



# **TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-347/Corr.1

**Appleton**

**(Appellant/Respondent on Cross-Appeal)**

**v.**

**Secretary-General of the United Nations**

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2013-UNAT-347/Corr.1

THE UNITED NATIONS APPEALS TRIBUNAL



... On 29 June 2009, the Chef de Cabinet forwarded the Note, including the record of evaluation of the candidates, to the SRG and requested them to “undertake an urgent review of this case before the Secretary-General takes his decision”.

... By email dated 15 July 2009, the ASG/OHRM, as Secretary of the SRG, communicated the SRG’s concerns to the USG/OIOS that, again, only one recommended candidate had been submitted for the Secretary-General’s consideration and approval. The SRG requested that four candidates prescreened by OHRM be interviewed and that three names, including at least one female, be provided.

... The USG/OIOS provided her response to the SRG’s concerns in a note addressed to the Secretary-General dated 5 August 2009. This note included an evaluation of the additional candidates that the SRG had requested be interviewed by the panel. The USG/OIOS stated that OIOS had carried out its own evaluation of the additional candidates referred to above, and set out the reasons why they were not invited to participate in the interview. The USG/OIOS also reiterated her request that the Secretary-General approve the appointment of the Applicant to the Post. The Chef de Cabinet forwarded this document to the SRG.

... The ASG/OHRM provided her comments on the USG/OIOS’s note of 5 August 2009 to the Chef de Cabinet on 9 September 2009. She stated, *inter alia*, that, based on OIOS’s review of the additional candidates, three had been improperly disqualified on the basis of their educational background and relevant work experience. She further noted that the educational qualifications and direct work experience of the only internal candidate, who had been performing the functions of the Post since August 2008, were not properly evaluated by OIOS. She therefore recommended that the internal candidate be given the fullest consideration in accordance with staff regulation 4.4.

... By a note addressed to the Chef de Cabinet dated 25 September 2009, the USG/OIOS provided a response to the ASG/OHRM’s comments. The USG/OIOS disagreed with the assessment of the additional candidates because, in her opinion, they did not meet the requirements for the Post which is why they were not shortlisted for an interview. With respect to the internal candidate, the USG/OIOS noted that he was interviewed and “given full consideration during the process”. The USG/OIOS also addressed a note to the Secretary-General dated 25 September 2009, reiterating her request for his approval to appoint the Applicant as her recommended candidate.

... On 18 February 2010, the SRG informed the Secretary-General that, in view of the fact that the USG/OIOS continued to recommend only one candidate, it was not in a position to make a recommendation on the case, noting that the SRG’s request for a recommendation of three candidates had been unsuccessful.



On 29 October 2010, the UNDT issued an Order on Receivability (Order No. 289 (NY/2010)), in which it determined that the application was receivable. Subsequently, on 13 December 2010, the Secretary-General filed a reply to the application.

5. An oral hearing was held befN34.675 4CAauo(ly, o21u)2der7(ber MarD[7(ber)-5( 2-4(Sev (O)- h

seventeen months following his separation from service until he was hired by the Global Fund in May 2010, and this loss of income should have been compensated.

9. Mr. Appleton had a “very high” likelihood of being selected for the post, as the UNDT found. Despite this finding, the UNDT also determined that Mr. Appleton’s selection for the post was not a “foregone conclusion”. Considering the evidence, which showed that Mr. Appleton would have been selected for the post except for the SRG’s unlawful failure to recommend him, the UNDT made an error of fact resulting in a manifestly unreasonable decision when it failed to conclude that Mr. Appleton’s chance of promotion amounted to a legitimate expectancy. Alternatively, the UNDT erred when it failed to consider as a basis for awarding pecuniary damages that Mr. Appleton suffered a loss of opportunity to move to a better position when he was not selected for the post except for the SRG’s unlawful failure to recommend him. In short, Mr. Appleton was denied the opportunity for a career with the Organization, and that opportunity will likely never materialize again.

10. The UNDT made an error of law when it failed to award any compensatory damages on the ground that Mr. Appleton failed to mitigate his loss of income. Throughout the first and second selection processes, Mr. Appleton was encouraged to maintain his candidacy and given assurances that the selection process was on-going despite delays. There are very few comparable senior positions in investigations available within the Organization for which Mr. Appleton could have applied. And accepting an appointment outside the Organization would have required Mr. Appleton to withdraw his application for the post. In light of these considerations, Mr. Appleton mitigated his losses when he could by accepting short-term work as a consultant.

