



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2011-243

**Kozlov and Romadanov
(Respondents/Applicants)**

v.

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

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Luis María Simón Judge Mary Faherty
Judgment No.:	2012-UNAT-228
Date:	29 June 2012
Registrar:	Weicheng Lin

Counsel for Respondents/Applicants: Duke Danquah

Counsel for Appellant/Respondent: Amy Wood

JUDGE INÉS WEINBERG DE ROCA, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by the Secretary-General of the United Nations on 5 August 2011 against Judgment No. UNDT/2011/103, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 20 June 2011. Mr. Igor Kozlov and Mr. Alexander Romadanov filed a joint answer on 26 September 2011.

Synopsis

2. Not every violation will necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute.

3. In *Kasyanov*¹ and *Wu*², this Tribunal awarded compensation in the amount of two months' net base salary where the decision not to appoint the applicants was procedurally flawed.

4. We see no reason to depart from this jurisprudence.

Facts and Procedure

5. Mr. Kozlov joined the United Nations on 11 October 1988 at the P-2 level in the Russian Translation Service (RTS), Translation Division (TD), Division of Conference Services (DCS) where he is currently serving as a translator at the P-3 level. Mr. Romanadov joined the same service on 5 October 1988 at the P-2 level where he is also currently serving as a translator at the P-3 level.

6. On 8 August 2006, a P-3 post of Russian Editor in the Official Records and Editing Section (ORES) in the Department of General Assembly and Conference Management (DGACM) was announced. Mr. Kozlov and Mr. Romadanov, as well as a third candidate, were interviewed for the post and, on 27 September 2006, they were informed that the third candidate had been deemed the most suitable. Two days later, the Office of Human Resources Management (OHRM) informed the Executive Office that the third candidate did not meet the eligibility requirements for the post. However, Mr. Kozlov and Mr. Romadanov were not considered for

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

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

the post and another staff member, who had not been part of the pool of considered candidates, was temporarily appointed to the post.

7. In October 2006, Mr. Kozlov and Mr. Romadanov requested administrative review of their non-selection and then submitted an appeal to the Joint Appeals Board (JAB). On 6 March 2008, the JAB concluded that the Administration had failed to fully and fairly consider both appellants and recommended that they both be awarded four months' net base salary. On 18 June 2008, the Secretary-General rejected the JAB's recommendations.

8. On 4 September 2008, Mr. Kozlov and Mr. Romadanov filed an appeal before the former Administrative Tribunal. Following the abolition of the former Administrative Tribunal, the case was transferred to the Dispute Tribunal. The Dispute Tribunal issued Judgment No. UNDT/2011/058 (Judgment on merits) on 30 March 2011, in which it found that there had been procedural irregularities in the post selection process and that consequently, Mr. Kozlov's and Mr. Romadanov's candidacies had not been fully and fairly considered. On 20 June 2011, the UNDT issued Judgment No. UNDT/2011/103 (Judgment on compensation), in which it awarded both applicants one year's net base salary as "non-pecuniary compensation" and also awarded Mr. Romadanov three months' net base salary for moral damages.

Submissions

Secretary-General's Appeal

9. The Secretary-General submits that the Dispute Tribunal erred on questions of law and exceeded its competence in awarding compensation in the amount of one-year net base salary to Mr. Kozlov and Mr. Romadanov, respectively.

10. The Secretary-General submits that while "the purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations", such an award can only be made if the staff member suffered actual damages. An award of compensation as a result of a procedural irregularity in a post selection process can only be made if the irregularity had a substantial impact on the process and if the staff member had a significant chance of being selected. Finally, the Secretary-General submits that such compensation must be proportionate to the actual harm.

11. The Secretary-General submits that, in addition to not explaining the methodology used in determining the amount of compensation awarded, the Dispute Tribunal erred in not demonstrating how the amount of compensation awarded was proportionate to the harm each applicant suffered. The Secretary-General submits that in *Kasyanov*³ the Appeals Tribunal found that when the lost chance concerned a post at the same level, an award of two months' net base salary was an appropriate award of non-pecuniary compensation. Consequently, considering the similarities between *Kasyanov* and the present case, the Dispute Tribunal erred in deviating from this jurisprudence.

12. The Secretary-General further submits that *Kasyanov* and *Wu*⁴ make no reference to the fact that moral injuries should be distinguished from non-pecuniary damages. Rather, the Secretary-General submits that these types of award cover the same injury and that the Dispute Tribunal erred in awarding multiple awards for the same injury. The Secretary-General also submits that the Dispute Tribunal's Judgment lacks any specificity as to the evidence supporting the referenced award.⁵

13. The Secretary-General submits that the Dispute Tribunal's award appeared to be based on procedural irregularities in the post selection process. The Secretary-General submits that while there are certain circumstances where this would be relevant, in the current case this would be akin to awarding punitive damages.

14. The Secretary-General requests that the Appeals Tribunal reduce the award of non-pecuniary damages to two months' net base salary for Mr. Kozlov and Mr. Romadanov, respectively, and to set aside the award to Mr. Romadanov of three months' net base salary for moral injury.

Respondents' Answer

15. The Respondents submit that the Dispute Tribunal Judgment clearly explained that the concept of loss of chance is particularly applicable in cases of lateral transfer even when there is no directly identifiable economic loss. Furthermore, the Respondents submit that the findings in

³ *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076.

⁴ *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

⁵ Cf. *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

Hastings, *Wu* and *Kasyanov* are only tangentially applicable to this case as the loss of chance in the present case is actually much more severe.

16. The Respondents submit that the Dispute Tribunal clearly explained the complexity of determining the amount of compensation to be awarded in the present case and why it opted to follow the principles expressed in *Lutta*⁶ rather than those in *Hastings*. The Respondents also submit that *Lutta* clearly establishes that it is within the discretionary authority of the Dispute Tribunal to determine the weight to be allocated to the Secretary-General's actions.

17. The Respondents further submit that, aside from the fact that the loss of chance occurred early on in the selection process resulting in a certain level of uncertainty as to the weight to be accorded to the actual loss of chance, *Antaki*⁷ held that “[t]he Dispute Tribunal has the unquestioned discretion and authority to quantify and order compensation”.

18. The Respondents submit that, contrary to the Secretary-General's contentions, the Respondents did provide evidence to support the award of compensation for moral damages. The Respondents contend that *Wu* does not indicate that moral injury is a part of non-pecuniary damages or that one cannot award both types of compensation.

19. The Respondents request that the Appeals Tribunal uphold the Dispute Tribunal's Judgment.

Considerations

20. The UNDT Judgment held that Mr. Kozlov and Mr. Romadanov did not lose an opportunity to pursue a P-4 post of Russian editor created in ORES. In addition, it held that the lateral transfer of the applicants was not a promotion. This part of the Judgment has not been appealed by either party and is therefore final.

21. The Appeals Tribunal has to decide whether the UNDT erred in determining the amount of compensation to be awarded to Mr. Kozlov and Mr. Romadanov for the irregularity in the proceedings. The UNDT awarded one-year net base salary to each Applicant for the procedural flaws and additionally three months' net base salary to Mr. Romadanov as damages for his

⁶ *Lutta v. Secretary-General of the United-Nations*, Judgment No. 2011-UNAT-117.

⁷ *Antaki v. Secretary-General of the United-Nations*, Judgment No. 2010-UNAT-095.

reported clinical depression of nearly one year. Mr. Kozlov did not receive the additional award for moral damages because of lack of evidence.

22. The Secretary-General requests that the compensation for the irregularity in the proceedings be reduced to two months' net base salary.

23. The Secretary-General also requests that the compensatory award to Mr. Romadanov for moral injury be vacated.

24. Not every violation will necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute. In *Kasyanov*⁸ and *Wu*⁹, this Tribunal awarded compensation in the amount of two months' net base salary where the decision not to appoint the applicants was procedurally flawed. We see no reason to depart from this jurisprudence. No pecuniary loss by the Respondents has been shown.

25. We modify the UNDT Judgment and award each Respondent as sole compensation in the amount of two months' net base salary.

26. The UNDT Judgment grants additional three months' net base salary as moral damages to Mr. Romadanov because he presented a note from his psychotherapist. A note from a psychotherapist is not sufficient evidence, when no medical bills or other evidence have been produced. "Moral" damages may not be awarded without specific evidence supporting the award.¹⁰ We hold that in view of the lack of evidence, no compensation for moral injury should have been awarded in the instant case to Mr. Romadanov and we vacate this part of the Judgment.

Judgment

27. The Appeals Tribunal grants the Secretary-General's appeal in its entirety. It reduces the award of non-pecuniary damages to two months' net base salary for each of the Respondents and sets aside the award to Mr. Romadanov of three months' net base salary for moral injury.

⁸ *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076.

⁹ *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

¹⁰ *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Weinberg de Roca, Presiding

(Signed)

Judge Simón

(Signed)

Judge Courtial

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar