



**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2011-233



**Mezoui  
(Appellant)**

**v.**

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

**JUDGMENT**

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| Before:       | Judge Inés Weinberg de Roca, Presiding<br>Judge Kamaljit Singh Garewal<br>Judge Jean Courtial |
| Judgment No.: | 2012-UNAT-220   |
| Date:         | 16 March 2012   |
| Registrar:    | Weicheng Lin  |

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Counsel for Appellant: François Lorient

Counsel for Respondent: Rupa Mitra

**JUDGE INÉS WEINBERG DE ROCA**, Presiding.

### Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Ms. Hanifa Mezoui on 24 July 2011 against Judgment No. UNDT/2011/098 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 10 June 2011 in the case of *Mezoui v. Secretary-General of the United Nations*. The Secretary-General filed his answer to the appeal on 12 September 2011.

2. The Appeals Tribunal is also seized of three motions: a “Motion to File Additional Evidence” filed by Ms. Mezoui on 29 July 2011; a “Motion to Strike and Adduce Evidence” filed by Ms. Mezoui on 28 September 2011; and a “Motion to Adduce New Documentary Evidence and Additional Pleadings” filed by Ms. Mezoui on 17 February 2012. The Secretary-General filed his answers on 25 August 2011, 17 October 2011, and 17 March 2012, respectively.

3. This Court considers that compensation must be set by the UNDT following a principled approach on a case-by-case basis. The UNDT should be guided by two elements. The first element is the nature of the irregularity, which led to the rescission of the contested administrative decision. The second element is the chance that the staff member would have had to be promoted, had the correct procedure been followed. The Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case.

4. In the instant case, the UNDT made a global assessment of the prejudice in the spirit of Article 10(5)(a) of the UNDT Statute. We find no error under Article 2(1) of the Statute of the Appeals Tribunal and thus reject the request to present additional documentary evidence.

5. The finding of abuse of process was based on the actions of Ms. Mezoui during trial and since Ms. Mezoui should not be made responsible for her counsel’s conduct, we decide to reverse the imposition of costs against her.

**Facts and Procedure**

6. Ms. Mezoui was a staff member at the D-1 level with the Economic and Social Council (ECOSOC), Department of Economic and Social Affairs (DESA), when she applied for a D-2 level post of Director of the Office for ECOSOC Support and Coordination.

7. Eight candidates were interviewed, including four internal candidates, of whom Ms. Mezoui was the only woman, and four external candidates, of whom two were women. The interview panel found that Ms. Mezoui only partially met the competency, experience, and educational requirements for the post. It found that two internal male candidates, Mr. X and Mr. Y, met all the requirements for competencies as well as experience, and one external female candidate met most of the criteria for competencies and partially met the experience requirements. The remaining candidates did not meet the criteria for competencies and/or the experience requirements, whether in whole or in part.

8. On 27 April 2006, the Under-Secretary-General of Economic and Social Affairs sent a memorandum to the Assistant Secretary-General of Human Resources Management. He explained that, from the interview process, it emerged that only Mr. X and Mr. Y met all of the vacancy requirements. He concluded that Mr. X was the most qualified and therefore recommended him for the post.

9. On 9 May 2006, the Senior Review Group (SRG) met to examine recommendations for several D-2 positions, including the post in question. The meeting was attended by four out of the five members of the SRG, namely the Under-Secretary-General for Management, the Under-Secretary-General for Communications and Public Information, the Assistant Secretary-General and Special Adviser on Gender Issues and Advancement of Women, the Assistant Secretary-General for Policy Coordination and Inter-Agency Affairs. The officer-in-charge of the Office of Human Resources Management was also present, serving as secretary.

10. On 11 May 2006, the Under-Secretary-General for Management and acting Chairperson of the SRG transmitted to the Secretary-General the conclusions of the SRG. With respect to the contested post, the SRG approved the recommendation of the Under-Secretary-General for Economic and Social Affairs in favour of Mr. X and recommended that the Secretary-General endorse it.

11. On 28 December 2006, Ms. Mezoui appealed the decision not to appoint her to the contested D-2 post to the Joint Appeals Board (JAB). Following requests from the JAB, the SRG released documents relating to the selection process to the JAB. Similarly, on 2 June 2008, the Assistant Secretary-General for Human Resources Management transmitted several documents related to the selection process to the JAB.

