Judgment No. 2018-UNAT-832

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Counsel for Secretary-General: Rupa Mitra

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/068, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 25 August 2017, in the case of Nikolarakis v. Secretary-General of the United Nations. The Secretary-General filed the appeal on 24 October 2017, and Mr. George Nikolarakis filed his answer on 21 December 2017.

Facts and Procedure

2. The following facts are uncontested:[1]

> ... The Applicant [a Security Officer serving at the S-2 level, step 11, in the Department of Security and Safety (DSS) in New York][2] commenced employment with the Organization on 12 July 2004 and has had no breaks in service. His unrebutted testimony is that whilst serving at the S-2 level, he performed a number of S-3 level SSO (Senior Security Officer) duties working as a Desk Officer, UMOJA Time Administrator, "CC Officer SOC-CCTV Operator" (an unknown abbreviation), and Firearms Armorer.
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> ... On 1 October 2007, following a competitive recruitment exercise, by letter from the then Executive Officer of DSS, the Applicant was placed on a roster for S-3 level SSO positions for one year expiring on 1 October 2008.
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> The 2008 roster recruitment
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> ... In 2008, there was another recruitment exercise for the S-3 SSO position, which resulted in additional rostered candidates ("2008 roster"). The Applicant contends, and which has not been disputed, that the 2008 roster exercise did not include competency-based interviews or a central review body clearance.
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> The 2011 roster recruitment
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> [...] the intention is to fill these eight posts from the 2011 roster which is the valid current roster for S-3, as per [Office of Human Resources Management ("OHRM")]. All rostered candidates who are still interested in being considered for the higher level position are required to apply. Only the rostered candidates who have applied for the advertised position will be considered.
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> ... There are at least another nine (9) posts to be filled through the "normal process" (i.e

candidates who were no longer on a valid roster, the Organization violated his right to full and fair consideration.

... [On 24 August 2016, the Applicant (...) filed an application [with the Dispute Tribunal] contesting his "[e]xclusion from [a] recruitment procedure for S-3 Senior Security Officers on job opening ["JO"] #52215", published on 24 December 2015. (...)

... (...) The application was transmitted by the [Dispute] Tribunal on the same day to the Respondent, who was instructed to file the reply by 23 September 2016.][3]

(...)

... Subsequent to the Applicant's 24 August 2016 filing of the (...) application [[before the UNDT], one week prior to the expiry of the deadline for the filing of the reply, and whilst the application was [still] pending (...)][4], the [Under-Secretary-General, Department for Management (USG/DM)] by letter dated 16 September 2016, informed the Applicant that he had accepted the conclusion of the MEU. The MEU agreed that the roster membership of twelve of the twenty candidates was invalid, concluding as follows (emphasis added):

> The MEU noted that there were only twenty candidates in total released by OHRM from the roster for consideration (and, ultimately, selection) for twenty S-3 posts. The roster membership of eight of those candidates is not in doubt. Therefore, if in fact the remaining twelve candidates were not actually on the roster at that time, the Administration would indeed have had to conduct a selection exercise that would have included non-rostered candidates such as yourself. The MEU examined the legal framework to assess your contention that the roster membership for twelve of the twenty candidates was invalid. ...
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> [...] the MEU concluded that the roster membership of those candidates from the 2008 roster had lapsed, and thus [they] were not eligible for recruitment from roster. […] the consequence of filling the S-3 SSO posts with candidates from [the] 2008 lapsed roster resulted in denying you [the Applicant] the opportunity to go through a competitive selection exercise.

... The USG/DM further informed the Applicant that the Secretary-General accepted the recommendation of the MEU and agreed to compensate the Applicant USD 833.45. Having concluded that the OHRM incorrectly instructed the DSS to include the twelve additional candidates from the 2008 roster, the MEU turned to assess compensation as follows (emphasis added):

[3] Ibid ., paras. 1 and 7.
[4] Ibid ., para. 8.

In determining the amount of compensation, the MEU was guided by the nature of irregularities in the selection process and the likelihood that you would have been selected for the post had these irregularities not been committed. See Solanki 2010-UNAT-044; Mezoui 2012-UNAT-220; Appleton 2013-UNAT-347. The MEU further considered that the compensation should correspond to the material injury that you suffered as a result of the irregularity in the process. This injury corresponds to th e difference in salary between S-3 and S-2 level from the date on which other candidates were promoted to S-3 post and until you are promoted to S-3 post, but in any event the duration of damages awarded should be limited to two years (Hastings, 2011-UNAT-109). Such damages should also be adjusted in accordance with your chances of success in being selected (Emphasis added).

[...] OHRM released 105 applications of candidates to be considered for 20 available posts. Eight candidates were rostered in 2011 and the validity of their roster membership is not in doubt. Accordingly, the MEU concluded that had the 2008 roster membership not have been taken into account 12 posts would have been available for 97 candidates. Thus, your chances of being selected for the post were 12 out [of] 97, namely 12.3 percent.

While implementing the said formula, the MEU noted that the annual salary of S-2 Security Officer at step 11 (your step in grade) equals USD 63,745. Had you been promoted, in accordance with

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seniority and more relevant experience"[12] than any other internal candidate and that it was "more probable than not that he would have been selected as he is long serving, a strong candidate with a good record of service, and has been recommended for promotion by his reporting officers" and he had scored only slightly below the required score to be successful in a 2011 recruitment exercise.[13]

5. In light of the foregoing, the UNDT ordered rescission of the "decision to exclude [Mr. Nikolarakis] from the recruitment exercise" and in-lieu compensation in the sum of USD 20,000.[14] In addition, the UNDT ordered payment of USD 5,000 "for loss of opportunity for career advancement and for loss of job security",[15] considering, in particular, that Mr. Nikolarakis would have no possibility to compete for an S-3 level post for some time and that he had lost an opportunity to become eligible for a continuing appointment as such conversion requires staff members to have been vetted by a Central Review Board which is only done starting from the S-3 level. The amount of USD 833.45 already paid to Mr. Nikolarakis was to be deducted from the compensation awarded by the UNDT.

