



THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2013-UNAT-347

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... 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

... By letter dated 18 March 2010, the Applicant asked to be informed of the outcome of the selection process. By letter dated 13 April 2010, OHRM informed the Applicant that the selection process remained ongoing, and that he would be informed once a decision had been made.

... On 29 March 2010, the Applicant submitted a request for management evaluation of the decision not to endorse his nomination for the post.

... On 14 July 2010, the USG/OIOS' appointment ended, and, on the same day, she submitted an end of assignment report to the Secretary-General.

... On 20 July 2010, the Washington Post issued an article entitled "Departing U.N. official calls Ban's leadership 'deplorable' in 50-pages memo". In connection with the Applicant not being selected for the Post, it quoted the Chef de Cabinet as stating that, "the Secretary-General fully recognizes the operational independence of OIOS" but that "does not excuse [the USG/OIOS] from applying the standard rules of recruitment". In his oral evidence, the Chef de Cabinet agreed that he had made several press statements regarding the USG/OIOS' end of assignment report, although he did not recall their exact context.

... On 23 July 2010, the Chef de Cabinet issued a statement to staff addressing the issues in the report of the USG/OIOS.

... On 14 September 2010, a new USG of the OIOS was appointed.

... On 3 November 2010, a new vacancy announcement was issued for the Post, which requested all candidates who had previously applied to submit a new application for the Post.

... On 5 November 2010, OHRM informed the Applicant that the previous vacancy announcement for the Post was cancelled and re-advertised in Inspira (the most recent United Nations online jobs site). The Applicant was also informed that "interested and qualified candidates should re-apply" for the new vacancy announcement. The Applicant did not re-apply before the closing date of the new vacancy announcement.

3. On 19 May 2010, Mr. Appleton was appointed Senior Legal Adviser and Interim Director of Investigations at the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) in Geneva. Before taking the position with the Global Fund, Mr. Appleton worked occasionally as a consultant.

4. On 30 July 2010, Mr. Appleton filed an application with the UNDT challenging "the decision of the Secretary-General to reject [his] nomination" for the Post. On 30 August 2010, the Secretary-General filed a reply contesting the receivability of the application and, pursuant to an order by the UNDT, the parties filed additional documents.



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 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.







21. Under Article 10(5) of the UNDT Statute, the total compensatory damages the UNDT can award under subparagraphs (a), (b), or both, “shall normally not exceed the equivalent of two years’ net base salary” unless the UNDT orders higher compensation in “exceptional cases” and provides the reasons therefore<sup>3</sup>. There is more than one method by which the trial court can assess compensatory damages, and it is up to that court to determine the method to employ in each case<sup>4</sup>.

22. Initially, the trial court is in a much better position than the Appeals Tribunal to assess the probabilities of appointment to a post.<sup>5</sup> This Appeals Tribunal has held in *Ardisson* that, with regard to measuring the amount of compensation to be awarded:

the Dispute Tribunal should bear in mind two considerations. The first is the nature of the irregularity ...<sup>6</sup>

23. In the present case, the Dispute Tribunal chose to use the following method to assess compensatory damages: “To assess the compensable harm to a candidate who has not been selected for a post, it is necessary to calculate the probability of the candidate being selected but for the breaches by determining his loss of chance of being selected.” It is entirely appropriate for the Dispute Tribunal to approach the issue of compensation under Article 10(5) by engaging in a consideration of Mr. Appleton’s likely prospects of success.

24. The UNDT then determined that “the chances of [Mr. Appleton] being selected for the Post were very high”. However, due to “the following unusual and particular circumstances of this case”, an award of compensation to Mr. Appleton was not warranted:<sup>8</sup>

(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”;<sup>9</sup>

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<sup>3</sup> *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131, para. 16, referring to *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

<sup>4</sup> *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219, para. 22, referring to *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117.

<sup>5</sup> *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

<sup>6</sup> *Ardisson v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-052, para. 24.

<sup>7</sup> Judgment No. UNDT/2012/125, para. 110, citing *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117; and *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

<sup>8</sup> Additionally, the UNDT determined that Mr. Appleton should not be compensated for any pecuniary loss attendant to his relocation to Geneva for the Global Fund and for his choice to maintain residences in two countries (the United States and Switzerland).

THE UNITED NATIONS APPEALS TRIBUNAL

27. “Generally, it is well within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case. The amount of moral damages awarded by the Dispute Tribunal may vary from case to case, as it should, depending on the factors considered by the Tribunal.”<sup>12</sup>

28. The UNDT listed the factors it considered in setting the amount of moral damages it was awarding to Mr. Appleton, stating:

[I]t is abundantly clear to the Tribunal that [Mr. Appleton] was the unwitting and blameless victim of an internal dispute between senior managers of the United Nations. His evidence and demeanor at the substantive hearing clearly demonstrated that he has been deeply distressed and frustrated by the lengthy, flawed and highly public selection process. In addition, [he] was not notified of the outcome of his application in a timely manner, causing further delay and anxiety. To compensate for these injuries, the Tribunal awards him USD 30,000.<sup>13</sup>

influence in the selection process and may potentially be very harmful and damaging to the process as well as to the candidates.

32. This statement by the UNDT is not a ruling of any sort; rather, it is merely an explanation of why the Dispute Tribunal considered the “highly public selection process” as a factor in awarding moral damages to Mr. Appleton. As such, this claim cannot be considered separately from the Secretary-General's second claim on cross-appeal, which challenges the UNDT's consideration of the “highly public selection process” as a factor in awarding moral damages.

33. As to his second claim, the Secretary-General argues that the amount of moral damages awarded should be reduced because the UNDT made an error of law in considering as an adverse factor the “highly public selection process” or public comments by officials of the Organization about the selection process, while the process was ongoing. The Secretary-General contends that such public comments were legitimate conduct by high-level officials, who have an obligation to publically respond to questions or criticisms from the press and others and to defend the actions of the Administration. Since the Secretary-General does not challenge the UNDT's consideration of the other factors listed as grounds for the award of moral damages to Mr. Appleton, such as delay, frustration, distress and anxiety, and such factors clearly support an award of moral damages;<sup>16</sup> the Secretary-General's claim comes to naught and the cross-appeal should be dismissed.

#### *Costs*

34. The UNDT should 11-20.191 -2.825 Td -4(e15(io-18on.5MCID 7)-8((35D 8 >>BDC /TT2 1 Tf 120.







THE UNITED NATIONS APPEALS T

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

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