12. In its report issued on 10 November 2008, the JAB found that the evaluation of Ms. Mezoui's qualifications had omitted a key fact which led to the finding that she did not meet all the requirements of the post in respect of educational requirements, and that consequently, her application was not given full and fair consideration. The JAB recommended that the Secretary-General award Ms. Mezoui compensation in the amount of three months' net base salary. By letter dated 4 February 2009, the Deputy Secretary-General forwarded a copy of the JAB report to Ms. Mezoui and notified her of the Secretary-General's decision to accept the JAB's recommendation.

13. On 28 February 2009, Ms. Mezoui retired from service.

14. On 2 October 2009, Ms. Mezoui filed an application with the UNDT, challenging the decision not to select her for the D-2 post. By Judgment No. UNDT/2009/026, the UNDT rejected the application as time-barred. The Appeals Tribunal however overturned the UNDT Judgment and remanded the case to the UNDT, finding that the tardiness of the application was due to the transition from the old to the new system of administration of justice.

15. By Order No. 71 (GVA/2010) of 31 August 2010, the UNDT ordered Ms. Mezoui to file her completed application no later than 1 October 2010. At her request, it also transmitted to her a copy of the SRG memorandum dated 11 May 2006 that had been provided to the JAB.

16. On 1 September 2010, Ms. Mezoui addressed a motion to the President of the UNDT, seeking the recusal of the UNDT Judge hearing her case, as well as a change of venue from Geneva to New York.

17. By Order No. 72 (GVA/2010) of 17 September 2010, the UNDT President rejected the request for recusal and stated that it was for the Judge to whom the case was assigned to decide on the motion for change of venue.

18. By e-mail dated 19 September 2010, Ms. Mezoui filed a motion before the UNDT Geneva, requesting again a change of venue and an extension of the time limit until the case had been assigned to a New York Judge.

19. By Order No. 73 (GVA/2010) dated 21 September 2010, the UNDT rejected Ms. Mezoui's request for a change of venue and granted her an extension until 15 October 2010 to file her completed application.

20. On 15 October 2010, Ms. Mezoui filed her completed application with the UNDT in New York without informing UNDT Geneva. The cover memorandum stated that the application was filed in New York because of geographic proximity. On 17 October 2010, Ms. Mezoui filed a motion with the UNDT in Geneva to suspend the proceedings in her case without informing the UNDT in New York.

21. By Order No. 80 (GVA/2010) of 21 October 2010, the UNDT Geneva rejected the motion for a stay of proceedings and ordered the Secretary-General to file his reply by 22 November 2010. The Order noted that the attempts by Ms. Mezoui's counsel to mislead the Tribunal were unacceptable.

22. On 22 November 2010, the Secretary-General filed his reply.

23. By Order No. 86 (GVA/2010), the President of the UNDT rejected Ms. Mezoui's second request for recusal of the UNDT Judge assigned to her case and reminded counsel for Ms. Mezoui of his duty to respect the UNDT's Orders.

24. On 1 December 2010, the Secretary-General filed a motion requesting the UNDT to impose costs on Ms. Mezoui for abuse of process.

25. The UNDT issued Judgment No. UNDT/2011/098 on 10 June 2011. It noted that Ms. Mezoui was no longer requesting the rescission of the decision not to promote her to the post of Director (D-2) of the Office for ECOSOC Support and Coordination in DESA, but merely requested compensation for the damages suffered.

26. The UNDT found that there had been procedural irregularities in the selection process:

- In violation of ST/AI/2002/4, the evaluation criteria that had been prepared by the programme manager were not submitted to the SRG for pre-approval. It found that this irregularity involved a substantial formality that vitiated the entire selection process since it was the duty of the SRG to verify that the candidates had been evaluated on the basis of the pre-approved criteria.
- The interview panel committed a material error in evaluating Ms. Mezoui's university qualifications.
- The Under-Secretary-General for Economic and Social Affairs failed to comply with ST/AI/1999/9 which required him to state the reasons for selecting a man when there is also a woman candidate.
- The SRG failed to develop and publish its own procedures as required under Section 3.2 of ST/SGB/2005/4.
- Finally, the Assistant Secretary-General for Policy Coordination and Inter-Agency Affairs was a member of both the interview panel and the SRG which resulted in a conflict of interest between these two positions.

