



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/019/
UNAT/1622
Judgment No.: UNDT/2011/103
Date: 20 June 2011
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

KOZLOV & ROMADANOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The matter before the Tribunal is that of compensation following Judgment No. UNDT/2011/058, dated 30 March 2011, wherein the United Nations Dispute Tribunal determined that the Applicants' rights were breached during a selection process for the P-3 level post ("the Post") of Russian Editor, Official Records and Editing Section ("ORES"), Department General Assembly Conference Management ("DGACM").

2. In Order No. 68 (NY/2011) of 3 March 2011, the Tribunal directed the parties to file and serve submissions on compensation, which they did. Following UNDT/2011/058, in Order No. 104 (NY/2011) of 8 April 2011, the Tribunal again directed the parties to file and serve submissions on compensation. The parties have also complied with that request of the Tribunal.

3. As with the determination of liability in UNDT/2011/058, the issue of the joinder of proceedings has not been raised by either party, and the Tribunal deems it appropriate to deal with the Applicants' separate compensation claims in a single judgment.

Relevant facts

4. The first Applicant, Mr. Kozlov, joined the Organization on 11 October 1988 at the P-2 level in the Russian Translation Service ("RTS"), Translation Division ("TD"), Division of Conference Services ("DCS"), was promoted on 1 May 1992 to the P-3 level as Editor in ORES, and had his appointment converted in 1995 to a permanent appointment. Effective 11 October 2004, he was reassigned to RTS as a Translator. Following his non-selection for the Post, Applicant Kozlov has continued his service with the Organization.

5. The second Applicant, Mr. Romadanov, joined the Organization on 5 October 1988 at the P-2 level in RTS/TD/DCS, was promoted on 1 January 1992 to the P-3 level as Editor in ORES, and had his appointment converted in 1995 to a permanent appointment. Effective 1 January 2004, he was reassigned to the RTS as a Translator. Following his non-selection for the Post, Applicant Romadanov has continued his service with the Organization.

6. On 27 September 2006, the Applicants were separately informed that they had not been selected for the Post.

7. Appointment to the Post would have been a lateral transfer for both Applicants and did not represent a promotion.

8. In UNDT/2011/058, the Tribunal found that numerous procedural violations had occurred during the selection process for the Post. The violations were as follows:

a. The selection panel admitted a candidate to the interview who was unqualified in two respects (the candidate was not on the roster of Russian editors and had no prior editing experience);

b. The selection panel's file note was unsigned and its authorship was uncertain;

c. The selection panel did not rank on all competencies announced in the vacancy announcement;

d. The vacancy announcement did not meet the requirements of ST/AI/2002/4 "Staff Selection System";

e. The vacancy announcement did not specify under ST/AI/2002/4, sec.1, whether the Post was a "vacant post" or a "temporarily vacant post";

f. The selection panel improperly rejected the Applicants' candidacies and did not return to the roster of Russian editors to reconsider one of the Applicants when the initially-successful candidate was found to be ineligible for the Post;

- g. DGACM kept an out-of-date roster of Russian Editors;
- h. Following the ineligibility of the initially-successful candidate, the Post was filled by the ultimately-successful candidate, without any announcement of the vacancy or competitive selection process; and
- i. The ultimately-successful candidate may not have possessed the requisite credentials for the Post at the time of her selection.

9. As a result of the above procedural violations, the Tribunal held, as a matter of law (para. 95 of UNDT/2011/058), that:

- a. The Respondent did not make a minimal showing that the Applicants' statutory rights were honoured in good faith in that the Administration gave fullest regard to them in the selection process for the Post; and
- b. The Respondent did not meet his burden of showing that the Respondent's discretion was exercised fairly and without extraneous considerations or improper motivation.

10. The Tribunal also referred the case to the Secretary-General of the United Nations, pursuant to article 10.8 of its Statute, for possible enforcement of accountability measures, due to the number and magnitude of procedural violations in the selection procedures for the Post.

