

UNDT/2016/183, Tiefenbacher

UNAT Held or UNDT Pronouncements

The UNDT found that the Applicant was not afforded proper priority consideration for the DM post under the framework established by staff rules 9.6(e) and 13.1(d). Tribunal finds that, had the Applicant been afforded proper consideration for the DM post as a displaced permanent staff member, he would have had fifty per cent chance of being selected. The UNDT found that there was insufficient evidence to establish that the selection process was tainted by bias against the Applicant. Having considered relevant factors—namely, that (i) the Applicant lost a fifty per cent chance of being selected for the DM post; (ii) if selected, it would be reasonable to expect him to occupy the DM post for two years after November 2015, given the various contingencies of life; (iii) he suffered no pecuniary loss for nine months between November 2015 until August 2016; and (iv) the Applicant’s reasonable prospects of finding alternative employment in the future—the UNDT assessed his actual pecuniary loss at seven months’ net base salary.

Decision Contested or Judgment/Order Appealed

The Applicant, a former D-1 level permanent staff member of the United Nations Development Programme (“UNDP”), filed an application contesting the decision not to “award [him]” a D-1 level position (“the DM post”).

Legal Principle(s)

Consideration of suitability of permanent staff on abolished posts: A proper matching exercise under staff rule 13.1(d) is clearly distinct from a full-scale competitive selection process open to external candidates. What staff rule 13.1(d) envisages is a matching exercise that would take into account various relevant factors (contract status, suitability, length of service, etc.), regardless of the name given to it. This is not the same process as a competency- based interview. There is not enough

evidence before the Tribunal to draw the conclusion that the short-listing of the Applicant for an interview as part of the standard recruitment process would necessarily mean that he would have been found suitable as part of a matching exercise under staff rule 13.1(d). The purpose of a structural change exercise is to find alternative employment for displaced staff. This goal is consistent with the requirements of staff rule 13.1(d). However, if a permanent staff member remains displaced after the completion of a structural change exercise, UNDP still maintains its obligation under the Staff Rules to make good faith efforts to retain this staff member. UNDP was fully aware that the Applicant was a displaced permanent staff member in need of a post; there was an available post; and therefore UNDP should have considered his suitability without opening the process to external candidates and conducting a full-scale selection exercise.

Termination indemnity: Ordinarily, in cases of appeals against termination of an appointment, if a finding of unlawfulness is made, the staff member's termination indemnity should be taken into account when assessing compensation. However, given that the Applicant did not dispute the abolition of his post and the resultant decision to terminate his appointment, the Tribunal will not take termination indemnity into account when determining compensation.

Mitigation: Both the Dispute Tribunal and the Appeals Tribunal have said that there is a duty to mitigate losses and the Tribunal should take into account the staff member's earnings, if any, during the relevant period of time for the purpose of calculating compensation. The Applicant's evidence is that, although he has taken steps to find a new job in order to mitigate his financial loss, he has been unsuccessful. However, given the Applicant's experience, skills, excellent performance record, relatively young age and his continued efforts to find alternative employment, it can be expected that he will be gainfully employed at some point in the future.

Pre-judgment interest: The Tribunal has considered the Applicant's request for pre-judgment interest on his pecuniary damages, with interest accruing from the date each salary payment would have been made, compounded semi-annually. As explained above, given that the Applicant suffered no pecuniary loss until August 2016, his pecuniary loss pertains to payments he would have received in the future. Accordingly, the Tribunal will not award pre-judgment interest.

Moral injury, moral damages, emotional distress: The Appeals Tribunal has consistently held that, as a general principle of compensation, moral damages may not be awarded without specific evidence supporting the claim for such relief (Kozlov and Romadanov 2012-UNAT-228; Hasan 2015-UNAT-541). No evidence has been adduced at the hearing to substantiate the Applicant's claim for compensation for moral injury, nor does the Tribunal consider that the breach of his

rights was of such a fundamental nature that it should give rise, in and of itself, to an award of compensation in addition to compensation for his pecuniary loss (see also art. 10.7 of the Tribunal's Statute, precluding awards of exemplary or punitive damages).

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Only financial compensation

Full judgment

[Full judgment](#)

Applicants/Appellants

Tiefenbacher

Entity

UNDP

Case Number(s)

UNDT/NY/2016/6

Tribunal

UNDT

Registry

New York

Date of Judgement

11 Oct 2016

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Abolition of post

Appointment (type)

Benefits and entitlements

Separation from service

Termination (of appointment)

Applicable Law

Staff Rules

- Rule 13.1
- Rule 9.6

UNDT Statute

- Article 10.5
- Article 10.7