27. The UNDT declared the entire selection process unlawful. Having considered all of the evidence and the arguments made at the hearing, the UNDT however found that while the selection process was compromised from the outset, Ms. Mezoui's chances of being selected, had there been no irregularities, were only one in four. It noted that the damages suffered by Ms. Mezoui amounted to the difference between the net remuneration she received at the D-1 level and the remuneration she would have received at the D-2 level, from June 2006, when her promotion could have taken effect, until her retirement in February 2009. The UNDT calculated that that amount was USD 17,000 with interest in addition to a lump sum of USD 5,000 to cover the loss in pension benefits. In light of the chances for promotion that Ms. Mezoui had, the UNDT concluded that she was entitled to one quarter of the total or USD 5,500.

28. The UNDT further held that the moral damages suffered by Ms. Mezoui consisted of the distress caused to her by the irregularities which the UNDT found established, and set the compensation for moral damage at USD 2,000.

29. The UNDT found that, in light of the compensation that Ms. Mezoui had already received, USD 23,400, for the irregularities committed during the selection process, Ms. Mezoui “should consider that her rights had been more than satisfied”.

30. The UNDT granted the Secretary-General’s request for an order of costs for abuse of process and ordered Ms. Mezoui to pay costs to the Secretary-General in the amount of USD 2,000. Conversely, it rejected Ms. Mezoui’s request for an order of costs against the Secretary-General.

31. Finally, the UNDT rejected Ms. Mezoui’s request to refer the case to the Secretary-General for possible action to enforce accountability under Article 10(8) of its Statute. It found that this case was rather a case of “collective negligence in applying regulations than of personal misconduct”.

### **Submissions**

#### **Ms. Mezoui’s Appeal**

32. Ms. Mezoui requests that the Appeals Tribunal order the rescission of the decision to select another candidate for the D-2 post and in the alternative, compensation in the amount of two years’ net base salary. She further requests that the Appeals Tribunal increase to two years’ net base salary the compensation for non-pecuniary damages in favour of Ms. Mezoui.

33. Ms. Mezoui requests that the Appeals Tribunal order, under Article 9(5) of its Statute, an accountability review by the Secretary-General on the irregularities that were committed in this case.

34. Finally, Ms. Mezoui requests that the Appeals Tribunal award costs against the Secretary-General in the amount of USD 10,000 for abuse of process, and quash the decision to award costs against Ms. Mezoui.

#### **Secretary-General’s Answer**

35. The Secretary-General requests that the Appeals Tribunal dismiss Ms. Mezoui’s appeal in its entirety.

36. The Secretary-General submits that the UNDT correctly imposed USD 2,000 costs against Ms. Mezoui.

37. The Secretary-General submits that the UNDT correctly concluded that Ms. Mezoui should not be awarded any additional compensation beyond the amount already paid to her in 2009.

### Considerations

38. The function of the Appeals Tribunal is to determine whether the Dispute Tribunal erred in fact or in law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction as prescribed by the Statute. The burden of satisfying the Appeals Tribunal that the Judgment of the Dispute Tribunal is defective rests with the Appellant.

39. In this appeal, Ms. Mezoui asserts that the UNDT erred in finding that Ms. Mezoui should not be awarded any additional compensation beyond the amount already paid.

40. Article 10, paragraph 5, of the Statute of the Dispute Tribunal provides as follows:

As part of its judgment, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

41. The Appeals Tribunal has consistently held that compensation must be set by the UNDT following a principled approach on a case-by-case basis. The UNDT should be guided by two elements. The first element is the nature of the irregularity, which led to the



rescission of the contested administrative decision. The second element is the chance that the staff member would have had to be promoted had the correct procedure been followed.<sup>1</sup>

42. The question to be answered here is whether the Dispute Tribunal, in the exercise of its discretion in determining the amount of compensation to be awarded to Ms. Mezoui, and in the course of its consideration of her chances of success, was entitled to conclude that there were four candidates (including Ms. Mezoui) who had the chance of promotion. Because the question of rescission does not arise here, it is entirely appropriate that the Dispute Tribunal would approach the issue of compensation under Article 10(5)(b), on the facts of the present case, by engaging in a consideration of the Appellant's likely chances of success.

43. The UNDT stated:

69. To consider the Applicant's chances of ultimately being selected for the post, the Tribunal must therefore weigh the number of candidates interviewed, the advantage for the Applicant of being a woman – albeit not the only one – in view of ST/AI/1999/9 on special measures for the achievement of gender equality and the error committed with respect to her university degrees together with the panel's poor evaluation of her following interview and the fact three other candidates were given better evaluations.

70. Considering all of the evidence filed and the arguments made at the hearing, the Tribunal finds that the Applicant's chances of obtaining the post had there been no irregularities can be fairly stated as one in four.

44. The Appeals Tribunal previously held in *Hastings*:

While not subject to exact probabilities, such assessments are sometimes necessary in cases where a staff member is unlawfully denied a position—and in many cases alternative means of calculating damages may be available. The trial court is in a much better position than this Court in assessing the probabilities.<sup>2</sup>

45. On the facts of this particular case, we consider as entirely reasonable the approach adopted by the Dispute Tribunal.

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<sup>1</sup> *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044.

<sup>2</sup> *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109, para. 18.

46. The Appeals Tribunal now turns to consider whether the UNDT assessed the amount of the compensatory award in a fair and reasonable manner. In the course of the Judgment, the UNDT stated:

72. The Tribunal may therefore award compensation only if the Applicant substantiates the damages suffered.

73. The damages suffered by the Applicant amount solely to the difference between the net remuneration she actually received at the D-1 level and the remuneration she would have received at the D-2 level, from June 2006, when her promotion could have taken effect, until her retirement in February 2009. Considering the salary scales and other variables such as the post allowance applicable at the time, that amount is \$ 17,000 with interest. A lump sum of \$ 5,000 should be added to that amount to cover the loss in pension benefits. In light of the finding above concerning the Applicant's chances of being promoted to the contested post, she is entitled to compensation for material damages amounting to one quarter of the total, or \$ 5,500.

74. The Applicant's moral damage consists of the distress caused to her by the irregularities which the Tribunal has found to be established an not, as the Applicant maintained at the hearing, the frustration she felt at not being selected for the contested post when she considered herself the best candidate. When one hundred candidates apply for a post and eight are short-listed, it cannot be seriously argued by the Applicant that she was almost certain to be the successful candidate. For that reason, compensation for moral damage should be set at \$ 2,000.

47. Having regard to all the matters of which the UNDT was apprised, the Appeals Tribunal finds no error in the approach of the UNDT. The UNDT correctly concluded that Ms. Mezoui should not be awarded any additional compensation beyond the amount already paid to her in 2009.

48. Ms. Mezoui requests that the Appeals Tribunal award costs against the Secretary-General. There is no ground to award costs to a party whose claims are rejected.

49. Ms. Mezoui further challenges the UNDT's decision to award legal costs against her. While the Secretary-General accepted the JAB's recommendation and awarded compensation to Ms. Mezoui, she was nevertheless entitled to have a court review her case. The UNDT Judgment found that Ms. Mezoui had abused the process and imposed USD 2,000 costs on her. However, since the finding of abuse of process was based on the actions

of Ms. Mezoui's counsel during trial and since Ms. Mezoui should not be made responsible for her counsel's conduct, we decide to reverse the imposition of costs against her.

50. Ms. Mezoui has filed several motions seeking leave to file additional evidence and submissions to rebut the Secretary-General's submissions as well as the UNDT's findings. Ms. Mezoui requests that the Appeals Tribunal authorize her to obtain and adduce a computation sheet from the UNJSPF of her pension losses due to her non-promotion. Since the UNDT did not rely upon it in reaching its conclusions, it is irrelevant to the determination of her appeal. We consequently reject Ms. Mezoui's request.

51. Ms. Mezoui further seeks to adduce the recording of the UNDT hearing to demonstrate that the UNDT Judge raised the question of costs shortly before the communication system between New York and Geneva collapsed. The Secretary-General does not contest Ms. Mezoui's account of the events regarding the hearing. The recording does therefore not add anything to the parties' submissions and will not be admitted.

52. Ms. Mezoui also seeks to adduce as additional evidence on appeal the Code of Conduct for the Judges of the UNDT and the Appeals Tribunal. The Code of Conduct is a document of the court and does not constitute "evidence". This request is dismissed.

53. The Appeals Tribunal held that it does not have any sympathy for a litigant who pursues a litigious line for the sake of litigation.<sup>3</sup> The Appeals Tribunal finds it unnecessary to address Ms. Mezoui's remaining submissions which are clearly without merit.

### **Judgment**

54. For the foregoing reasons, the appeal is granted in part and the imposition of costs against Ms. Mezoui is reversed. All other grounds of appeal are dismissed.

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<sup>3</sup> *Ishak v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-152, para. 24.

Original and Authoritative Version: English

Dated this 16<sup>th</sup> day of March 2012 in New York, United States.

*(Signed)*

Judge Weinberg de Roca,  
Presiding

*(Signed)*

Judge Garewal

*(Signed)*

Judge Courtial

Entered in the Register on this 7<sup>th</sup> day of May 2012 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar