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**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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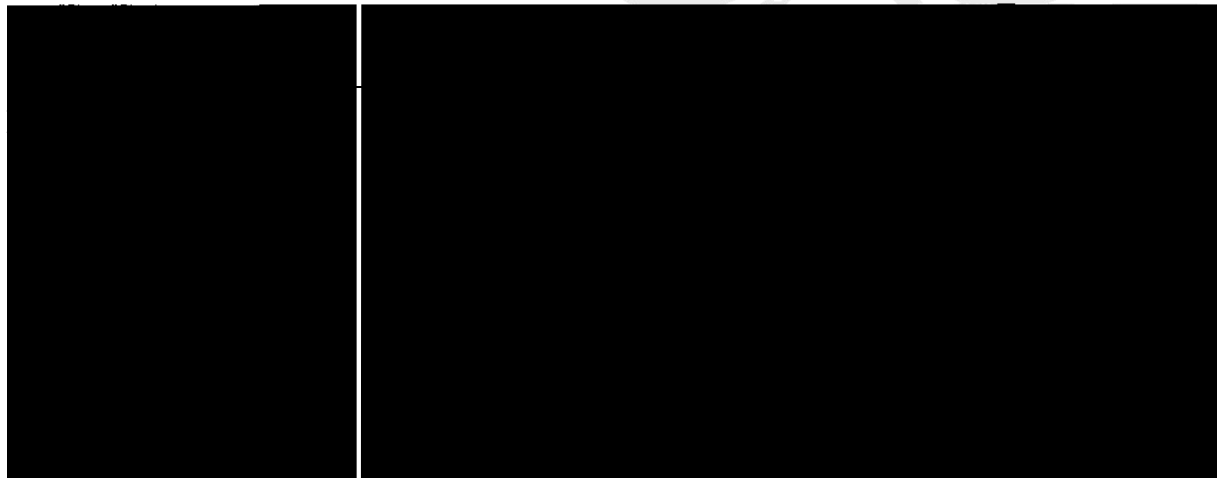
Judgment No. 2014-UNAT-439

**Gusarova  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**



Counsel for Ms. Gusarova: Self-represented

Counsel for Secretary-General: Simon Thomas

**JUDGE MARY FAHERTY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Alexandra Gusarova against Judgment No. UNDT/2013/072, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 25 April 2013 in the case of *Gusarova v. Secretary-General of the United Nations*. Ms. Gusarova appealed on 25 June 2013, and the Secretary-General answered and cross-appealed on 26 August 2013.

**Facts and Procedure**

2. The UNDT made the following findings of fact, which are not contested by the parties:<sup>1</sup>

... The Applicant entered the service of the United Nations Framework Convention on Climate Change (“UNFCCC”) in 2009, as a Human Resources Officer, at the P-3 level, on the basis of a fixed-term appointment, a post that she held at the time of her application to this Tribunal.

... On 25 February 2011, the Applicant applied for CCPO positions at the P-5 level with the United Nations Peacekeeping Operations, under generic vacancy announcement No. 11-HRE-PMSS-425171-R-MULTIPLE D/S. The Applicant was subsequently invited to participate in a written assessment and having successfully passed it, she was invited for a telephone interview conducted on 7 July 2011.

... Since her Personal History Profile (“PHP”) did not contain information on her status and personal grade, the Interview Panel asked the Applicant at the beginning of the interview the level at which she was currently serving at UNFCCC. After the Applicant informed the Panel that she was holding a P-3 position, the Panel considered her ineligible to apply for a P-5 post at the Secretariat and decided to end the Applicant’s interview.

... By email of 7 July 2011, the Applicant sought clarification from the Administration with respect to the basis on which she was considered ineligible for the P-5 positions, and requested that the decision be reconsidered.

... On 13 July 2011, the Operational Group Manager, Recruitment, Outreach and Career Development Section (“OCDS”), Field Personnel Division, Department of Field Support (“FPD/DFS”), United Nations, responded to the Applicant, confirming that as a staff member currently serving at the P-3 level, she was not eligible to apply for positions more than one level above her grade. She stressed that “with the harmonization of the conditions of service and the new staff selection system, the

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<sup>1</sup> The following text is taken from Judgment No. UNDT/2013/072, paras. 2-11.

organizations that fall within the larger United Nations family [...] are all subject to the same rules and regulations governing the recruitment process”.

... By email dated 26 July 2011, the Applicant requested further clarification

Ms. Gusarova ineligible to apply for the P-5 generic vacancy was discriminatory and illegal it was accordingly rescinded by the Dispute Tribunal.

6. The UNDT found that by deeming her ineligible, after she had successfully passed the written test, and by denying her the possibility to pass the interview, Ms. Gusarova had lost a chance of being selected for inclusion on the roster and ultimately to be selected for a P-5 position. The Dispute Tribunal held that she also lost a chance to considerably improve her status within the Organization at the material time. This warranted a compensatory award of USD 3,000 for the material damage sustained by Ms. Gusarova. The Dispute Tribunal, however, concluded that Ms. Gusarova had not established any entitlement to moral damages, finding that she had not substantiated her claim in this regard and had not provided evidence in support of it.

### **Ms. Gusarova's Appeal**

7. Ms. Gusarova appeals only the quantum of compensation awarded by the Dispute Tribunal for material damage and its failure to award her moral damages.

8. She submits that the UNDT erred on a question of law since it did not properly address both material and moral damages.

9. In respect of material damages, Ms. Gusarova contends that the UNDT failed to properly assess material damages and failed to analyse appropriate precedents. She submits that she has the right to understand how the Dispute Tribunal arrived at an assessment of USD 3,000 material damages. Taking into consideration the gravity of the violation, which amounted to gender discrimination and, in her submission, discrimination vis-à-vis female applicants who worked in separately administered funds like the World Health Organization (WHO), her claim for compensation by way of material damages merits an amount of two years' net base salary. She argues that the ia

would not have meant actual appointment, Ms. Gusarova submits that it is clear that selection for the roster would have improved her chances for other positions.

10. Ms. Gusarova further submits that the Dispute Tribunal did not correctly analyse the gravity of the violations. While the UNDT noted that the interview panel was not authorised to find her ineligible, it failed to consider its doing so as an aggravating factor. Ms. Gusarova contends that the violation in her case was so grave that even before her appeal of the Dispute Tribunal decision, the Secretary-General had recognised it as such, by giving an across-the-board exception from Section 6.1 of ST/AI/2010/3 to female candidates applying for positions two grades higher than their own.

11. Her case was aggravated by abuse of authority, gender discrimination and discrimination vis-à-vis other female candidates justifying compensation for material damage at two years' net base salary.

12. On the issue of moral damages, Ms. Gusarova submits that the Dispute Tribunal erred in law in denying her such damages. She claims



level of compensation given its appreciation of the case” and given that the Appeals Tribunal

25. With regard to her claim that she should have been given an opportunity, following the judgment on the merits, to make her case for moral damages, the Secretary-General contends that there is nothing in the Dispute Tribunal Statute or Rules of Procedure or in the Appeals Tribunal's jurisprudence to say that a staff member is allowed to present only half of his or her case before the Dispute Tribunal or that he or she is entitled as of right to separate hearings on merits and remedies or the opportunity to present further evidence. He argues that the UNDT application form requires the staff member to list the remedies sought and to provide supporting documentation. Many UNDT cases deal with merits and remedies in a single judgment. Some eight months after her application to the UNDT, Ms. Gusarova submitted further evidence, yet she did not file evidence with regard to moral injury. He submits that Ms. Gusarova's claim that she was denied an opportunity to present her case on moral injury is untenable.

26. In any event, Ms. Gusarova, in her appeal, has not demonstrated that there is any evidence of moral injury that she could have addressed before the Dispute Tribunal that would have justified such a finding. There is no merit in her claim to have been "publically humiliated" since the interview process was confidential. With regard to her claim that she was unfairly treated by the Interview Panel, Ms. Gusarova's objection was with the *substance* of the communications not the manner in which they were delivered.

27. The Secretary-General further contends that Ms. Gusarova's exclusion from the P-5 selection process, while determined by the Dispute Tribunal to have been illegal, was not found to have been wrongfully carried out. He further states that even if Ms. Gusarova had given evidence to the Dispute Tribunal regarding her outrage and humiliation, the established jurisprudence would have precluded an award of moral damages.

