



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/019/  
UNAT/1622

Judgment No.: UNDT/2011/103

Date: 20 June 2011

Original: English

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## **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 fa**



- g. DGACM kept an out-of-date roster of Russian Editors;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:

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”;





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







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 20<sup>th</sup> day of June 2011

Entered in the Register on this 20<sup>th</sup> day of June 2011

*(Signed)*

Santiago Villalpando, Registrar, New York