UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/039
Judgment No.: UNDT/2017/068
Date: 25 August 2017
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

NIKOLARAKIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

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

Introduction

1. On 24 August 2016, the Applicant, a Security Officer serving at the S-2 level, step 11, in the Department of Security and Safety ("DSS") in New York, filed an application contesting his "[e]xclusion from [a] recruitment procedure for S-3 Senior Security Officers on job opening ["JO"] #52215", published on 24 December 2015. The recruitment exercise resulted in the selection of twenty Senior Security Officers ("SSO") at the S-3 level from a roster.

2. The Applicant submits that the selection exercise was a violation of his right to full and fair consideration, and requests that the decision to exclude him from the recruitment exercise be rescinded and that he be granted the opportunity to compete for an S-3 level post. In the alternative, the Applicant requests damages for the loss of opportunity/chance of promotion, and for the harm to his career progression and career stability, including the adverse impact on his ability to convert to a continuing appointment applicable to those at the S-3 level or higher. The Applicant also requests compensation for moral damages.

3. The Respondent has admitted to irregularities in the selection process. Specifically, the Under-Secretary-General, Department of Management ("USG/DM") accepted the findings of the Management Evaluation Unit ("MEU"), which admitted that twelve out of the twenty selected roster candidates were not eligible for selection because they were selected from an invalid roster and, accordingly, the Organization should have conducted a full competitive selection exercise to recruit those twelve positions.

4. Liability having being admitted, the parties agree that the only issue in dispute is the quantum of damages payable. The Respondent urges the Tribunal to reject the application on the grounds that the Organization has already agreed to compensate the Applicant the sum of USD833.45 for the admitted irregularities. The Applicant

refutes the Respondent's method of calculation and rejects the amount of USD833.45 as insufficient compensation for harm suffered.

5. The Respondent confirmed that the Organization had deposited USD833.45 into the Applicant's bank account via payroll process in November 2016 without prior or specific notification to the Applicant.

Procedural History

6. On 27 April 2016, the Applicant filed a request for management evaluation.

7. On 24 August 2016, not having heard from the MEU, the Applicant filed the instant application. The application was transmitted by the Tribunal on the same day to the Respondent, who was instructed to file the reply by 23 September 2016.

8. On 16 September 2016, one week prior to the expiry of the deadline for the filing of the reply, and whilst the application was pending before the Tribunal, the Applicant received a response from the USG/DM on his request for management evaluation, advising that the Secretary-General had decided to accept the recommendation of the MEU to compensate the Applicant in the amount of USD833.45.

9. On 23 September 2016, the Respondent filed his reply, incorporating the position set out in the aforesaid letter, stating that the USG/DM "accepted the Applicant's claim, and authorized the payment in the amount of USD833.45 for his non-selection".

10. On 5 December 2016, by Order No. 271 (NY/2016), noting that, in the reply, the Administration admitted liability by acknowledging irregularities in the selection process and had "authorized" compensation of USD833.45, the Tribunal requested the parties to clarify whether the sum had been paid to or accepted by the Applicant. The parties were ordered to file a joint submission by 12 December 2016 to inform

the Tribunal whether they had resolved the dispute, and if not, the Applicant was ordered to file a response to the Respondent's reply by 12 December 2016.

11. On 12 December 2016, the parties filed a joint submission informing the Tribunal that they had not resolved the matter.

12. Although cases are generally considered by the Tribunal in chronological order of filing, since liability was admitted by the Respondent and only the issue of quantum remained, the Tribunal considered that this case could be expedited following certain clarifications.

13. On 2 February 2017, by Order No. 22 (NY/2017), the Tribunal scheduled a Case Management Discussion ("CMD") for 17 February 2017, and ordered the Applicant to file his response in accordance with para. 7 of Order No. 271 (NY/2016) and to respond, in particular, to the following questions:

> a. Whether the Applicant has received USD833.45, or any other sum, from the Administration as compensation; and
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> b. What other relief, if any, alternative to rescission, is sought by the Applicant, the legal basis and grounds therefor, and the quantum of such relief if any.

14. On 6 February 2017, due to the unavailability of the Applicant's counsel, the Tribunal rescheduled the CMD set down for 17 February 2017 to 22 February 2017.

15. On 10 February 2017, the Applicant submitted his response to the Respondent's reply of 23 September 2016, indicating that, on 16 September 2016, he had indeed received the Administration's response confirming the MEU's conclusion that the decision not to consider his application for an S-3 post was unlawful. The Applicant contended that the response, however, contained factual errors when it indicted he had not applied for all the S-3 SSO vacancies that had been advertised then or previously. The Applicant further indicated that the Organization's method of calculating loss of opportunity damages calculated at USD833.45 was insufficient.

16. On 15 February 2017, the Applicant's Counsel filed a motion requesting the Tribunal to reschedule the CMD for a date after 22 February 2017 on account of illness, indicating that Respondent's counsel was consulted and did not object.

17. On 16 February 2017, by Order No. 30 (NY/2017), the Tribunal granted the Applicant's motion and rescheduled the CMD for 28 February 2017.