Applicants' submissions on compensation

11. The Applicants seek compensation in the following categories (reference is made to the Applicants' response to Orders Nos. 68 (NY/2011) and 104 (NY/2011)):

- a. Improper denial of full and fair consideration for the P-3 post: under this head, the Applicants seek eight months' net base salary for each of them, calculated on the basis of the annual salary scale;

b. Loss of opportunity to pursue the new P-4 level post that was created in ORES after the Applicants had been denied the Post, for which they claim the “financial loss for the past two years, based on the difference in the annual remuneration (net base salary plus post adjustment) between the corresponding steps of P-4 and P-3 levels and compensation for the difference in pension gains between the P-4 and P-3 levels for the past two years (based on pensionable remuneration), that is payable to the United Nations Joint Staff Pension Fund”; under this head, the Applicants have also referred to damage caused to their reputations and career prospects;

c. Excessive delay of at least three years in having the matter resolved since the issuance of the unanimous recommendation of the Joint Appeals Board (“JAB”) in February 2008, a delay that has resulted in prolonged bouts of anxiety and mental stress for the Applicants;

d. Moral injury, including damage to professional reputation and, for Applicant Romadanov, a bout of clinical depression that lasted for about one year; under this head, an amount of six months’ net base salary for each Applicant is requested, based on the gravity of the violations committed by the Respondent.

12. Applicant Romadanov has submitted an annex to the Applicants’ response to Order No. 68 (NY/2011), which is a note from a psychotherapist and which sets forth the specific way in which the actions of the Organization caused direct harm to Applicant Romadanov. Reference is made to the relevant annex for more detailed information.

13. Applicant Kozlov has not supplied a similar note.

Respondent's submissions

14. The Respondent makes the following submissions regarding the Applicants' compensation requests (reference is made to the Respondent's response to Order No. 104 (NY/2011)):

The Applicants cannot now amend their request for compensation

- a. The Applicants are constrained by their submission in response to Order No. 68 (NY/2011), in which they requested a total of seven months' net base salary as compensation, in addition to interest accrued over a period of three years;
- b. The Tribunal has not granted the Applicants leave to amend their compensation submissions, and the Respondent therefore objects to the Applicants' revision of the amount of compensation requested;

The compensation for a breach of the right to fair and full consideration is limited

- c. The United Nations Appeals Tribunal in both *Kasyanov* 2010-UNAT-076 and *Wu* 2010-UNAT-042 has held that two months' compensation was appropriate for non-pecuniary loss as a result of a breach of the right to fair and full consideration; this figure should act as a guide to the Tribunal in the present case;

The Applicants are not entitled to any compensation for loss of a chance

- d. The Appeal Tribunal in *Hastings* 2010-UNAT-109 provided the following guidance on compensation for loss of chance:

...

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;

...

e. The instant case was not one of promotion, since the Post was at the same level as the positions occupied by the Applicants (P-3 level), and therefore the Applicants have not suffered any pecuniary loss as a result of not being selected for the Post;

f. The Applicants have not shown any facts or quoted any law in support of their contention that they have been denied the opportunity to “pursue the new P-4 post of Russian editor that was created in ORES”;

Claims for damages for moral injury must not be punitive in nature and must be supported by evidence

g. The Applicants request six months’ net base salary as compensation for moral injury because of the “gravity of the violations committed by the Respondent”. A principled approach to requests for compensation for moral injury requires consideration of the harm, if any, suffered by an applicant. Awards of compensation must not be punitive in nature; by requesting compensation due to the gravity of violations committed by the Respondent, the Applicants seek punitive damages, which is not permitted, and the application should be dismissed as a result;

h. If the Tribunal is minded to entertain the application, the Applicants are required to provide convincing evidence in support of their claims; as stated by the UNAT in *Hastings*, “‘moral’ damages may not be awarded without specific evidence supporting the award”;

i. Applicant Kozlov has not provided any evidence supportive of his claim of moral injury, and his application for compensation on this ground should be dismissed;

j. Applicant Romadanov has provided, as an annex to the Applicants' reply to Order No. 68 (NY/2011), a note from his psychotherapist; this note, however, is not credible evidence in support of the Applicant Romadanov's claim; contrary to what is stated in the note, the Applicant was not "rejected for the position which he had successfully occupied for over 14 years"; he was denied a lateral *transfer* to a different position at the same level that carried distinct responsibilities; while he was not selected for the Post, it was never maintained that he was unsuitable to work in the language section or the duties he had been carrying out; although the note supports the contention that the Applicant did experience difficulties as a result of the selection process, his alleged "anxiety regarding his future career" is not substantiated;

k. The Applicants' requests are not in line with the moral injury damages given by the Dispute Tribunal, which have been modest; in *Hastings* UNDT/2010/071, although overturned on appeal for lack of evidence of injury, the Tribunal had awarded USD5,000; in *Wu* UNDT/2009/084, the Tribunal awarded a total of two months' net base salary, including damages for moral injury.

Consideration

May the Applicants amend their request for compensation?

15. The Respondent contends that the Tribunal did not grant the Applicants leave to amend their compensation submissions and that the Applicants, therefore, are constrained by their submission in response to Order No. 68 (NY/2011), in which they requested a total of seven months' net base salary as compensation, in addition to interest accrued over a period of three years.

16. On this point, the Tribunal rejects the Respondent's contention, as the Tribunal in Order No. 104 (NY/2011) specifically called for updated submissions on compensation, under which the Tribunal thus granted leave for the Applicants' amended submissions.

The Applicants' compensation requests

17. Under the United Nations Appeals Tribunal's judgment in *Antaki* 2010-UNAT-096, the Dispute Tribunal has the unquestioned discretion and authority to quantify and order compensation under article 10.5 of its Statute for a violation of the legal rights of a staff member, as provided under the Staff Regulations, Staff Rules and administrative issuances.

18. Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress and moral injury (*Wu* 2010-UNAT-042).

19. The very purpose of compensation is to place the staff member in the same position s/he would have been in, had the Organization complied with its contractual obligations (*Warren* 2010-UNAT-059, *Iannelli* 2010-UNAT-093).

20. The Appeals Tribunal has specifically determined that under art. 10.5(a) of the Statute of the Dispute Tribunal, an award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization, which is prohibited under art. 10.7 of the Statute of the Dispute Tribunal (*Wu* 2010-UNAT-042, explicitly reaffirming the former United Nations Administrative Tribunal Judgment No. 1047, *Helke* (2002), and Judgment No. 1122, *Lopes Braga* (2003) (both cases of compensation for procedural irregularities)).

21. The Applicants claim compensation in the categories of:

- a. Improper denial of full and fair consideration for the Post (eight months' net base salary for each Applicant);
- b. Loss of opportunity to pursue the new P-4 level post created in ORES after the Applicants had been denied the Post;
- c. Damage to reputation and career prospects, which the Applicants include under the head of loss of opportunity; and
- d. Moral injury damages.

Loss of opportunity to pursue the new P-4 level post created in ORES

22. The Tribunal agrees with the Respondent that the Applicants have not presented any evidence supporting their contention that they were denied the opportunity to pursue a new P-4 post of Russian editor that was created in ORES, and the Tribunal denies this compensation request.

Improper denial of full and fair consideration for the Post

23. When the Applicants request compensation for “improper denial of full and fair consideration for the P-3 post” (including damage to reputation and career prospects), they are, in fact, seeking loss of chance/opportunity damages. Based on the analysis in *Sprauten* UNDT/2011/094, the Tribunal hereinafter refers to the Applicants' request as one for “loss of chance/opportunity” compensation.

24. 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 (*Sprauten* UNDT/2011/094, para. 70).

25. Loss of chance/opportunity compensation is of a non-pecuniary or non-economic nature to compensate for procedural violations, and does not represent compensation for lost earnings (*Sprauten* UNDT/2011/094, paras. 69, 71 and 72).

26. The Respondent argues that the “Applicants are not entitled to any compensation for a loss of chance”, since they have not suffered any pecuniary loss (lost earnings) as a result of not being selected for the Post (citing *Hastings* 2010-UNAT-109). *Hastings*, however, stands for the exact *opposite* proposition and affirmed a damages award by the Dispute Tribunal under the head of loss of chance for the procedural violations in that case.

27. As explained in *Sprauten* UNDT/2011/094, the purpose of loss of chance/opportunity compensation is to make reparation for procedural violations; therefore, notions of pecuniary, or economic, loss do not apply when determining loss of chance/opportunity compensation. While compensation for loss of chance/opportunity may be measured against contract benefits and emoluments (i.e., earnings) (*Hastings*), that measurement is for the sole purpose of determining an approximate value to be placed against loss of chance/opportunity. The calculation of loss of chance/opportunity compensation is not for the purpose of reimbursing for lost earnings. Thus, the Respondent is not correct when he argues that the Applicants are not entitled to loss of chance/opportunity compensation because they did not suffer any pecuniary loss as a result of not being selected for the Post.

28. The Respondent further contends that the Applicants are not entitled to any compensation for loss of a chance, since the case was not one of promotion, but was a lateral move at the P-3 level (again citing *Hastings*, a non-promotion case). The Respondent again reads *Hastings* too narrowly, as standing for the proposition that loss of chance/opportunity compensation may apply only in a non-promotion case.

29. While the United Nations Appeals Tribunal in *Hastings* and in *Lutta* 2010-UNAT-117 approved compensation according to loss of chance principles and stated that loss of chance damages may apply in non-promotion cases, the UNAT did *not* also state that loss of chance/loss of opportunity damages cannot apply in any other type of case. In fact, loss of chance/opportunity principles are peculiarly applicable in cases of lateral transfer where there is *no* direct economic loss resulting from non-selection, but where a demonstrated injury has occurred (denial of the right to be fairly considered).

30. Where a staff member has suffered a loss of opportunity, then compensation may be measured under the “percentage” method approved in *Hastings* or may be determined according to the trial judge based on the facts of the individual case (*Lutta*), without being bound by the percentage method articulated in *Hastings*.

31. The complicating aspect of determining compensation in the Applicants’ case is that the Tribunal determined, in UNDT/2011/058, that the Respondent had breached his obligation to make an actual selection of one of the two Applicants for the Post. By not properly observing the selection procedures in effect for the Post and which resulted in non-selection of one of the Applicants in this case, the effect of the procedural violations (for purposes of assessing loss of chance/opportunity compensation) is far greater than it would have been otherwise.

32. Further complicating the assessment of compensation is that the procedural violations were so grave as to warrant a referral by the Tribunal to the Secretary-General for accountability measures. In UNDT/2011/058, the Tribunal made the following observation:

106. The Tribunal refers this case to the Secretary-General of the United Nations for possible enforcement of accountability measures to determine whether the unfortunate possibility of nepotism may have occurred in this case. It is for the Secretary-General to determine which persons (both within and without the selection process) may have been involved in the matters discussed herein, and who may be held accountable.

33. The Tribunal, of course, is not in a position to know exactly which Applicant would have been selected, had the Respondent properly returned to the roster of Russian editors, once the initially-selected candidate was determined to be ineligible for the Post.

34. Under the *Hastings* formula, a “50% chance” would apply if the damages are evaluated at the point in time after the initially-selected candidate was eliminated and only the two Applicants remained, or a “30% chance” would apply if the initially-selected candidate was included and three candidates are counted. Given that one of the Applicants should actually have been appointed to the Post and given the magnitude and nature of the procedural violations in this case, it hardly seems fair or appropriate to use the *Hastings* mathematical formula (“50%” or “30%”), to multiply that formula against the salary in effect for the Post, and to award the resulting amount as the approximate value for loss of chance/opportunity compensation.

35. The Tribunal will award loss of chance/opportunity compensation under *Lutta*, which evaluates the facts of the individual case. Some of the significant factors here are: (a) the existence of numerous procedural irregularities in this case; (b) the magnitude of the procedural irregularities, i.e., the fact that they were not mere technical breaches of the regulations and rules of the Organization; (c) the fact that one of the Applicants was, in fact, denied being selected for the Post; and (d) the fact that the circumstances of the case compelled the Tribunal to make a referral to the Secretary-General for accountability measures.

Moral injury

36. Both Applicants additionally request compensation for moral injury.

37. The United Nations Appeals Tribunal has held in *Hastings* that moral damages may not be awarded without specific evidence supporting the award.

38. Applicant Romadanov has supplied the requisite evidence that would support an award of moral injury compensation to him; Applicant Romadanov suffered a bout

of clinical depression lasting for about one year and has supplied a note from his psychotherapist to this effect.

39. Applicant Kozlov has not provided specific evidence that would support an award of moral injury damages.

Conclusion

Compensation for Applicant Kozlov

40. Given the unusual facts and considerations of this case, the Tribunal awards Applicant Kozlov, under art. 10.5 of the Statute of the Dispute Tribunal, one year's net base salary in effect in September 2006, as non-pecuniary compensation for the substantial and unwarranted irregularities in the selection process for the Post.

41. The Tribunal rejects Applicant Kozlov's claim for moral injury damages.

42. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed in paragraph 40 above is to be paid to Applicant Kozlov 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.

Compensation for Applicant Romadanov

43. Given the unusual facts and considerations of this case, the Tribunal awards Applicant Romadanov, under art. 10.5 of the Statute of the Dispute Tribunal, the following:

- a. one year's net base salary in effect in September 2006, as non-pecuniary compensation for the substantial and unwarranted irregularities in the selection process for the Post;

b. the sum of three months' net base salary for the bout of clinical depression experienced by him that was causally-related to the Administration's actions in this case.

44. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed in paragraph 43 above is to be paid to Applicant Romadanov 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.

(Signed)

Judge Marilyn J. Kaman

Dated this 20th day of June 2011

Entered in the Register on this 20th day of June 2011

(Signed)

Santiago Villalpando, Registrar, New York