11. The UNDT made an error of law when it failed to award Mr. Appleton compensation “for the full extent of moral damages he suffered”. Although the UNDT awarded moral damages for the lack of timely notification “causing further delay and anxiety”, it also should have awarded moral damages for “the violation of his due process rights and the contractual right to fair consideration for the post to which he applied” and his “aggravated emotional stress from being mentioned by name in public pronouncements” while the selection process was ongoing.





high-level officials in the Administration may

21.

(1) While there was a “high chance” Mr. Appleton would have been appointed, “that was not a foregone conclusion” and “[n]o staff member has a right to be selected even though he is the only recommended candidate”;idatew27437.7657454

complains that the UNDT should have awarded moral damages to him for “the violation of his due process rights and the contractual right to fair consideration for the post to which he applied” and his “aggravated emotional stress of being mentioned by name in public pronouncements” while the select

specifically challenges statements made by the UNDT in paragraph 121 of the Judgment, wherein the Dispute Tribunal stated:

The Tribunal observes that it is highly inappropriate for high-level United Nations officials to comment publicly on a pending selection process, and that it is particularly

**Judgment**

35. Mr. Appleton's appeal is dismissed, with Judge Chapman partially dissenting.

Original and Authoritative Version: English

Done in New York, United States.

*(Signed)*

*(Signed)*

*(Signed)*

Judge Chapman, Presiding

Judge Simón

Judge Adinyira

28 June 2013

28 June 2013

21 June 2013

Entered in the Register on this 26<sup>th</sup> day of August 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar



**Partial Dissent on Appeal by Judge Chapman**

1. I respectfully dissent from the majority's

The Secretary-General does not appeal the UNDT's findings that these serious irregularities occurred.

4. Turning to Mr. Appleton's genuine prospects for appointment if the irregularities had not occurred, the UNDT determined that Mr. Appleton had a "very high" chance of being appointed to the post. Under the jurisprudence of the Appeals Tribunal, this ultimate conclusion, when made in conjunction with the findings of serious procedural irregularities, compel the award of compensatory damages based on loss of opportunity.<sup>19</sup> For Mr. Appleton, "the loss of opportunity was more severe as it resulted in a loss of job security",<sup>20</sup> and even a possible career in the Organization. Instead, he was separated from service after his fixed-term appointment ended.

5. Yet, the UNDT did not award compensatory damages to Mr. Appleton, listing three reasons for not doing so. I find the reasons proffered by the UNDT to be specious. First, the UNDT's opinion that Mr. Appleton's appointment was "not a foregone conclusion" does not conflict with or change the ultimate conclusion that he had a "very high" chance of being appointed. Clearly, Mr. Appleton's appointment to the post depended upon the

7. Moreover, even assuming *arguendo* the UNDT correctly determined that Mr. Appleton reasonably should have known by 3 March 2009 that his appointment might not occur, he had no duty to mitigate damages *prior to* that date. At a minimum, under the UNDT's own rationale, compensatory damages should have been awarded to Mr. Appleton for the two months preceding March 2009: from the date of separation from service on 31 December 2008 until 3 March 2009.

8. A dissent is not the proper place for a complete discussion of the duty to mitigate damages or mitigation generally. Suffice it to say, the UNDT did not correctly analyze the duty to mitigate damages when it took an "all or nothing" approach to mitigation. Although a staff member must take reasonable steps to mitigate his or her loss, that does not mean the staff member's failure to *completely* mitigate his or her loss is a reason to refuse to award *any* compensatory damages. Rather, it may be a reason to reduce the award of compensation proportionately to the staff member's mitigation efforts.

9. In the present case, Mr. Appleton testified that he worked as a consultant after his separation from service, and such work certainly counts towards mitigation, albeit not *complete* mitigation. Mr. Appleton began "earnestly" searching for full-time employment at the time he applied for the position with the Global Fund, and his search for full-time employment also counts as mitigation. Prior to that time, as a high-level official with the Organization, Mr. Appleton could not have honestly or in good conscience represented to a

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of June 2013 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

Entered in the Register on this 26<sup>th</sup> day of August 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar