



JUDGE ROSALYN CHAPMAN, Presiding.

1. On 16 June 2011, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva issued Judgment No. UNDT/2011/101 in the case of *Nyakossi v. Secretary-General of the United Nations*.

Synopsis

2. The Secretary-General appeals the portion of Judgment No. UNDT/2011/101 of the UNDT awarding damages to Mr. Kwami Eleda Nyakossi (Appellant) as compensation for a procedural irregularity by the United Nations High Commissioner for Refugees (UNHCR or Agency) in evaluating Mr. Nyakossi's application for placement in a pool of candidates. This Tribunal finds the UNDT made an error of law in awarding damages to Mr. Nyakossi, who was not prejudiced or damaged by the procedural irregularity, and reverses the portion of the Judgment awarding damages to him.

Facts and Procedure

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Submissions

Secretary-General's Appeal

12. Pursuant to Article 2(1) of the Dispute Tribunal Statute (Statute), the Dispute Tribunal erred on a question of law and exceeded its jurisdiction by awarding damages to Mr. Nyakossi, who had a very weak chance of promotion even if there had not been any procedural irregularity and who suffered no damages.

13. The Dispute Tribunal must consider two things in determining damages: the nature of the irregularity; and the assessment of the staff member's genuine prospects for promotion if the procedure had been regular. In this case, the procedural irregularity was minor and had a negligible impact on the selection process. To the contrary, UNHCR had the right to consult with DSS during its selection process. Even without any procedural irregularity, Mr. Nyakossi's chances of being selected were very weak.

14. Compensation is to make an injured staff member whole, and should be awarded only if the staff member actually suffered damages. Not every violation of due process necessarily leads to an award of compensation.

Mr. Nyakossi's Answer

15. The Dispute Tribunal did not err on a question of law or exceed its jurisdiction in awarding compensation to Appellant, who had suffered a "loss of chance" from the irregular procedure used by UNHCR in evaluating his candidacy.

16. The procedural irregularity was not minor. To the contrary, UNHCR refused to exercise its discretion in evaluating Appellant's candidacy and instead illegally delegated its discretion to DSS. Under these circumstances, the UNDT awarded compensation to Appellant and the Appeals Tribunal should defer to the UNDT's decision.

17. Compensation for a "loss of chance" can be calculated on a percentage basis, wherein less than 10% is too speculative for an award, or by the trial court based on the circumstances of the case. In this case, the UNDT did not find Appellant's chances were less than 10% and it properly exercised its discretion under the circumstances of the case.

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endorse the opinion of DSS” that Mr. Nyakossi had insufficient security experience and no management experience.

23. The UNDT determined that, even if UNHCR had not procedurally erred, “it is highly unlikely that the Applicant would have been selected” for the pool of candidates cleared for P-3 and P-4 FSA posts. The UNDT did not find Mr. Nyakossi was distressed by UNHCR’s illegal conduct⁵ or that he suffered any adverse consequences or harm from UNHCR’s procedural error in following the opinion of DSS.⁶

24. Nevertheless, the UNDT awarded Mr. Nyakossi 1,500 Swiss Francs as “compensation for the damage arising out of th[e] illegality.” In awarding compensation to Mr. Nyakossi, the Dispute Tribunal exceeded its competence and made an error of law since Mr. Nyakossi suffered no pecuniary loss or distress and was not harmed by UNHCR’s “illegality”.⁷ This Tribunal reverses the UNDT’s award of compensation to Mr. Nyakossi.

⁵ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201; *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

⁶ *Sina*, 2010-UNAT-094.

⁷ *Sina*, 2010-UNAT-094.

Judgment

25. The appeal is granted and the portion of the Judgment awarding damages to Mr. Nyakossi is reversed.

Original and Authoritative Version: English

Dated this 1st