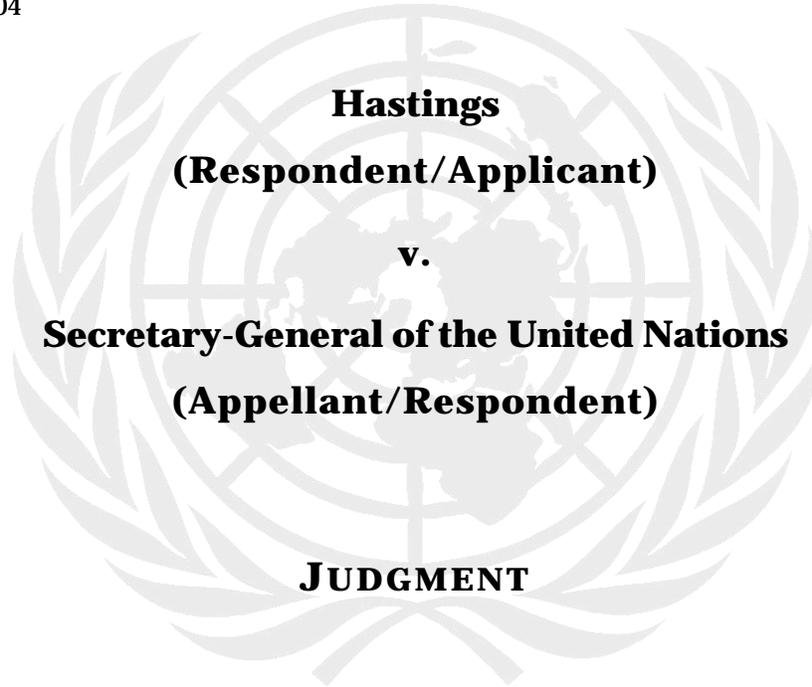




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-104



Before: Judge Mark P. Painter, Presiding
Judge Jean Courtial
Judge Luis María Simón

Judgment No.: 2011-UNAT-109

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Bart Willemsen

Counsel for Appellant/Respondent: John Stompor

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. In limited circumstances, exceptions may be made to section 5.2 of Administrative Instruction ST/AI/2006/3. The Administration conceded as much.
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.
3. “Moral” damages may not be awarded without specific evidence supporting the award.

Facts and Procedure

4. Rada Hastings (Hastings) joined the Organization in 1978 and has been working in the Secretariat of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) since 1999. In 2000, she was promoted to the P-5 level as a Senior Administrative Management Officer, ACABQ.
5. In January 2007, Administrative Instruction ST/AI/2006/3 came into force replacing ST/AI/2002/4. Section 5.2 of ST/AI/2006/3 provides that “[s]taff members shall not be eligible to be considered for promotion to posts more than one level higher than their personal grade”.
6. In September 2008, Hastings was named Acting Executive Secretary of the ACABQ and granted a Special Post Allowance to the D-1 level, when the then Executive Secretary at the D-2 level separated from the Organization.
7. In January 2009, the vacant D-2 post of Executive Secretary of the ACABQ was advertised and the following month Hastings wrote to the Secretary-General requesting that an exception to Section 5.2 of ST/AI/2006/3 be made to enable her, a P-5, to apply for the D-2 post.

8. On 16 March 2009, the Office of Human Resources Management (OHRM) replied to Hastings that her case fell under Section 5.2 of ST/AI/2006/3, and that she was not eligible to be considered for promotion to D-2.

9. Subsequently the Assistant Secretary-General for Human Resources Management (ASG/OHRM) also responded to Hastings that “[u]nder the current staff regulations and rules including ST/AI/2006/3, we are not permitted to grant exceptions to the prohibitions set out in [section] 5.2 and, to date, no such exception has been made. Accordingly, we are not able to comply with your request to grant an exception of [Section] 5.2 for your application.”

10. After she requested administrative review of the decision not to grant her an exception to Section 5.2 of ST/AI/2006/3 and was informed that the decision would be upheld, Hastings appealed to the Joint Appeals Board (JAB). The JAB did not have an opportunity to review the case before its abolition. The case was later transferred to the United Nations Dispute Tribunal (UNDT).

11. On 7 October 2009, the UNDT issued Judgment No. UNDT/2009/030 (Judgment on Merits). Judge Shaw determined that “[t]he wording of section 5.2 is susceptible to exceptions under staff rule 112.2 (b)”. (Staff Rule 112.2 (b) provides that “[e]xceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members”.) She then devised a three-step test and asked whether the decision not to grant Hastings an exception to Section 5.2 of ST/AI/2006/3 met the test. Judge Shaw found that as the ASG/OHRM did not consider an exception to Section 5.2 to be possible she did not move to the next step of deciding what circumstances might constitute reasons for an exception to be granted. “[I]t is more likely than not that [Hastings’s] case for an exception was not properly considered and accordingly the decision of the ASG to reject her application on the basis that no exceptions were possible to section 5.2 was not lawful.” Judge Shaw instructed the parties to seek a joint resolution of the issue of remedies by themselves or through mediation, which failed to resolve the case.

12. On 28 April 2010, the UNDT issued Judgment No. UNDT/2010/071 (Judgment on Remedies). Judge Shaw awarded Hastings the sum of USD 5,000 for moral damages, as she found that Hastings “must have suffered some distress at the unlawful decision”. Judge Shaw also found that Hastings had suffered material loss as a result of the decision not to grant her an exception, and that she had a ten per cent chance of being successful in her application for the D-2 post of the Executive Secretary of the ACABQ—if the process Judge Shaw described in her Judgment on Merits had been followed, Hastings would have stood a “good although not certain chance of being granted an exception to apply for the post she wanted”, the other eligible candidates at the D-1 level would not have been necessarily prejudiced by Hastings’s candidacy, and Hastings would presumably have passed the written test and would certainly have been interviewed again. Judge Shaw ordered the Secretary-General to pay Hastings “ten percent of the difference between the salary she actually carries and that she would have received in the D-2 position on a continuous basis”. The payments were to be made from the date on which the successful candidate to the D-2 position started and were to continue until the date of Hastings’s retirement. Judge Shaw further ordered the Secretary-General to pay Hastings “10 percent of any additional allowances and benefits she would have received at the D-2 level including adjustment of her pension contributions and consequent retirement benefits”.

13. On 14 June 2010, the Secretary-General filed an appeal from both the Judgment on Merits and the Judgment on Remedies. On 2 August 2010, Hastings filed an answer.

Considerations

14. Hastings maintains that since the Secretary-General did not appeal the Judgment on Merits, the findings in that judgment are *res judicata*. This court disposed of that argument in *Kasyanov*.¹ The case is not time-barred.

15. Judge Shaw held that Staff Rule 112.2(b) (“Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.”) allowed an exception to the language of Section 5.2 of ST/AI/2006/3: “Staff members shall not be

¹ *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076.

eligible to be considered for promotion to posts more than one level higher than their personal grade.”

16. We find no fault with Judge Shaw’s reasoning, and affirm that part of the Judgment. We believe that the “exception” language is just as much for the ability of the Administration to have flexibility in staffing decisions as it is for the staff, which is probably why the Administration conceded that exceptions could be made.

17. The UNDT was not substituting its judgment on personnel matters—the problem here was that the Administration had believed, incorrectly, that no exception was legally possible. That belief *precluded* discretion. If the Administration had allowed that exceptions could be made, but in its discretion decided not to make an exception in this instance, we doubt a case could be made against that decision. But that is not what happened—an error of law precluded the exercise of discretion, and deprived Hastings of the chance of promotion.

18. Judge Shaw found that the chances of Hastings’ being granted the exception and then being appointed at the D-2 level were ten per cent. While not subject to exact probabilities, such assessments are sometimes necessary in cases where a staff member is unlawfully denied a position—and in many cases alternative means of calculating damages may be available. The trial court is in a much better position than this Court in assessing the probabilities. We affirm that part of the Judgment. But the damages awarded—ten per cent of the difference of salary and benefits *until retirement*—seem a bit excessive. We think the duration should be limited, except in very compelling cases, to two years.² Thus we modify the amount of damages to 10 per cent of the difference between what she would have earned at the D-2 level and what she is earning at the P-5 level for two years.

19. Judge Shaw also concluded that her determination that Hastings “must have suffered some distress at the unlawful decision” was sufficient to support her award of USD 5,000 for “moral damages”. In *James*,³ we held that the need for compensation must be demonstrated by evidence. But “there was no evidence of damages or injuries” in this case. Speculation will not suffice. That part of the Judgment is vacated.

² See Statute of the Dispute Tribunal, Article 10(5)(b).

³ *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009.

Judgment

20. We affirm the decision of the UNDT concerning the possibility of an exception to Section 5.2 of ST/AI/2006/3. We modify the duration of the damages to two years of the difference in salary and benefits. The Judgment for “moral damages” is vacated.

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Painter, Presiding

(Signed)

Judge Courtial

(Signed)

Judge Simón

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar