

# **UNDT/2011/012, Tolstopiatov**

## **UNAT Held or UNDT Pronouncements**

Likelihood of being offered a new contract: The Applicant did not just lose a chance of being considered for a new position; rather, it was only reasonable to assume that the Applicant would have been offered a new contract, had UNICEF properly complied with its own rules. Length of a new contract: Had UNICEF fulfilled its obligations, the Applicant would have been offered a new contract as a two-year fixed-term appointment. Possible renewal: It could not be assumed that, had the Applicant been offered a new contract, then this contract would automatically have been renewed indefinitely—the compensable period of time for lost compensation was limited to a two-year term. Income loss: The Applicant was entitled to the net base salary, post adjustment as well as mobility and hardship allowances he would have received under a new contract. Health and dental insurance subsidies: Since employment with the United Nations, such as would be assumed under a new contract, could require that staff members carry medical insurance, either through the Organization or through a carrier identified by the staff member, all sums required for such subsidies were included in the category of income loss.

Repatriation grant, travel, shipment, accrued annual leave and termination indemnity: The Applicant was entitled to compensation in accordance with his rights under a new contract. Loss of earning capacity: The Applicant failed to substantiate the allegations on which he supports his claim. Loss of pension: If the Applicant had lost his pension rights through non-payment of the required pension contributions, this loss was solely attributable to the Applicant's own failure to pay the required amounts and not the result of any error on UNICEF's part as identified in Judgment UNDT/2010/147. Non-pecuniary damages: The Applicant did not prove his claim in this regard. Offset: It was necessary to deduct, as an offset from compensation owing to the Applicant, any amounts received by him following his actual separation from UNICEF. Mitigation of damages: A basic principle of law is that a party is obliged to mitigate his or her losses. This means that the aggrieved party must act reasonably following a breach and may recover only for those damages that arose naturally from the breach or could have been contemplated by the parties. In the

employment context of the United Nations, then, it is only reasonable and necessary that, if a staff member challenges not being selected for a position and seeks compensation for her/his loss of income, the natural demand is for the staff member to demonstrate that s/he had sought other employment to limit her/his income loss. In making its assessment on compensation and whether to apply the doctrine of mitigation, the Tribunal will consider the particularities of the specific case in question. Such circumstances could influence the determination of what steps the staff member could reasonably be expected to take in terms of searching for alternative employment and thereby alleviating her/his responsibility in this regard. For the Applicant, mitigation considerations would include, *inter alia*, the professional qualifications of the Applicant, his attempts to find other employment following abolishment of his post, reasons for not seeking work, his age, and other efforts identified by him as amounting to mitigation. Outcome: The Respondent shall pay the Applicant USD97,324.04 as compensation.

## Decision Contested or Judgment/Order Appealed

This is the judgment on compensation following Tolstopiatov UNDT/2010/147 in which it was found that: (a) UNICEF did not follow its own mandatory procedures for granting preferential treatment when the Applicant applied for some positions with UNICEF; and (b) UNICEF did not comply with its obligation to offer meaningful recruitment assistance to the Applicant.

## Legal Principle(s)

The purpose of compensation: Since the very 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, the Tribunal first determines the likelihood that the Applicant would have been offered a hypothetical new contract and thereafter the characteristics of it.

## Outcome

Judgment entered for Applicant in full or in part

## Outcome Extra Text

The Respondent shall pay the Applicant USD97,324.04 as compensation.

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Tolstopiatov

## Entity

UNICEF

## Case Number(s)

UNDT/NY/2009/008/JAB

## Tribunal

UNDT

## Registry

New York

## Date of Judgement

13 Jan 2011

## Duty Judge

Judge Kaman

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Appointment (type)  
Benefits and entitlements  
Health (medical) and/or dental insurance  
Pension (see also, UNJSPF)  
Repatriation grant  
Compensation  
Non-pecuniary (moral) damages  
Pecuniary (material) damages  
Non-renewal

## Applicable Law

Administrative Instructions

Former Staff Rules

- Rule 106.6

Staff Rules

- Rule 6.6

UNDT Statute

- Article 10.5

## Related Judgments and Orders

UNDT/2010/147

UNDT/2010/011

UNDT/2010/040

UNDT/2010/117

UNDT/2010/026

UNDT/2010/061

UNDT/2010/080

2010-UNAT-095

2010-UNAT-092