18. On 28 February 2017, the parties attended a CMD, whereat it was agreed that the only remaining issue in dispute involved relief, notably the quantum of damages. The Respondent informed the Tribunal that the Administration had, on 10 November 2016, via payroll, deposited USD833.45 directly into the Applicant's bank account, the Tribunal having received no prior notification of this payment during the pending proceedings.

19. Neither the Tribunal nor the Applicant appeared to have received any formal notification of such payment and, on the same day, following the CMD, the Respondent submitted a copy of the payroll document reflecting the payment. The Tribunal notes that this payment was made unilaterally whilst proceedings were pending before the Tribunal, and that it is not contended that this unilateral deposit of USD833.45 into the Applicant's account constitutes an acceptance, or full and final settlement by the Applicant, nor a waiver of his rights.

20. On 1 March 2017, by Order No. 40 (NY/2017), the Tribunal ordered the parties to file closing submissions addressing the matter of relief.

21. On 9 March 2017 and 17 March 2017, the parties filed their respective closing submissions in compliance with Order No. 40 (NY/2017). Attaching a signed statement to his submission, the Applicant contended, *inter alia*, that he has provided credible evidence of moral damages. The Respondent argued, *inter alia*, that there is no basis for the Applicant's belated claim for moral damages and that the signed statement submitted by the Applicant had not been subjected to cross-examination and was insufficient evidence to meet the required standard of proof.

22. On 21 March 2017, by Order No. 48 (NY/2017), the Tribunal, in light of the parties' submissions, ordered the parties to inform the Tribunal of a mutually agreeable date for a hearing on the issue of damages, and where the Applicant was to provide *viva voce* or other evidence regarding his request for moral damages.

23. On 24 March 2017, the Respondent filed a submission in compliance with Order No. 48 (NY/2017), indicating that the parties had discussed their availability, with Applicant's counsel expressing preference for 30 March or 4 April 2017.

24. On 27 March 2017, by Order No. 57 (NY/2017), the Tribunal scheduled a hearing for 4 April 2017 and instructed the parties to confirm their availability by 29 March 2017.

25. On 28 March 2017, the Applicant filed a submission in compliance with Order No. 57 (NY/2017), informing that the Applicant would be physically present at the hearing in the New York courtroom and that his Counsel would participate remotely from Geneva.

26. On 29 March 2017, the Respondent's Counsel informed the Tribunal of his attendance at the hearing.

27. On 4 April 2017, the Tribunal conducted a hearing on the issue of moral damages, whereat the Applicant gave sworn testimony.

Factual background

28. The Applicant commenced employment with the Organization on 12 July 2004 and has had no breaks in service. His unrebutted testimony is that whilst serving at the S-2 level, he performed a number of S-3 level SSO (Senior Security Officer) duties working as a Desk Officer, UMOJA Time Administrator, "CC Officer SOC-CCTV Operator" (an unknown abbreviation), and Firearms Armorer.

29. On 1 October 2007, following a competitive recruitment exercise, by letter from the then Executive Officer of DSS, the Applicant was placed on a roster for S-3 level SSO positions for one year expiring on 1 October 2008.

The 2008 roster recruitment

30. In 2008, there was another recruitment exercise for the S-3 SSO position, which resulted in additional rostered candidates ("2008 roster"). The Applicant contends, and which has not been disputed, that the 2008 roster exercise did not include competency-based interviews or a central review body clearance.

The 2011 roster recruitment

31. In 2011, another recruitment exercise took place, 37 officers were promoted and eight candidates were rostered ("2011 roster").

Job opening #42689

32. On 18 June 2015, the Chief of DSS sent daily orders to DSS staff members, including the Applicant, announcing job opening ("JO") #15-SEC-DSS-42689-R-NEW YORK (R) ("JO #42689") for eight S-3 level SSO positions published on Inspira (the United Nations online jobsite) with the expiry date of 18 July 2015. The announcement further stated (emphasis added):

> […] the intention is to fill these eight posts from the *2011* roster which is the valid current roster for S-3, as per [Office of Human Resources Management ("OHRM")]. All rostered candidates who are still interested in being considered for the higher level position are required to apply. Only the rostered candidates who have applied for the advertised position will be considered.
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> …
>
> There are at least another nine (9) posts to be filled through the "normal process" (i.e., written technical assessments, interviews) and will be posted shortly. The decision to publish two JOs was made in

> order to make the process more efficient considering the level of operational activities in the coming months.

33. The vacancy announcement for JO #42689 was published on Inspira on 18 June 2015 for one month.

34. According to the MEU response, after JO #42689 was advertised, a number of additional staff members, who were rostered in the previous online jobsite, Galaxy, prior to 2010, received notifications from the OHRM that their roster membership was still valid. The DSS requested the OHRM to clarify the issue of legacy rosters and indefinite roster membership. On 23 July 2015, the OHRM replied to the DSS advising that:

> […] the S-3 selection[s] were made on 3 September 2008. Based on the existing ST/AI on Staff Selection (ST/AI/2006/Rev.1-9.3) their roster memberships were valid for one or three years […] Roster membership became indefinite as of 1 July 2009, when the S-3 of the 2008 exercise were still rostered. Hence, since they had a valid roster status as 1 July 2009, they were granted indefinite roster membership.

35. Following the above clarification and advice from OHRM, JO#42689 for the eight posts was cancelled.

The contested recruitment: Job Opening #52215

36. On 24 December 2015, a new JO (#52215) was issued on Inspira announcing the recruitment for twenty S-3 level SSO positions. Daily orders to the DSS staff dated the same day encouraged both rostered and unrostered candidates to apply. The Applicant applied.

37. On 1 March 2016, the Chief of DSS released the names of the 20 officers selected to the S-3 level SSO posts for JO#52215. The Applicant was not selected. No full competitive recruitment exercise took place as recruitment of all 20 posts was from the roster.

38. On 27 April 2016, the Applicant filed a request for a management evaluation challenging the decision to exclude him from the recruitment exercise. The Applicant primarily argued that, by conducting a roster recruitment for twenty posts to include candidates who were no longer on a valid roster, the Organization violated his right to full and fair consideration.

Response of the MEU

39. Subsequent to the Applicant's 24 August 2016 filing of the instant application, the USG/DM by letter dated 16 September 2016, informed the Applicant that he had accepted the conclusion of the MEU. The MEU agreed that the roster membership of twelve of the twenty candidates was invalid, concluding as follows (emphasis added):

> The MEU noted that there were only twenty candidates in total released by OHRM from the roster for consideration (and, ultimately, selection) for twenty S-3 posts. *The roster membership of eight of those candidates is not in doubt. Therefore, if in fact the remaining twelve candidates were not actually on the roster at that time, the Administration would indeed have had to conduct a selection exercise that would have included non-rostered candidates such as yourself.* The MEU examined the legal framework to assess your contention that the roster membership for twelve of the twenty candidates was invalid.
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> …
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> […] *the MEU concluded that the roster membership of those candidates from the 2008 roster had lapsed, and thus were not eligible for recruitment from roster. […] the consequence of filling the S-3 SSO posts with candidates from [the] 2008 lapsed roster resulted in denying you [the Applicant] the opportunity to go through a competitive selection exercise*.

40. The USG/DM further informed the Applicant that the Secretary-General accepted the recommendation of the MEU and agreed to compensate the Applicant USD833.45. Having concluded that the OHRM incorrectly instructed the DSS to include the twelve additional candidates from the 2008 roster, the MEU turned to assess compensation as follows (emphasis added):

> In determining the amount of compensation, the MEU was guided by the nature of irregularities in the selection process and the likelihood that you would have been selected for the post had these irregularities not been committed. See *Solanki* 2010-UNAT-044; *Mezoui* 2012-UNAT-220; *Appleton* 2013-UNAT-347. The MEU further considered that the compensation should correspond to the material injury that you suffered as a result of the irregularity in the process. *This injury corresponds to the difference in salary between S-3 and S-2 level from the date on which other candidates were promoted to S-3 post and until you are promoted to S-3 post, but in any event the duration of damages awarded should be limited to two years* (*Hastings*, 2011-UNAT-109). Such damages should also be adjusted in accordance with your chances of success in being selected (Emphasis added).
>
> […] OHRM released 105 applications of candidates to be considered for 20 available posts. Eight candidates were rostered in 2011 and the validity of their roster membership is not in doubt. Accordingly, the MEU concluded that had the 2008 roster membership not have been taken into account 12 posts would have been available for 97 candidates. Thus, your chances of being selected for the post were 12 out 97, namely 12.3 percent.
>
> While implementing the said formula, the MEU noted that the annual salary of S-2 Security Officer at step 11 (your step in grade) equals USD63,745. Had you been promoted, in accordance with Staff Rule 3.4, you would have been promoted to S-3, step 9 and your salary would have equalled USD67,133. The difference between your S-2 and S-3 annual salary would have been USD3,388. Since DSS standard contracts are issued for two years, we multiplied USD3,388 by two which equalled USD6,776. As your chances of being successful in the selection exercise were 12.3%, we multiplied USD6,776 by 12.3% and concluded that your overall compensation should be USD833.45.

41. Regarding the Applicant's request for compensation for the loss of opportunity to be considered for a continuing appointment, the USG/DM indicated in his letter that the MEU concluded as follows:

> […] As the recruitment of security officers at the S-2 level is not vetted by the Central Review Board, they are not eligible to be considered for a continuing appointment.
>
> Accordingly, if, *arguendo*, you were selected for a[n] S-3 post at […] namely [in] April 2016, you would still not be eligible for

> consideration for continuing appointment until at least April 2021. […] the conversion for continuing appointment is not automatic and is contingent on the continuing operational needs of the Organization. […] you would also have to satisfy a myriad of other criteria, such as receiving at least "meets expectations" in the four of the most recent performance appraisals before conversion; to have at least seven years of service remaining before retirement; not have been subject to any disciplinary measure in the five years prior to consideration; and continuity of service must not be broken until 2021. Given the myriad conditions that you will require to meet by the time the conversion exercise takes place, the MEU considered that your prospects for conversion at this stage are purely theoretical and are thus not quantifiable. Accordingly, […] you are not entitled to any compensation for the alleged loss of opportunity to be considered for conversion to a continuing appointment.

Applicant's submissions

42. The Applicant's principal contentions may be summarized as follows:

a. The Administration did not appropriately calculate loss of opportunity damages, and it is troubling that the Organization values an individual's loss of chance of promotion so insignificantly, so as to conclude that denial of the opportunity to compete for twelve posts equates to only USD833.45. The MEU in its calculation considered only one approach, namely a numerical calculation based on the number of applicants at the time, as this is the cheapest and most financially advantageous to the Administration as essentially the "graver their error the less damages they argue they should have to pay". By this logic, the more individuals that apply the further reduced would be his compensation. For instance, if 500 candidates applied, the Applicant would receive around USD100. The logic is flawed as the loss to the Applicant cannot be valued by how many individuals competed, but should be assessed by an objective measure of his loss;

b. It is trite law that alternative means of calculating loss of opportunity damages are available and nothing in the jurisprudence binds the

Administration to calculate compensation in the manner they have chosen, and their choice is merely one of expedience, referring to *Hastings* 2011-UNAT-109, *Sprauten* 2012-UNAT-219, *Marsh* 2012-UNAT-205.

c. In its method of calculation, the Administration has valued his candidature the same as any other applicant regardless of whether they were external, had relevant experience or even met the minimum requirements, which is not an equitable measure of damages. There are factors that should have been considered in assessing his chances of being recruited such as:

i. Eight years prior, the Applicant took a competitive recruitment process for S-3 level and was placed on roster in 2007 having been found suitable. The record illustrates that his candidacy has only improved in this time;

ii. The Applicant subsequently missed being rostered in 2011 solely due to one of his responses being considered half a mark below the level. This was not due to lack of teamwork but in his poor choice of giving an example about teamwork during the interview. He is scored as "outstanding" on this same competency by his supervisors;

iii. The Applicant has twelve years of prior service and is the only candidate at the S-2 level with the greatest seniority and more relevant experience than any other internal candidate who applied for the S-3 posts; and

iv. The Applicant has exceeded expectations in his last five performance evaluations and was specifically commended for "work[ing] high above his S-2 rank and handles every assignment professionally". In the last four performance appraisals, his first reporting officer recommended him for

promotion, and his last two appraisals his second reporting officer joined in the recommendation;

d. Per the above factors, the Applicant would have been among the strongest candidates for promotion to the S-3 level and, given the number of posts available and had the recruitment process been conducted in a lawful manner, his promotion would have been virtually assured. The Applicant testified before the Tribunal that he also took training courses to improve interviewing skills following the 2011 recruitment where he was scored slightly below the required score for teamwork;

e. In their jurisprudence, the Dispute and Appeals Tribunals have not calculated loss of opportunity damages solely by the number of candidates involved in a recruitment, but also by an objective measure of anapplicant's loss, referring to *Niedermayr* 2015-UNAT-603 the Appeals Tribunal indicated:

f. In *Neidermayr*, the staff member was not considered for one post. In the instant matter, the Applicant was unlawfully not considered for twelve posts. Further, in *Asariotis* 2013/UNDT/144, loss of opportunity damages relating to one single post was calculated at USD8,000. By this logic the Applicant should receive USD96,000, although the Applicant is not requesting this amount. Considering the overwhelming evidence of his positive candidature, the Tribunal should evaluate the Applicant's chance at 50 percent. His past performance in recruitment exercises, seniority and performance evaluations indicate he would have been in the top 25 percent of the candidates for the 12 posts. While the Respondent indicates a future recruitment for S-3 SSOs will occur there is no evidence to support this. The last time this occurred was 2011;

g. Relevant to this loss is the fact that 12 posts were unlawfully filled from the 2008 roster. This means that the opportunity lost was significantly

greater than if only one post had been available to be filled. Having recruited so many S-3 SSOs through an unlawful process, it follows that opportunities at that level will not arise for a significant period of time. Had this been a limited recruitment against a small number of posts, the Applicant might reasonably expect a further opportunity to be fairly considered could be expected. The significant number of posts recruited against means this is not the case and the Applicant has lost the opportunity to compete for an S-3 post for a significant period of time damaging his career progression;

h. The Applicant's damages should not be measured purely in salary differential as he has also lost the opportunity for consideration for continuing appointments, which begin at the S-3 level and which is not only a denial of his opportunity for career advancement but also denial of the opportunity to have the increased job security afforded to those holding continuing appointments. Conversion to continuing appointment is not allowed for staff who have not been promoted to at least the S-3 level. The Applicant fulfils all the required eligibility requirements for a continuous appointment except this element. Failure to consider him for promotion to the S-3 level has, therefore, damaged his career stability for which he requests compensation;

i. In addition, the Applicant has provided medical evidence, his statement, and his *viva voce* testimony under oath as to his emotional and psychological damages as a result of the decision to exclude him from the recruitment. There is ample precedent on moral damage awards in recruitment exercises, namely in *Boutiba* 2013/UNDT/153 where CHF500 was awarded and in *Asariotis* UNDT/2013/144 where USD6,000 was awarded.

Respondent's submissions

43. The Respondent's principal contentions may summarized as follows:

a. In agreement with the MEU and the USG/DM, an appropriate compensation of USD833.45 was offered and unilaterally paid to the Applicant via payroll as an accurate amount as per the calculation method supported by jurisprudence;

b. The compensation awarded was based on favourable assumptions towards the Applicant. Granting compensation in the method calculated and for the maximum two years is consistent with jurisprudence (*Hastings* 2011-UNAT-109) and the practice of the DSS issuing two-year contracts. Two years is to the benefit of the Applicant as the DSS plans to hold another S-3 selection exercise in the first quarter of 2017;

c. Compensation for damage to career progression is not entitled. Staff only have the right to full and fair consideration, not to promotion or career progression (*Andrysek* 2010-UNAT-070);

d. The cases cited by the Applicant, *Niedermayr* and *Asariotis*, do not support the award of additional compensation. The Applicant misreads those cases. The relevant part of the cited cases is the principle of compensation followed by the Dispute Tribunal, and not the actual amounts awarded. In both cases, the Dispute Tribunal calculated the compensation payable to applicants by reference to the pay differential divided by the chance lost. It is by this method that the Respondent arrived at the USD833.45 paid to the Applicant;

e. The Applicant's suggestion that he should be compensated for the loss of chance for each of the 12 positions that were incorrectly filled from a roster does not correctly reflect the Applicant's loss of chance as the Applicant is only capable of being appointed to one of the 12 positions. It is only from one such position that he was ultimately excluded, and that must be the basis of the calculation. In seeking a remedy detached from the calculus for loss of a chance, and by reference to "aggravating features", the Applicant seeks, in

effect, punitive damages. Article 10.7 of the Dispute Tribunal's Statute expressly forbids awards of such damages;

f. The Applicant's claim for moral damages should be rejected as there is no basis. The Applicant's signed statement does not meet the standards of evidence by the Appeals Tribunal which in *Kozlov* and *Romadanov* 2012-UNAT-228, held "[a] note from a psychotherapist is not sufficient evidence, when no medical bills or other evidence have been produced". In this context the statement of the Applicant, which has not been subjected to cross-examination is clearly insufficient evidence, and the Organization has admitted fault for these irregularities so the Applicant has moral satisfaction from the decision.

Consideration

44. The Tribunal notes that the Respondent correctly conceded that the recruitment of 12 officers to the S-3 level was unlawful from the outset. The Tribunal commends material admissions in pleadings and in cases generally as this saves time and costs, enhances judicial economy and promotes a harmonious working culture. It is also the professional and ethical duty of counsel to advise client to make the necessary concessions in indefensible matters, as specious or spurious defences may warrant orders for costs. The MEU concluded that the roster membership of candidates from the 2008 roster had lapsed and, thus, they should not have been considered eligible for recruitment from the roster. In particular, the MEU concluded and the administration agreed that the roster membership of 12 of the 20 candidates was invalid. The MEU further concluded that the consequence of filling the S-3 SSO level posts with candidates from the lapsed 2008 roster resulted in denying the Applicant the opportunity to undergo a competitive recruitment exercise. The Applicant likewise has argued that he was deprived of the right to full and fair consideration.

Requested relief

45. The Applicant seeks compensation for his exclusion from, and for not being fully and fairly considered for, the S-3 recruitment, together with compensation for loss of opportunity. The Applicant specifically requests:

> a. Rescission and the opportunity to compete for the posts unlawfully filled from the roster or one year's salary loss of chance/opportunity compensation; and
>
> b. USD9,000 in moral damages.

46. Pursuant to art. 10.5(a) of the Dispute Tribunal's Statute, as part of its judgment, the Dispute Tribunal may order:

> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to paragraph (b) of the present paragraph;

47. Under art. 10.5(a) of the Tribunal's Statute, the Secretary-General therefore has the right to elect between either paying compensation or implementing an order for rescission or specific performance.

The loss of chance calculation method and compensation amount

48. It is within the Tribunal's discretion to order rescission of the contested decision in this case or specific performance. In *Solanki* UNDT/2009/045 (upheld by the Appeals Tribunal in *Solanki* 2010-UNAT-044), the Dispute Tribunal held that the irregular procedure of the promotion process vitiated the entire recruitment and ordered rescission of the decision not to promote the Applicant in that case. In the

alternative, the Dispute Tribunal ordered compensation in the amount of CHR8,000 plus interest.

49. As the Respondent correctly concedes and admits, in this case, the recruitment and filling of twelve S-3 level posts with twelve ineligible candidates was invalid and unlawful. This constituted a violation of the Applicant's right to full and fair consideration. Accordingly, the Tribunal finds it appropriate to order the rescission of the decision to exclude the Applicant from the recruitment exercise, As the contested decision concerns a promotion/appointment the Tribunal, as mandated by art. 10.5 (a) of its Statute, shall also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision, based on the considerations below.

50. As the method of calculating compensation and the proper quantum of damages is in dispute in this case, the Tribunal will firstly review whether the Respondent's method of calculating loss of chance damages is appropriate.

51. In *Kozlov & Romadanov* UNDT/2011/103 (para. 24), the Dispute Tribunal stated:

> ... 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). Other types of loss of chance/opportunity may exist as well. (*Sprauten* UNDT/2011/094 para. 70).

52. In awarding compensation for loss of chance/opportunity, the Appeals Tribunal has often found the Dispute Tribunal to be in the best position to decide on the level of compensation. For instance, in *Solanki* 2010-UNAT-044, para. 20, the

Appeals Tribunal upheld the Dispute Tribunal's award of compensation for loss of chance/opportunity, stating that (emphasis added):

> … We consider that compensation must be set by the [the Dispute Tribunal] following a principled approach and on a case-by-case basis. In cases such as this, [the Dispute Tribunal] should be guided by two elements. The *first element is the nature of the irregularity* which led to the rescission of the contested administrative decision. The *second element is the chance that the staff member would have been recommended for promotion had the correct procedure been followed*. The Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case.

53. Similarly, in *Muratore* 2012-UNAT-245, the Appeals Tribunal indicated it will generally defer to the trial court's discretion in the award of damages as there is no set way for the Dispute Tribunal to set damages for loss of chance of promotion. Also in *Leclerq* 2014-UNAT-429, the Appeals Tribunal affirmed there is no set way for the Dispute Tribunal to set damages for loss of chance and that each case must turn on its facts.

54. While the Appeals Tribunal has approved the method of assessing damages by way of using percentage of chance that the Applicant would have been selected, the Appeals Tribunal in *Lutta* 2011-UNAT-117 indicated that deference was given to the Dispute Tribunal judge as to how to determine damages based on the facts of the particular case (see also *Goodwin* 2013-UNAT-346 and *Terragnolo* 2014-UNAT-448).

55. In *Niedermayr* 2015-UNAT-603, para. 39, the Appeals Tribunal, citing *Lutta*, stated that:

> ... In *Sprauten* [2012-UNAT-219], we stated that "[t]he Appeals Tribunal affirmed in *Lutta* that there is no set way for a trial court to set damages for loss of chance of promotion and that each case must turn on its facts" [reference to footnote omitted]. In *Marsh* [2012-UNAT-205], we opined that "the lost chance of being selected, even if slight, and the loss of a better chance of being recommended or included in the roster had … material and financial consequences".

56. The Appeals Tribunal in *Marsh* 2012-UNAT-205 stated that "loss of chance of being selected, even if slight, and the loss of a better chance of being recommended or included in the roster has in [that] case material and financial consequences also deprived [the Applicant] of an opportunity to improve his status within the Organization".

57. The Applicant refutes the method of calculating damages used by the Respondent, namely calculating the salary difference for two years as multiplied by the percentage of chance (based on the total number of candidates who applied for the posts). The USG/DM agreed to compensate the Applicant. As a consequence, the compensation was calculated by the difference in the salary between his current position and the contested position over a two year period (USD6,776), multiplied by the Applicant's loss of chance to compete against a total of 97 candidates for 12 positions (12.3 percent). This resulted in the amount of USD833.45.

58. In justifying this calculation, the Respondent argues that the use of two years is consistent with the jurisprudence (*Hastings* 2011-UNAT-109). However, in *Hastings*, supra, the Appeals Tribunal opined that, "We think the duration should be limited, except in very compelling cases, to two years" (see para. 18). The Tribunal finds therefore that the two-year yardstick is not a hard and fast rule. Therefore, even if one were to apply the *Hastings* formula in this particular instance, in all its peculiar circumstances, this would be such a "compelling" case for the reasons stated hereunder.

59. The Respondent argues that the use of two years is favorable to the Applicant, as the DSS planned to hold another S-3 level selection exercise within the first quarter of 2017. However, at the hearing, the Respondent conceded that no S-3 level selection exercise had taken place in the first quarter of 2017 as previously pleaded, nor was any such recruitment exercise envisaged to be undertaken in the near future. As one of the principle factors or rationalizations upon which the Respondent's calculation was predicated upon has fallen away, this calculation is at best, unreliable.

Furthermore, the Applicant's predicament has been compounded and his opportunities or prospects for promotion appear bleak, at least for the next few years, the last such recruitment exercise having taken place way back in 2011. The Respondent also submitted during the proceedings that there may possibly be some promotions to the S-4 level in the foreseeable future, which may then free up some S-3 level positions. In this regard, the Tribunal notes the Applicant's Counsel's submission that there is no guarantee that these may not be filled from outside candidates even if such a promotion exercise were to take place at all.