### **The Secretary General's Cross-Appeal**

28. The Secretary-General submits that the UNDT erred in law in relying on *Marsh*<sup>4</sup> and awarding USD 3,000 to Ms. Gusarova and contends that the facts in that case and Ms. Gusarova's circumstances are distinguishable. In *Marsh*, the Appeals Tribunal noted the Dispute Tribunal's observation that Mr. Marsh was one of three candidates and was disadvantaged by the selection of a candidate who had been wrongfully included in the process. The Appeals Tribunal thus upheld the Dispute Tribunal's finding that, absent the

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<sup>4</sup> *Marsh v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-205.



wrongfully included candidate, Mr. Marsh would have had a “substantially increased” chance of being placed on the roster, as one of what would have been two candidates.

29. The Dispute Tribunal declined to make any substantiated findings about Ms. Gusarova’s chances of being placed on the roster but then went on to find that she “might

*The Secretary-General's cross-appeal on material damages*

35. In support of his contention that an award of USD 3,000 material damages was not merited in this case, the Secretary-General relies on the jurisprudence of the Appeals Tribunal in *Hastings* wherein the Appeals Tribunal emphasized that where a loss of chance becomes speculative (including, but not limited to, being a less than a ten per cent chance) damages should not be awarded. The Secretary-General describes as speculation the Dispute Tribunal's assessment that had Ms. Gusarova been interviewed on 7 July 2011, "she might have been recommended to be put on the roster". Both the Secretary-General and Ms. Gusarova acknowledge that the Dispute Tribunal did not embark on an assessment of Ms. Gusarova's chances based on any empirical evidence; it was not ascertained by the UNDT how many candidates had applied for the generic vacancy, how many candidates were successfully rostered following the interview pr

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abuse of authority. In her submissions to this Tribunal, Ms. Gusarova claims that the actions of the interview panel amounted to an abuse of authority and thus, as an aggravating factor, this warranted an increased compensatory award. Ms. Gusarova did not advance an abuse of authority claim before the Dispute Tribunal. Even if such a claim had been advanced, we are not satisfied, given the circumstances of the present case, that such an argument would have found favour with the Dispute Tribunal. The available documentary evidence suggests that, at most, Ms. Gusarova's declared ineligibility arose as a misconceived interpretation and application by the Administration of ST/AI/2010/3.

43. On the issue of what damages should be awarded where an infringement of a staff member's rights is established, the Appeals Tribunal has stated that the Dispute Tribunal is the forum best placed to assess monetary compensation.<sup>8</sup> The Appeals Tribunal will not lightly trespass upon the UNDT's function in this regard. It is from this perspective that we consider Ms Gusarova's claim for an increased award of material damages.

44. We are persuaded that, at its height, Ms. Gusarova's expectation, had she passed the interview, was to secure a place on the generic roster and, ultimately, possible selection for a P-5 post. It must also be factored that Ms. Gusarova's objective of gaining a P-5 position came to pass a year after the events in this case. We, however, regard as significant the fact that several of the candidates for the generic vacancy were selected for positions in the months following the roster approval. This fact merited due consideration. We hold that the Dispute Tribunal did not pay due regard or attach sufficient weight to the aforesaid factor. We hereby substitute the sum of USD 3,000 with an award of two months' net base salary.

*Ms. Gusarova's appeal against the Dispute Tribunal's failure to award moral damages*

45. With regard to Ms. Gusarova's arguments on the failure of the UNDT to award moral damages, the Appeals Tribunal, noting her claim of procedural unfairness on the part of the UNDT, took the opportunity of analysing the record of the proceedings before the Dispute Tribunal. Having listened to the recording of the proceedings, we find no merit in Ms. Gusarova's contention that her Counsel had requested that in the event negotiations on

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<sup>8</sup> *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-346; *Andersson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379.



**Judgment**

51. Ms. Gusarova's appeal is upheld in part. The UNDT's finding of no entitlement to moral damages is upheld. The UNDT's award of USD 3,000 for material damages is vacated and substituted with an award of two months' net base salary, with interest at the US Prime Rate accruing from the date of the UNDT Judgment. This amount shall be paid within 60 days from the date this Judgment becomes executable. If the 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.

52. The Secretary-General's cross-appeal is dismissed.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2014 in Vienna, Austria.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Adinyira

Entered in the Register on 29<sup>th</sup> day of August 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar