



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2010-096

Antaki
**(Respondent on Appeal and Appellant
on Cross-Appeal/Applicant)**

v.

Secretary-General of the United Nations
**(Appellant on Appeal and Respondent
on Cross-Appeal/Respondent)**

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Jean Courtial Judge Luis Simón
Judgment No.:	2010-UNAT-095
Date:	29 October 2010
Registrar:	Weicheng Lin

Counsel for Respondent on Appeal and
Appellant on Cross-Appeal/Applicant: François Lorient

Counsel for Appellant on Appeal and
Respondent on Cross-Appeal/Respondent: Melanie Shannon

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. On 17 April 2010, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) issued Judgment No. UNDT/2010/059, which concluded that the decision not to appoint Michele Antaki (Antaki) as a P-5 interpreter was valid and lawful. Nonetheless the Dispute Tribunal ordered that the Secretary-General pay Antaki compensation in the amount of USD 1,000 for frustration and distress.
2. In the present appeal, the Secretary-General submits that the Dispute Tribunal erred in law and exceeded its competence in awarding compensation in the absence of procedural errors and demonstrable loss. This Court allows the appeal and reverses the award of compensation.
3. The cross-appeal of Antaki for enhanced compensation is dismissed.

Facts and Procedure

4. The promotion exercises for two P-5 positions in the Arabic Interpretation Section in New York (AIS) in the Department of General Assembly and Conference Management (DGACM) gave rise to the case before the UNDT.
5. Antaki applied for two P-5 positions in the AIS and was interviewed in early November 2004. Subsequently, examination by the Administration of the e-PAS system in the AIS revealed fundamental shortcomings that reflected significantly on the reliability of the appraisals and the P-5 selections. It therefore decided to cancel the 2004 vacancy announcements and to recommence the selection process.
6. In April 2005, Antaki was informed that the posts had been re-advertised. However, in early November 2006, the second round of the selection process was also cancelled. On 8 November 2006, the candidates received a list of "Performance/Promotion Criteria for P-5 Interpreters". This list was referred to as the "list of 12" as it had already been revised twelve times in consultation with the candidates.

7. On 12 July 2007, two P-5 vacancies were issued on Galaxy. On 24 October 2007, Antaki was interviewed by a panel of five members, including the Programme Case Officer (PCO) who was the chief of the AIS. Each interviewer took notes and scored the interviewed candidates, using tables prepared by the PCO. Following the evaluation by the interview panel members, Antaki was ranked fifth out of seven candidates.

8. During the proceedings before the UNDT, the PCO testified that after the interviews, she created a narrative which reflected the handwritten notes of the interview panel members and the scores given to the candidates. The PCO noted that she “convened a meeting to ascertain that the narrative fairly reflected what the members had written, having first provided them with the notes to enable the comparison to be made”. She created a descriptive narrative of the interview, an interview matrix, a promotion criteria matrix, and an overall matrix which she provided, along with several other documents relating to the selection and interview process, for review to the Under-Secretary-General for DGACM (USG/DGACM).

9. By note to the USG/DGACM dated 29 November 2007, the PCO and the Assistant Secretary-General, DGACM, specifically recommended two candidates for the two P-5 interpreter posts. Two further candidates were placed on a “recommended list” or roster. Antaki was not selected for either of the posts nor was she placed on the roster. On 26 December 2007, the Central Review Board (CRB) endorsed the recommendation and the recommended candidates were selected. In January 2008, a third P-5 post was advertised and awarded to one of the candidates listed on the roster. Antaki was notified later that month that she had not been selected for that post, either.

10. Antaki requested an administrative review of the decision not to appoint her to a P-5 post. The Administrative Law Unit rejected her claim that she had been improperly excluded from promotion. Antaki subsequently filed an appeal with the Joint Appeals Board (JAB). Subsequent to the JAB’s abolition, her case was transferred to the UNDT.

11. On 7 April 2010, the UNDT issued Judgment No. UNDT/2010/059. The UNDT concluded that the decision not to appoint Antaki as a P-5 interpreter was valid and lawful. It found that, in this case, the Administrative Instruction on Special Measures for the Achievement of Gender Equality was not applicable to Antaki. Further, having considered the question of the relevance of the e-PAS evaluations in the AIS over the

relevant period and the relevance of the e-PAS in the selection process, it found that the decision at the outset to exclude e-PAS evaluations was not unreasonable. It however found that there was an “inappropriate imprecision and confusion of the matrices” which contributed to Antaki’s frustration and stress and justified an award of compensation. The UNDT found that Antaki failed to achieve a promotion to which she legitimately aspired and a fundamental requirement of good faith obliged the Administration to ensure that the outcome demonstrably complied with all the instrumental requirements, especially in light of the unfortunate mismanagement of prior attempts, which had directly involved Antaki. The UNDT noted that “[t]he transparency and logic of the process should have prevented this from occurring”. It held that the shortcomings in the process had not affected the propriety of the outcome and that therefore compensation should be nominal, but sufficient to reflect the real, and not trivial, interest of Antaki in compliance with her contractual rights. It accordingly awarded Antaki the sum of USD1,000.

12. On 10 May 2010, Antaki submitted an application for revision of judgment to the UNDT, which the UNDT dismissed by Order No. 119 (NY/2010).

13. On 24 May 2010, the Secretary-General filed an appeal against Judgment No. UNDT/2010/059. The appeal was assigned case no. 2010-096. On 27 August 2010, Antaki filed her answer together with a cross-appeal.¹ The Secretary-General filed his answer to the cross-appeal on 8 October 2010.

14. The same day, on 24 May 2010, Antaki filed an appeal against Judgment No. UNDT/2010/059 and UNDT Order No. 119 (NY/2010) and, on 30 May 2010, she filed a rectified appeal. In her appeal, Antaki submits that the UNDT erred in law in finding that the decision not to appoint her to a P-5 interpreter position was valid and lawful. Antaki’s appeal was assigned case no. 2010-097. The Appeals Tribunal disposes of Antaki’s appeal in a separate judgment.

¹ See Order No. 6 (2010) issued by the Duty Judge on 31 August 2010 accepting the cross-appeal as timely filed.

Submissions

Secretary-General's Appeal

15. The Secretary-General contends that the UNDT erred in law in determining that there were any shortcomings in the selection process that gave rise to an entitlement to compensation. The Secretary-General further submits that the UNDT erred in law and exceeded its competence in awarding compensation for procedural non-compliance where the staff member has shown no demonstrable loss. In the Secretary-General's view, such compensation can only be characterized as punitive damages. The Secretary-General requests that the Appeals Tribunal reverse the UNDT's order to pay compensation.

Antaki's Answer and Cross-Appeal

16. Antaki requests that the Appeals Tribunal dismiss the Secretary-General's appeal. She submits that the UNDT did not err in recognizing her right to compensation for the frustration and distress suffered throughout the selection process and did not award punitive damages. In her cross-appeal, she contests the amount of compensation awarded by the UNDT and requests that the Appeals Tribunal increase the amount to two years net base salary for the procedural irregularities committed by the Secretary-General. She requests that the Appeals Tribunal remand the case to the UNDT for a further hearing on compensation "for losses of promotion opportunity, salary and pension benefits suffered" by Antaki. Finally, she requests the Appeals Tribunal to order costs against the Secretary-General.

Secretary-General's Answer to Antaki's Cross-Appeal

17. The Secretary-General requests the Appeals Tribunal to find that Antaki has not established any errors that would warrant an increase in the compensation awarded by the UNDT. He requests the Appeals Tribunal to dismiss the cross-appeal in its entirety and to reverse the UNDT Judgment.

Considerations

18. As previously noted, the Appeals Tribunal in a separate judgment disposes of Antaki's appeal challenging the UNDT's finding that the decision not to appoint her to a P-5 interpreter position was valid and lawful.

19. The Dispute Tribunal has an unquestioned discretion and authority to quantify and order compensation under Article 10(5) of its Statute for violation of the legal rights of a staff member as provided under the Staff Regulations, Rules, and administrative issuances.

20. Not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages.

21. A Tribunal may thus award compensation for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury. In *Wu* for example, the Appeals Tribunal affirmed the UNDT decision to award compensation in the amount of two months' net base salary as moral damages.² The UNDT held that the decision to choose a 30-day candidate instead of a 15-day candidate, violated Section 7.1 of ST/AI/2006/3 and that therefore, the decision not to appoint was procedurally flawed.

22. In *James*, this Court set aside the order for compensation on the grounds that James had not requested compensation; that there was no evidence of damages or injuries, and that James acknowledged on appeal that he did not ask for or suffer damages, but instead his real injury was the monetary loss he claimed.³

23. In the instant appeal, the Dispute Tribunal found that, despite the shortcomings in the process, the decision not to appoint Antaki was valid and lawful. In the particular circumstances of this case, such decision precludes the Dispute Tribunal from awarding any compensation to Antaki.

² *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

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

24. We empathize with the inevitable frustration, disappointment, and distress that Antaki might have experienced as a consequence of her failure during the selection process.

25. However, we find that the Dispute Tribunal erred in law in awarding compensation to Antaki in the absence of any procedural errors in the selection process or a breach of her legal rights.

26. Furthermore, Antaki has not claimed nor demonstrated any pecuniary loss during the selection process.

27. Consequently we allow the appeal. In view of the above the cross-appeal is dismissed.

Judgment

28. The appeal is allowed. The decision of the Dispute Tribunal in relation to the award of compensation is set aside. The cross-appeal is dismissed.

Dated this 29th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Courtial

(Signed)

Judge Simón

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

(Signed)

Weicheng Lin, Registrar