determine, as the staff member (following the non-selection), would remain in his former post, and the loss of chance doctrine is also applicable in such a case.

"Loss of opportunity"

61. Within the Dispute Tribunal jurisprudence, the underpinning of "loss of opportunity" as compensation for violation of procedural rights finds itself in two judgments of the former United Nations Administrative Tribunal: Judgment No. 1341, *Hawa* (2007), and Judgment No. 1348, *Van Note* (2008), both compensate for this category. In *Hawa*, the Administrative Tribunal stated (emphasis added):

> IX. ... The Tribunal is therefore of the opinion, contrary to that of the Administration, that the Applicant has not been fully compensated for the *loss of the opportunity* to participate in promotion exercises over a period of seven years, and must, therefore, be compensated for

> the violation of her right to be fairly and equitably considered in promotion exercises.

62. In *Shashaa* UNDT/2009/034, the Dispute Tribunal developed the loss of opportunity doctrine further and interpreted it as being a loss of opportunity to continue with the Organization until retirement age, and awarded the applicant further contributions to the United Nations Joint Staff Pension Fund.

63. The case of *Wu* UNDT/2009/084 discussed the applicant's "loss of opportunity to be nominated against this particular post". In *Wu*, the Tribunal compensated the applicant for violation of his due process right to full and fair consideration for promotion and appointment, where a lateral move was involved in which no immediate financial damage was caused (similar to *Kasyanov*).

64. In discussing loss of opportunity, *Abbasi* UNDT/2010/055, para. 47, stated:

> The Applicant had her legitimate career aspirations thwarted and suffered economic loss. She is entitled to be compensated for loss of the opportunity of being appointed and consequent damage to her career development. Further, the Applicant was, and still is, distressed by the experience. … (See also *ibid.*, para. 50.)

65. In *Koh* UNDT/2010/040 (Judgment on compensation), the "loss of opportunity" was alternatively characterised within the same judgment as the "positive value of a chance of a benefit", as well as "the loss in being subjected to a significant possibility of future detriment".

66. From the above examination of the loss of opportunity cases, it is difficult to discern a doctrinal difference between the loss of chance and loss of opportunity cases, and it would seem that two different terms have been used for the same theoretical concept. "Loss of opportunity" incorporates notions of the lost "chance" of being selected for a position: "The loss of opportunity for the Post must be a factor in determining appropriate compensation. But for the violations found by the prior Tribunal, the Applicant "stood a real and significant chance of being selected, being a core staff member of UNOPS whose post (containing similar functions) had been

abolished and who had more seniority than the other finalist" (Para. 4 of Applicant's 11 June 2010 submission on compensation).

Governing principles

67. The above review of the Appeals Tribunal and the Dispute Tribunal jurisprudence reveals the following principles regarding "loss of chance" and "loss of opportunity" doctrines.

68. First, the terms "loss of chance" and "loss of opportunity" appear to be different terms for the same doctrine. It is difficult to discern an underlying theoretical difference between the two types of cases. The terms have been used interchangeably within the same judgment, and stand for the same concept. Being interchangeable terms, either "loss of chance" or "loss of opportunity" may be used, if properly applied.

69. Second, loss of chance/opportunity represents compensation of a non-pecuniary or non-economic nature to compensate for procedural violations.

70. Loss of chance/opportunity compensation could represent: (a) the impact on a staff member's employment situation and career prospects (*Kasyanov* UNDT/2010/026); (b) the loss of opportunity to compete for remunerative employment (*Koh* UNDT/2010/040); (c) the loss of the right to be fairly considered in the promotion exercise (UN Administrative Tribunal Judgment No. 1341, *Hawa*); (d) the loss of the right to continue with the Organization until retirement age (*Shashaa* UNDT/2009/034); (e) the loss of the right to full and fair consideration for promotion and appointment (*Wu* UNDT/2009/084; and (f) the loss of job security of a P-4 position and conversion to a 100 series contract (*Sprauten* UNDT/2010/087). Other compensable types of loss of chance/opportunity may exist, as well.

71. Third, the term "loss of chance" appears to have been misunderstood as being a compensation measure for lost *earnings*, which necessarily requires an application of concepts of "foregone income".

72. Fourth, loss of chance/opportunity must be differentiated both from (a) a determination of whether a staff member would prevail on his claim of wrongful denial of a post (a liability determination), and (b) the attendant compensation resulting from a wrongful denial of post (i.e., to place the staff member in the same position as he/she would have been in, had the breach not occurred). The value of a loss of chance/opportunity may be assessed by the Tribunal by taking into consideration the salary for the post(s) for which the opportunity was lost, but should be differentiated from exact compensation for loss of salary, which will necessarily have a direct correlation with a specific salary.

73. Fifth, where a tribunal decides that a staff member should have been appointed to a post, that constitutes a liability determination, and the staff member would be entitled to economic compensation for the contract benefits and emoluments that s/he lost following the wrongful denial. Where a staff member has been wrongfully denied a post and where the measure of damages is against the lost wages and benefits of the denied post, it would be incorrect to refer to loss of chance/loss of opportunity in such cases.

74. Sixth, while ccompensation for loss of chance/opportunity may be measured against contract benefits and emoluments (*Hastings* 2011-UNAT-109), that measure is for the sole purpose of determining an approximate value to be placed against loss of chance/opportunity, but the calculation is not for the purpose of reimbursing for lost earnings. Being a doctrine that compensates for procedural violations and being compensation of a non-pecuniary or non-economic nature, the concept of lost earnings does not apply within the loss of chance/opportunity context.

75. Finally, two possible methods exist for calculating non-economic damages for procedural violations: the *Hastings* approach of examining the salary and benefits, or the *Lutta* approach of determining compensation according to the facts of each case. Where a staff member has suffered a loss of opportunity, then compensation *may* be measured under the “percentage” method approved in *Hastings* 2010-UNAT-109 or *may* be determined according to the trial judge based on the facts of the individual

case (*Lutta* 2011-UNAT-117), without being bound by the percentage method articulated in *Hastings* 2010-UNAT-109.

76. The above cases clarify that compensation for moral injury is of a different category than compensation for loss of opportunity.

Application of governing principles to the Applicant's case

77. In the Applicant's case, two substantial and unwarranted irregularities in the selection process occurred, which were characterised by the prior tribunal as being "not merely formal in character but had a substantive effect on the outcome". A third factor did not directly bear on the liability judgment but was mentioned—the UNMAS chair was also a friend of the ultimately-successful candidate. It would be easy to understand how this third factor could influence the selection process, also.

78. The Tribunal rejects the Applicant's contention that his case requires the award of compensation in excess of two year's net base salary for exceptional cases under art. 10.5(b) of the Statute of the Dispute Tribunal.

79. The Tribunal rejects the Applicant's request for compensation to cover the costs of legal and administrative expenses associated with bringing his two cases before the Tribunal.

80. In his submission of 7 September 2010, the Applicant adds a claim for two years' net base salary concerning "his entitlement to a standard enhanced separation package of 18 months termination indemnity base salary" as "[t]his compensation was never paid since the UNOPS argued (wrongly) that he had been offered a post but had rejected it".

81. The Tribunal makes the specific finding that the Applicant was *not* offered the Post and did not reject assuming the Post, and orders the Respondent to determine whether the Applicant was wrongly deprived of his entitlement to a standard enhanced separation package of 18 months termination indemnity base salary.

82. Following the principles articulated above, under art. 10.5 of the Statute of the Dispute Tribunal, the Tribunal will award the Applicant six months' net base salary in effect at the time of the selection process mentioned herein, as non-pecuniary compensation for the substantial and unwarranted irregularities in the selection process for the Post. This figure is assessed by the Tribunal to be fair in light of all the evidence before it (*Lutta* 2011-UNAT-117), was a sum requested by the Applicant and is well within the parameters set by the Appeals Tribunal in loss of opportunity cases.

83. For the stress experienced by the Applicant that was causally related to the Applicant's loss of chance/loss of opportunity (the Applicant was on certified sick leave—clinical depression—from August 2007 through October 2008); (the Applicant's doctor's reports are with the United Nations Medical Services, which approved and certified the sick leave, according to the Applicant's 11 June 2010 submission on compensation, para. 7), the Tribunal will award the sum of three months' net base pay in effect at the time of the selection process mentioned herein.

Conclusion

84. The Tribunal awards the Applicant the following:

a. the sum of six months' net base salary in effect in May 2007 as non-pecuniary compensation for the substantial and unwarranted irregularities in the selection process for the Post; and

b. the sum of three months' net base salary for the stress experienced by the Applicant that was causally related to the Applicant's loss of chance/opportunity.

85. The total sum of compensation as detailed in paragraph 84 above is to be paid within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not

paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

Orders

86. Noting that the Tribunal has not received fully elaborated arguments on the issue of termination indemnity, the Tribunal considers that this is a matter that can now be most expeditiously rectified by the Respondent.

87. By 1 September 2011, the Respondent shall determine whether the Applicant was wrongly deprived of his entitlement to a standard enhanced separation package of 18 months' net base salary as termination indemnity and to notify the Applicant by 1 September 2011 of its determination and make payment of the termination indemnity if warranted, including interest backdated as appropriate.

88. This order is without prejudice to the Applicant in later filing an appeal of the determination of the Respondent on termination indemnity, if necessary.

(signed)

Judge Marilyn J. Kaman

Dated this 1st day of June 2011

Entered in the Register on this 1st day of June 2011

(signed)

Santiago Villalpando, Registrar, New York