



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

Case No. 2010-072

**Kasyanov
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Sophia Adinyira
Judge Mark P. Painter

Judgment No.: 2010-UNAT-076

Date: 28 October 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Brian Gorlick and Miles Hastie

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. Kirill Kasyanov (Kasyanov) is a Russian interpreter at the P-4 level in the Department of General Assembly and Conference Management (DGACM) in New York. He applied for a P-4 position of Russian interpreter in the Conference Services Division in the United Nations Office at Geneva (UNOG) and was wrongly denied a lateral transfer as a 15-day candidate. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found in his favour and awarded compensation under the provisions of Article 10(5)(b) of the Statute of the Dispute Tribunal (UNDT Statute). This Tribunal amends the compensation and awards the equivalent of two months' net base salary.

Facts and Procedure

2. Kasyanov is a Russian interpreter at the P-4 level in DGACM in New York. He applied for a P-4 position of Russian interpreter in the Conference Services Division in the UNOG. The position was advertised on 31 December 2007, with a deadline of 29 February 2008. In addition to Kasyanov, one other 15-day candidate applied for the position. The latter applied after the 15-day period, while Kasyanov applied within the 15-day period. Nonetheless, both candidates were determined to be suitable. But ultimately a 30-day candidate was selected on 27 February 2008 for the P-4 position in Geneva. Kasyanov was informed of his non-selection in a letter dated 3 March 2008.

3. In the *Kasyanov* Judgment on merits, the UNDT found that, since Kasyanov was a 15-day mark candidate and a suitable candidate for the position, the selection of a 30-day mark candidate meant that Kasyanov “was not considered in accordance with ST/AI/2006/3 as was his legal right”.¹ It directed the parties to provide written submissions as to the appropriate relief to be ordered.

4. On 9 February 2010, the UNDT issued *Kasyanov* Judgment on compensation,² which is the subject of the present appeal. The UNDT ordered the Administration to pay USD 25,000 for breach of Kasyanov's right to appointment, as well as for causing him to

¹ *Kasyanov v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/022.

² *Kasyanov v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/026.

invest time and trouble to undertake court proceedings. It also ordered the Administration to pay “actual damages” in the amount of USD 22,932, based on the difference in post adjustment for Geneva and New York for the period from February 2008 to February 2010.

5. The UNDT further ordered the Administration to pay USD 12,000 for injury to Kasyanov’s career prospects as a result of being denied the lateral move. It noted that, under Section 5.3 of ST/AI/2006/3, staff members are required to have two prior lateral moves in order to be considered for promotion to the P-5 level. It reviewed a memorandum, dated 31 August 2007, by the Officer-In-Charge, Office of Human Resources Management (OHRM), which communicated an exemption from the lateral move requirement for language staff, which Kasyanov is. But the UNDT did not believe that the OHRM memorandum had any legal effect because “administrative instructions cannot be amended by memoranda or by officials who lack proper delegated authority”.³ Noting that ST/SGB/1997/1 on the “Procedures for the promulgation of administrative issuances” requires administrative instructions to be promulgated by the Under-Secretary-General for Management or other officials with specific delegated authority,⁴ the Dispute Tribunal concluded that the Assistant Secretary-General for OHRM, let alone the Officer-in-Charge, had no authority to promulgate administrative instructions and had therefore no authority to modify ST/AI/2006/3.

6. The UNDT further ordered, by way of partial specific performance, that a lateral move be recorded in Kasyanov’s personnel records or, in the alternative, payment of USD 20,000.

7. On 26 March 2010, the Secretary-General filed an appeal against the *Kasyanov* Judgment on compensation. Kasyanov filed his answer on 30 April 2010. On 19 October 2010, in response to Kasyanov’s request, this Tribunal held a hearing in New York, which both parties attended.

³ *Kasyanov*, Judgment No. UNDT/2010/026, para. 40.

⁴ ST/SGB/1997/1 has been replaced by ST/SGB/2009/4 (18 December 2009).

Submissions

Secretary-General's Appeal

8. The Secretary-General submits that the UNDT erred in law and exceeded its competence in ruling that Kasyanov had a right to be appointed to the P-4 position in Geneva. As established by the former Administrative Tribunal, the United Nations Charter vests the authority to appoint staff solely in the Secretary-General, who therefore has a broad scope of discretionary authority to make appointment decisions. In reviewing challenges to such decisions, the former Administrative Tribunal could not substitute its judgment for that of the Secretary-General, though it could ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. It held that a staff member does not have a right to promotion, but only to full and fair consideration and the same reasoning must apply to appointments. Therefore, the Secretary-General argues that the UNDT erred in holding that Kasyanov had a right to be appointed to the P-4 post.

9. The Secretary-General alleges that the UNDT contradicted itself in stating, on the one hand, that Kasyanov was the sole 15-day candidate who applied by the 15-day mark and who was therefore eligible for consideration at the 15-day mark while, on the other hand, it considered that "if despite best endeavours, it has not been possible to evaluate the 15-day candidates by the 30 day mark, they should be placed in a separate pool and evaluated before the 30-day candidates". But even if Kasyanov were the only 15-day candidate who applied, he would still not have a right to an appointment. Being considered a suitable candidate does not automatically mean that the candidate will be selected. Section 7.5 of ST/AI/2006/3 provides that "[f]or candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required".

10. The Secretary-General claims that the UNDT erred in law in determining that OHRM had no authority to exempt language staff from the lateral move requirements set out in ST/AI/2006/3. Under Staff Regulation 112.2(b), in effect at the time the OHRM memorandum was issued, exceptions to the Staff Rules may be made by the Secretary-General. Under Annex II of the Administrative Instruction on the Administration of the

Staff Regulations and Staff Rules (ST/AI/234/Rev/1), the authority to decide on an exception to the Staff Rules under Staff Rule 112.2(b) has been delegated to the Assistant Secretary-General for Human Resources Management. The Secretary-General argues that the authority to make exceptions to the Staff Rules necessarily extends to exceptions to administrative instructions, which are hierarchically inferior to the Staff Rules. In support of his contention, the Secretary-General points to Annex IV of ST/AI/2006/3 which provides that OHRM has the responsibility for “[e]stablishing policies, rules and guidelines for the [staff selection] system and providing authoritative interpretations”.

11. The Secretary-General next alleges that the UNDT erred in law in ordering compensation for a breach of a right. Kasyanov has no legal right to appointment and has incurred no damage. There has only been a procedural error. The legal framework governing the award of compensation by the UNDT prohibits the award of punitive damages and thereby prohibits compensation in the present case. The Secretary-General further contends that the UNDT erred in law in considering that an assertion that USD 25,000 “appears just” constitutes a sufficient reason to establish a sum of compensation, without stating “the reasons, facts and law” as required by Article 11(1) of the UNDT Statute.

12. The UNDT erred in law and exceeded its competence in awarding compensation for the “time and trouble of litigation”. Kasyanov’s submissions to the Joint Appeals Board (JAB) and the UNDT were prepared by the Panel of Counsel and Office of Staff Legal Assistance (OSLA), respectively. Moreover, the General Assembly specifically considered authorizing the UNDT to award costs of litigation, but ultimately decided against it. Furthermore, the UNDT’s ruling that an appellant may be awarded compensation for the “time and trouble” in pursuing litigation against the Organization will create inappropriate incentives for staff members who may be deterred from pursuing and accepting an informal resolution of their cases if there is a prospect of higher compensation from the UNDT.

13. The Secretary-General contends that the UNDT erred in law and fact in ordering compensation for “actual damages”, by purporting to calculate “actual damages” based on the difference in post adjustment for Geneva and New York for the period from February 2008 to February 2010. Post adjustment is intended to ensure equality of remuneration to all staff members in the United Nations regardless of the duty station at

which they serve. The UNDT erred in law in finding that Kasyanov had a right to an appointment. The UNDT also erred in fact in finding that the calculations of the post adjustment in 2008 demonstrated that the post adjustment did not provide a useful calculation “for assessing the actual difference in costs that would be paid by an individual staff member”. The UNDT further erred in finding that Kasyanov was entitled to the entire amount of post adjustment, regardless of the actual expenses incurred, because he could have chosen his living standard and could have profited from the difference between the post adjustment in Geneva and New York.

14. The Secretary-General also argues that the UNDT erred in awarding the difference in the post adjustment between Geneva and New York for the period from February 2008 to February 2010. The decision on the selection of candidates was made on 27 February 2008 and, had Kasyanov been selected, he would likely not have been transferred to Geneva until May 2008. Under Section 10.4 of ST/AI/2006/3, staff members transferring to another duty station may be released up to two months after the releasing office is notified. Moreover, had the UNDT awarded compensation at the same time that it issued its Judgment on the merits of this case, the period from October 2009 to February 2010 would not arise.

15. The Secretary-General submits that the UNDT erred in law in determining that Kasyanov was deprived of a right to a lateral move and that he thereby suffered an injury to his career prospects, warranting compensation. Kasyanov had no right to an appointment; and as a language staff member, he was exempted from the lateral move requirement. It further erred in setting the amount of compensation at USD 12,000, a level that does not correspond to the difference between the salaries of a staff member at the P-4 and P-5 level.

16. Similarly, the UNDT erred in law in ordering the recording of a lateral move as well as compensation if such specific performance is not undertaken. When compensation is established as an alternative to specific performance, it should correspond to the damage that would be suffered if the Secretary-General decided not to undertake specific performance. Since Kasyanov is not required to fulfil the lateral move requirements as a language staff member, he would not suffer any damage. Furthermore, the UNDT has doubly compensated Kasyanov, by awarding him USD 12,000 for the injury to his career prospects resulting from the deprivation of his

right to a lateral move and by ordering the recording of a lateral move or USD 20,000 in lieu of specific performance.

Kasyanov's Answer

17. Kasyanov argues that the Secretary-General's assertion that the UNDT erred in law in holding that Kasyanov had a right to the P-4 post in Geneva is time-barred. The UNDT Judgment on the merits of this case, dated 23 September 2009, concluded that Kasyanov had a right to obtain the P-4 post. It stated that Kasyanov "was the only staff member eligible for consideration at the 15-day mark"; that eligible 15-day mark candidates must be considered before other candidates, "so that if one or more is found to be suitable, the 30-day candidates are no longer to be considered". It noted that Kasyanov was deemed suitable for the post; that he was the only suitable candidate eligible to be considered at the 15-day mark; and that he therefore had a right to the contested post. Since the UNDT Judgment on the merits was rendered on 23 September 2009, the time-limit for filing an appeal expired on 7 November 2009. The Secretary-General's appeal on the issue of whether Kasyanov had a right to the post is therefore time-barred.

18. Kasyanov further submits that, in any event, the UNDT did not err in law in determining that he had an entitlement and right to be appointed to the P-4 post in Geneva. The Secretary-General's discretionary authority in the appointment of staff must be exercised within the parameters of ST/AI/2006/3. The UNDT correctly found that, since Kasyanov was the only eligible 15-day mark candidate who had applied for the post, he had a right to that post under ST/AI/2006/3. The UNDT correctly held that, because the other candidate, who would have otherwise met the eligibility requirements of Section 5.4, failed to apply within the 15-day mark, she became a 30-day mark candidate.

19. Kasyanov argues that the UNDT did not err in law in holding that OHRM had no authority to exempt language staff from the lateral move requirements set out in ST/AI/2006/3. Pursuant to Section 1.2 of ST/SGB/1997/1, "[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative instructions".

20. On 31 August 2007, Officer-in-Charge, OHRM issued a memorandum, in which she stated, *inter alia*, that “internal candidates at the P-4 level, who are language staff, will be considered eligible to apply for P-5 language posts even if they do not meet the lateral move requirement that would otherwise be applicable”. However, a rule exempting all P-4 level language staff from the lateral move requirements of Section 5.3 is a rule or policy of general application within the meaning of ST/SGB/1997/1, Section 1.2. As such, it could only be given legal effect if it was duly promulgated, either through a Secretary-General’s Bulletin or an Administrative Instruction. No amendments to ST/AI/2006/3 reflecting the policy change in the 31 August 2007 memorandum were ever duly promulgated. OHRM therefore acted outside its scope of authority in implementing the policy.

21. Moreover, OHRM had no authority under Staff Rule 112.2(b) to exempt all P-4 level language staff from the lateral move requirement under Section 5.3. Rule 112.2(b) provides that an exception may be made on a case-by-case basis, but OHRM attempted, by memorandum, to promulgate a rule of general application that was inconsistent with the existing legislation. Similarly, Annex IV of ST/AI/2006/3 does not give OHRM the authority to promulgate rules and policies of general application that are inconsistent with the “statute”. Viewed in the context of the entire statute, OHRM was given authority to give effect to the Regulations and Rules provided in ST/AI/2006/3. This authority is not so broad as to allow OHRM to unilaterally promulgate rules of general application that are inconsistent with the statute.

22. Kasyanov submits that the UNDT did not err in law in awarding compensation for breach of a right. An examination of the legislative history of the UNDT Statute leads to the conclusive determination that the UNDT did not err in law or exceed its jurisdiction in awarding compensation for the violation of Kasyanov’s rights. It also provided sufficient grounds for awarding the sum of USD 25,000 for the violation of Kasyanov’s rights. The compensation was intended to recompense Kasyanov, as nearly as possible, for the violation of his rights. The award of compensation rendered by the UNDT did not therefore constitute exemplary or punitive damages and was not prohibited by Article 10(7) of the UNDT Statute. The UNDT did not err in law in ruling that Kasyanov could be awarded compensation for the “time and trouble” in pursuing litigation. It is a question of fact which the Secretary-General cannot raise for the first time on appeal.

Furthermore, the award of compensation was intended to recompense Kasyanov for the injuries he suffered as a result of the violation of his rights. These injuries include the time, trouble, stress, and anxiety of litigation. The Secretary-General's mere assertion that such compensation might be a disincentive for the informal resolution of future disputes is not supported by any facts or evidence and is contrary to the facts of the present case, where Kasyanov has "earnestly sought to settle his case through informal negotiations with the [Secretary-General]".

23. Kasyanov contends that the UNDT did not err in awarding compensation for actual loss by calculating that loss based on the difference in post adjustments for Geneva and New York. Kasyanov argues that the language in Staff Rule 103.7(a) is mandatory. It provides for the staff members' entitlement in the event that they are assigned to a duty station and this entitlement is given to staff members regardless of their standard of living. Similarly, the UNDT did not err in awarding compensation for the period from February 2008 to February 2010. The length of the period was not "artificially created by the Dispute Tribunal's delays in deciding the amount of compensation". Rather, the failure of the settlement negotiations resulted in the necessity to hold a hearing on remedies. And the Secretary-General delayed the resolution of the case by re-litigating facts that had already been finally resolved at trial and by requesting additional leave in his third submission.

Considerations

24. This Court wishes to first address the time-bar issue that Kasyanov has raised. Kasyanov contends that as the earlier UNDT Judgment (UNDT/2009/022) on the merits of his application was issued on 23 September 2009, it was too late for the Secretary-General to appeal, on 26 March 2010, any finding in that Judgment. We disagree. We believe that UNDT's *Kasyanov* Judgment on merits is not a final judgment, in that Adams, J. made substantive findings, but left the issue of remedy to be studied and resolved in the future. The Judgment became final only when the UNDT issued the Judgment on compensation on 9 February 2010, the subject of the present appeal. It is this final Judgment that is appealable to the Appeals Tribunal. When a party appeals that final judgment, he or she can challenge not only the judgment on compensation but also the judgment on merits.

25. The UNDT determined that Kasyanov had a right to be appointed to the P-4 level position in Geneva because he was the only P-4 15-day-mark candidate requesting a lateral transfer. During the oral hearing held on 19 October 2010 the Secretary-General submitted that he did not contest the judgment on the merits. This does not then require adjudication.

26. The issue on appeal is the relief granted in the Judgment on compensation of 9 February 2010. The UNDT ordered the Administration to pay:

- (a) USD 25,000 for breach of Kasyanov's right to appointment, as well as the emotional stress of having to undertake court proceedings;
- (b) "Actual damages" in the amount of USD 22,932, based on the difference in post adjustment for Geneva and New York for the period from February 2008 to February 2010;
- (c) USD 12,000 as compensation for injury to career prospects; and
- (d) USD 20,000 as an alternative to partial specific performance of recording a lateral move in Kasyanov's personnel records.

27. The purpose of the award of USD 22,932, based on the difference in post adjustment for Geneva and New York, was to award the same living conditions in the different duty stations of the United Nations. Post adjustment is not intended as a profit for a staff member but as a means of maintaining the same level of income in spite of the different costs of living at different duty stations of the Organization. It does not accrue unless the staff member effectively lives at the duty station. Since Kasyanov did not move to Geneva he is not entitled to the subsistence allowance of Geneva but to that of New York, his duty station at the material time where he effectively lived. The award of this amount is therefore reversed.

28. The injury to Kasyanov's career prospects is remedied if the lateral transfer is recorded in his personnel records. But the Administration has waived its right to require language staff such as Kasyanov to undergo two lateral transfers before they may be promoted. Consequently, the partial specific performance demanded in the UNDT Judgment has taken place and the injury to his career prospects has therefore been repaired. Accordingly the damages of USD 32,000 (aggregate of paragraph 26(c) and (d) above) for injury to Kasyanov's career are also reversed.

29. The UNDT Judgment awarded Kasyanov USD 25,000 as moral damages for the breach of his right to be appointed to the P-4 post in Geneva. Both parties during the hearing of 19 October 2010 admitted that another P-4 Russian Interpreter post in Geneva was open in April 2008, one month after Kasyanov was notified of his non-selection, but he did not apply. Kasyanov explained that he did not wish to apply for a transfer to a duty station where they did not want him.

30. Under Article 10(5)(b) of the UNDT Statute, Kasyanov may be awarded compensation for non-pecuniary damage arising from the violation of his rights during the selection process. This is not in dispute. While not every violation will necessarily lead to an award of compensation, the UNDT found in this case that Kasyanov had suffered damage for which he was entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

31. In *Wu*,⁵ this Tribunal affirmed the UNDT decision to award compensation in the amount of two months' net base salary. Both cases, *Kasyanov* and *Wu*, decide the same issue. The UNDT in the *Wu* Judgment made its findings based on the UNDT Judgment on the merits in *Kasyanov*, that the decision to choose a 30-day candidate instead of the applicant, a 15-day candidate, violated Section 7.1 of ST/AI/2006/3 and that, therefore, the decision not to appoint the applicant was procedurally flawed.

32. This Tribunal determined in *Wu* that the relief of two months' net base salary was adequate. The same quantum of compensation should be awarded in this case.

⁵ *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

Judgment

33. For the foregoing reasons, the Appeals Tribunal grants the appeal in part, the UNDT Judgment is modified, and the compensation awarded by the UNDT is reduced to the equivalent of two months' net base salary as compensation for the violation of Kasyanov's rights during the selection process.

Dated this 28th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Painter

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar