

2021-UNAT-1165, Rhyan Ramsaroop, Miksch et al.

UNAT Held or UNDT Pronouncements

UNAT considered an appeal by Mr. Ramsaroop, an appeal by the Secretary-General and a cross-appeal by Miksch et al. While UNAT found that it was reasonable for the UNDT to hold that Miksch et al had a significant chance of selection for the posts, it held that the UNDT erred by assessing the lost opportunity for Mr. Miyashiro, Mr. Miksch, Mr. Ramsaroop and Mr. Mazioui as enduring until their retirement from the Organization, and compensating accordingly with a cap of two years' net base salary. UNAT noted that these applicants had a further opportunity for promotion in the second selection exercise that took place about a year after the contested selection exercise and it was reasonable to conclude that the lost opportunity ended with the completion of that selection exercise. Hence, the lost opportunity endured only for a year until the next opportunity for promotion arose which remedied the defect, and of which opportunity Mr. Miyashiro, Mr. Miksch, Mr. Ramsaroop and Mr. Mazioui availed themselves. While Mr. George and Mr. Kennedy did not avail themselves of the opportunity, they should be compensated for the period of the lost opportunity.

Decision Contested or Judgment/Order Appealed

Miksch et al., six staff members of DSS contested before the UNDT their non-selection for posts of Security Sergeant at the S-4 level. In Judgment No. UNDT/2020/192, the UNDT granted the applications in part, finding that Miksch et al. had not been fully and fairly considered. The UNDT held that the fact that the vacant posts had been filled coupled with the amount of time elapsed rendered the rescission of the decisions "impossible" and no award of compensation could be granted under Article 10(5)(a) of the UNDT Statute. The UNDT, however, awarded compensation for harm (for loss of opportunity) under Article 10(5)(b) on grounds that all six candidates had a significant chance of selection given that they had been rostered for positions similar to those under review and none of them had had negative performance reviews in the previous years. The UNDT found that each shortlisted candidate had a 9.8 per cent chance of selection. The UNDT found that Mr. George and Mr. Kennedy's compensation should be limited to an amount equivalent to 9.8 per cent of the difference between their salaries and the salary they would have obtained at the S-4 level for one year in light of their failure to mitigate their losses by failing to participate in the second selection exercise for a similar S-4 post in May 2019. As to the remaining four applicants, the UNDT found that given that they all held permanent appointments, the compensation of their loss of chance should be calculated for the period between the date of the unlawful decision and the prospective date of their retirement from the Organization, with a cap of two years' net base salary. The UNDT rejected the applicants' requests for moral damages in the absence of supporting evidence.

Legal Principle(s)

Where a lower tribunal has given a decision on a matter within its discretion in the strict sense, the appellate tribunal should interfere only if it concludes that the tribunal a quo had not exercised a judicial discretion by exercising it capriciously or upon wrong principle, did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons. The exercise of power by the UNDT should not be set aside on appeal merely because the Appeals Tribunal would have preferred the UNDT to have followed a different course than the legitimate one it opted to follow. An appellate tribunal will show reluctance to interfere with an award of compensation by the tribunal that tried the case. Where the amount of compensation or damages is a matter of estimation and discretion, the appellate tribunal will be slow to intervene. However, that is not say the appellate court should abdicate its supervisory power. Where the lower tribunal has considered irrelevant facts, ignored relevant ones or where there is a substantial variation or a striking disparity between the award by the lower tribunal and the award the Appeals Tribunal considers ought to have been made, the Appeals Tribunal will make

an assessment and substitute the impugned award with its own.

Outcome

Appeal dismissed on merits; Appeal granted in part; Cross-appeal dismissed on merits

Outcome Extra Text

The appeal under Case No. 2021-1510 and the cross-appeal under Case No. 2021-1511 are dismissed. The appeal of the Secretary-General under Case No. 2021-1511 partially succeeds and the order of the UNDT is substituted and varied to read as follows: a. The application is granted in part; b. The Respondent shall pay Applicants Miksch, Miyashiro, Ramsaroop, Mazioui, George and Kennedy each an amount equivalent to 9.8% of the difference between their salaries and the salary they would have obtained at the S-4 level for one year; c. The Applicants' claim for moral damages is rejected.

Full judgment

[Full judgment](#)

Applicants/Appellants

Rhyan Ramsaroop

Miksch et al.

Entity

UN Secretariat

Case Number(s)

2021-1511

2021-1510

Tribunal

UNAT

Registry

New York

Date of Judgement

29 Oct 2021

President Judge

Judge Murphy

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Compensation

Loss of chance

Staff selection (non-selection/non-promotion)

Full and fair consideration

Applicable Law

UNDT Statute

- Article 10.5

Related Judgments and Orders

2019-UNAT-926

2020-UNAT-1014