6. On 22 September 2017, the Secretary-General filed an application for revision of judgment requesting the UNDT to take note of a new DSS JO issued in April 2017 for thirteen S-3 vacancies for which Mr. Nikolarakis was invited to interview. The application for revision before the UNDT is still pending.

Submissions

The Secretary-General's Appeal

7. The Secretary-General argues that the UNDT erred in finding that the rule for a two-year maximum duration for calculation of compensation did not apply in the instant case. The UNDT incorrectly rejected the Secretary-General's use of a two-year period to calculate the difference between the S-2 and S-3 level annual salaries, which was based on the fact that DSS appointments generally last two years. According to the Appeals Tribunal's jurisprudence, the duration used in such calculations should generally be no more than two years except in "compelling cases", as reflected in Article 10(5)(b) of the UNDT Statute.

[12] Ibid., para. 66.
[13] Ibid., para. 67.
[14] Ibid., para. 75.
[15] Ibid.

8. In particular, the UNDT erred in finding that the calculation had been principally based on the assumption that another DSS selection exercise would take place soon, which turned out not to be the case. If that had been a principal factor, the duration may have been factored in at one year, rather than two since DSS was planning to hold another S-3 selection exercise about one year from the date of the contested decision. The UNDT further erred in finding that there were unusual circumstances taking the case out of the normal two-year limitation. Particularly, contrary to the UNDT's finding, the fact that the next S-3 selection exercise was delayed did not create such exceptional circumstances as it did not affect Mr. Nikolarakis' chances of being selected in the contested exercise. The UNDT ex

11. Further, the Secretary-General submits that the UNDT erred in awarding compensation for loss of opportunity for career advancement and for loss of job security. The UNDT made a duplicative award by ordering payment of USD 5,000 in addition to the in-lieu compensation of USD 20,000 which already took into account the impact on Mr. Nikolarakis' career opportunities and already served to put him in the position he would be in had the selection exercise been properly conducted. Moreover, the UNDT based its award on the groundless assumption that another S-3 selection exercise would not take place for several years. The additional ground that Mr. Nikolarakis could not be considered for conversion to a continuing appointment was too speculative as he would not be eligible for such a conversion until April 2021 and it was contingent on several factors including the operational needs of the Organization.

12. In light of the foregoing, the Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, save for the finding that the claim for moral damages was not sustainable.

Mr. Nikolarakis' Answer

13. Mr. Nikolarakis submits that the "percentage formula" as applied by the Secretary-General is not an appropriate method for calculating loss of opportunity compensation in this case. In contravention of the Appeals Tribunal's jurisprudence, this formula treats the calculation of loss of opportunity as purely mathematical. The only cases in which the Appeals Tribunal has applied this calculation method concerned situations where the pool of candidates was relatively small or had been reduced through excluding weaker candidates. In the present case, the UNDT was correct in rejecting the application of the percentage formula as it treats as undistinguishable the quality of a large group of candidates without any preselection and therefore leads to enhanced speculation and inexactitude. The Appeals Tribunal's holding in Hastings,[16] which considered the mathematical approach as being too speculative when it provides a percentage below ten per cent, is applicable in this case as the Secretary-General's calculation at 12.3 per cent is inflated by the fact that there were twelve available posts. In fact, Mr. Nikolarakis' chances of being selected were calculated at being one per cent against each post.

14. Mr. Nikolarakis further contends that the UNDT adopted an appropriate principled approach to establishing loss of opportunity damages which, in accordance with the Appeals Tribunal's jurisprudence, considered the nature of the irregularity and other elements

[16] Hastings v. Secretary-General of the United Nations, Judgment No. 2011-UNAT-109, paras. 2 and 18.

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24. In regard to that particular question, on 22 September 2017, the Secretary-General filed an application for revision of judgment, requesting the UNDT to take note of the new DSS JO that was issued in April 2017 for thirteen S-3 level vacancies, for which Mr. Nikolarakis was invited to interview.

25. The present appeal was filed on 24 October 2017, which was the deadline for filing the appeal, since the UNDT Judgment was issued on 25 August 2017. The filing of the appeal has prevented the UNDT from proceeding with the hearing of the application for revision. This is because, pursuant to Article 12(1) of the UNDT Statute, an application for revision must relate to an executable judgment, whereas, under Article 7(5) of the Appeals Tribunal Statute, the filing of the appeal has the effect of suspending the execution of the judgment. Consequently, the application for revision of judgment is still pending before the UNDT.

26. Article 12(1) of the UNDT Statute provides:

> Either party may apply to the Dispute Tribunal for a revision of an executable judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence. The application must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

27. Article 7(5) of the Appeals Tribunal Statute states: "The filing of appeals shall have the effect of suspending the execution of the judgement or order contested."

28. In our view, the application for revision that is currently pending before the Dispute Tribunal concerns a new consideration which could be relevant to the issue of the quantum of compensation. The outcome of the application for revision, whatever it may be, is likely to impact on the appeal before us. Therefore, we are of the view that to proceed with the appeal without giving the UNDT an opportunity to hear and pass judgment on the application for revision would neither be appropriate for the fair and expeditious disposal of the case nor to do justice to the parties.

29. In the circumstances, it is appropriate to remand the case.