60. The Applicant argues that this calculation of loss of opportunity is not appropriate and is a formula that is the cheapest and most financially advantageous to the Organization. If the Organization invited more candidates than should have been this impacts the percentage of chance, and reduces the compensation. Essentially, he argues that the graver the error the less damages they pay. Damages should instead be measured by an objective measure of the Applicant's loss.

61. The Tribunal finds that an interpretation such as to assess the Applicant against 97 possible candidates who are not co-complainants, not applicants in a class action, and not short-listed candidates, is an unrealistic and unreliable formula for assessment of compensation in this case. It is, in this instance, a fundamentally flawed formula from an actuarial point of view as there is no information whether these candidates were external, met the minimum requirements or were at all eligible, had relevant experience or the requisite skill sets, or were short-listed. In other words, there is no information whether these candidates were evenly matched or equally well-qualified. Even if all the above information was known, how is the Tribunal to assess comparatively the Applicant's chances and is one supposed to take the weighted average of the 97 candidates? In any event, even if the Applicant had had the opportunity to be shortlisted, if one were to follow the logic in *Chhikara* 2017-UNAT-723, the only certainty is that the Applicant lost the opportunity to compete against 12 other possible candidates, being the ineligible rostered and thus, so to

speak, "shortlisted" candidates. He lost the opportunity to compete with 12 candidates for 12 positions, thus he lost 12 opportunities for full and fair consideration.

62. The Tribunal agrees with the submission that the loss to the Applicant cannot be valued by how many individuals applied, since if 500 candidates applied he would receive around USD100. In the circumstances, this is an unreliable, unrealistic and irrational methodology. Pursuant to *Solanki* 2010-UNAT-044 (para. 20), the Tribunal has to take "a principled approach on a case-by-case basis" taking into account

> … the nature of the irregularity which led to the rescission of the contested administrative decision [and] the chance that the staff member would have been recommended for promotion had the correct procedure been followed. The Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case".

63. The Tribunal finds that, as stated in *Niedermayr*, the assessment of loss of chance is an inexact science, and the Tribunal must assess the matter in the round and arrive at a figure deemed to be fair and equitable having regard to the number of imponderables present in the case, including the chances of being selected.

64. The Tribunal should take into account two matters: (a) the nature of the irregularity and (b), thereafter in the assessment, all the imponderables, noting all the while that this is an inexact science (*Niedermayr*). The Tribunal notes the established jurisprudence that the calculation of loss of opportunity damages need not be determined by the number of candidates involved in a recruitment exercise, but by the objective measure of an individual applicant's loss, as a fair and equitable measure, and upon consideration of a conspectus of all material factors and imponderables.

65. The nature of the irregularity is that the Respondent has admitted to 12 unlawful and invalid recruitments from an invalid eight year old roster, albeit in one selection exercise. Thus, the Applicant did not receive any consideration at all, let alone a full and fair consideration to compete as against 12 positions. The Applicant lost 12 opportunities to be fully and fairly considered for 12 posts irregularly filled at

the S-3 level. The irregularity has had a direct impact on the Applicant's chances. The opportunity lost to the Applicant is significantly greater than if only one post had been available to be filled, since the infraction has compounded the improbability of another recruitment exercise in the foreseeable future. The Respondent has also acknowledged that the envisaged recruitment in the first quarter of 2017 was not, and will not be, undertaken in the near future. Thus, as stated above, the Applicant's opportunities or prospects for promotion appear bleak, at least for the next few years, the last such recruitment exercise having taken place way back in 2011. Whether future envisaged promotions to the S-4 level may free up some S-3 level positions for which the Applicant may compete is purely speculative.

66. The Tribunal has considered the Applicant's arguments that several factors should be considered in assessing his chance of selection. It is not disputed that he had previously been placed on a roster in 2007, and that he was scored slightly below the required score for teamwork in the 2011 recruitment exercise, following which he took training courses to improve his interviewing skills. It is not disputed, and is evident from his performance appraisals, that he has been performing higher-level functions from time to time more than satisfactorily. That he has 12 years of prior service and was the only candidate at the S-2 level with the greatest seniority and more relevant experience than any other internal candidate who applied for the S-3 posts. The Applicant's stellar performance appraisals are a matter of record and he is even fully supported by his first reporting officer in the last four performance appraisals "for promotion when the opportunity arises" (see electronic performance appraisal report for 2013-2014). In his last two appraisals, the second reporting officer also supported this promotion recommendation. He has a clean disciplinary record and is considered as "an asset" by his supervisors.

67. The Tribunal, in all the circumstances, and taking into account the Applicant's seniority, performance history and prior candidacy, together with all the imponderables, finds that his chances were more than slight, and cannot exclude the possibility that it is more probable than not that he would have been selected as he is

long serving, a strong candidate with a good record of service, and has been recommended for promotion by his reporting officers.

68. In *Neidermayr*, the Appeals Tribunal found that USD10,000 constituted an adequate remedy for the loss of chance which arose by reason of the prejudice suffered by the applicant in that case. The Appeals Tribunal, recognizing that the assessment exercise was problematic as the pool of candidates for the two recruitment exercises therein would have been 3 or 31 respectively, assessed a figure of compensation in the round, without entertaining a percentage chance. Having taken into account the nature of the invalidity and irregularity of the filling of the 12 posts and their continuing and projected long-term effect on the Applicant, and taking into consideration a conspectus of all material factors and imponderables, the Tribunal finds that a fair and equitable of the Applicant's loss in this case would be the sum of USD20,000.

Loss of opportunity to obtain continuing appointment and impact to career progression

69. The Applicant states that the loss of opportunity to compete has affected his career advancement and job security. He argues that he is now the longest serving S-2 level officer without a promotion to S-3 level, despite receiving favourable performance reviews. He has reached the highest level of S-2, step 12, and is stuck thereat. Given the significant number of posts recruited against, i.e., 20 posts, it means he will not have an opportunity to compete for an S-3 level SSO post for some time to come and that he is unable to be considered for conversion for continuing appointment as this consideration requires staff members who are at least at the S-3 level. The Applicant fulfils all the required eligibility requirements for a continuous appointment except this element, see SGB/2011/9 (Continuing appointments). Having recruited so many S-3 level SSOs through an unlawful process, it follows that opportunities at that level will not arise for a significant period of time.

70. The Applicant cannot be considered for conversion to continuing appointment unless he is at S-3 level. The Applicant has been recommended for promotion by both his reporting officers whenever the earliest opportunity arises. The infraction of 12 unlawful recruitments has compounded the improbability of another recruitment for S-3 level SSO's in the near future as hereinbefore mentioned. Although he currently satisfies the age and performance criteria, his exclusion from the recruitment exercise has prevented him from fulfilling the other continuing appointment criteria and set him back several years. The Tribunal finds that the contested decision has impacted the Applicant's opportunity for career advancement and job security, and awards the sum of USD5,000 to the Applicant.

Payment of USD833.45 to Applicant

71. The Applicant testified, and it is not contested, that he was not notified in writing that he would actually receive USD833.45—rather the Administration unilaterally deposited this into his account. The parties did not dispute that this unilateral payment into Applicant's account does not constitute a full and final settlement and receiving it in his account unbeknownst to him in no way constitutes acceptance of a settlement offer. The Tribunal finds, however, that this amount should be deducted from any award of compensation made by the Tribunal in the Applicant's favor.

Moral damages

72. The Applicant seeks USD9,000 in moral damages. The Applicant did not pray for moral damages in his application filed on 24 August 2016, but made such request on 10 February 2017 in his response to the Respondent's reply, to which was attached a signed statement attesting to emotional harm suffered.

73. In order to afford the Respondent an opportunity to address the belated request and issue of moral damages, the Tribunal conducted a hearing. At the hearing, the Applicant testified under oath that, in locker room banter, he is called "S-2 for life"

and he fears that because he has challenged several decisions of the administration, his prospects may be affected. He stated that he has suffered harm to his reputation and general well-being. During cross-examination the Applicant produced a recent medical note dated 30 March 2017, which was read out in court, the Applicant's Counsel not having previously seen it, and being in remote attendance in Geneva. Applicant's Counsel confirmed that there was no application or request for the medical note to be admitted in evidence, it was not submitted as evidence, and was duly handed back to the Applicant.

74. The Respondent has admitted fault for the irregularities which denied the Applicant being considered for selection. The Applicant has demonstrated by the performance evaluations attached to his submissions that he is a good performer with a good record, often performing higher-level functions. He is a well-respected member of the DSS, and is well valued by his supervisors. In all these circumstances, the Tribunal finds that this judgment constitutes sufficient satisfaction and the Applicant's belated claim for moral damages is not sustainable. The Tribunal appreciates that it has been difficult for the Applicant to challenge this decision. He is, in essence, between the devil and the deep blue sea. Naturally , a staff member must wonder whether a compensatory award from the Tribunal would thereafter deter the Administration from considering him for and granting him a future promotion. The Applicant should not feel any anxiety because he has challenged the administration's decisions as such is the lawful right of every staff member of the organization. Since the record speaks for itself, the Tribunal has every confidence that the management will take all this into account at the earliest available opportunity on consideration for his promotion.

Conclusion

75. The Tribunal has found that the Applicant has suffered damages for loss of chance of the right to be fairly considered in the promotion exercise and that the

contested decision has impacted his opportunity for career advancement and job security.

In view of the foregoing, the Tribunal DECIDES:

a. Liability having being admitted, the application succeeds and the decision to exclude the Applicant from the recruitment exercise is rescinded;

b. As an alternative to rescission, the Respondent may elect to pay the Applicant compensation in the amount of USD20,000;

c. The Respondent is to pay the Applicant the amount of USD5,000 for loss of opportunity for career advancement and for loss of job security;

d. The total amount of USD24,166.55, being the sums above, less USD833.45 already paid, shall bear interest at the U.S. Prime Rate effective from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Ebrahim-Carstens

Dated this 25th day of August 2017

Entered in the Register on this 25th day of August 2017

(Signed)

Morten Albert Michelsen, Registrar, New York, Officer-in-Charge