



Case No. 2010-042

Wu

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:

Judge Kamaljit Singh Garewal, Presiding

Ju

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2010-UNAT-042

5. On 26 August 2008, Wu was informed that the decision not to select him for the posts was confirmed. Wu's subsequent appeal against the decision to the Joint Appeals Board (JAB) was transferred to the UNDT on 1 July 2009.

6. In its Judgment issued on 20 November 2009, the UNDT found, based on the Kasyanov<sup>1</sup> Judgment, that the decision to choose two 30-day candidates instead of Wu, a 15-day candidate, violated Section 7.1 of ST/AI/2006/3 and that, therefore, the decision not to appoint Wu was procedurally flawed. In Kasyanov, the UNDT ruled that the selection of a 30-day candidate when there is a suitable 15-day candidate was in breach of ST/AI/2006/3, since it interpreted section 7.1 of the Administrative Instruction as requiring 15-day candidates to be given priority consideration before any 30-day mark candidates could be considered. The UNDT noted that shortly after Wu had been notified that he had not been selected for the two subject posts, he was informed that he was successful in his application for another Chinese Reviser post at the P-4 level in Geneva. Wu assumed the functions of this

Submissions

Secretary-General's Appeal

9. The Secretary-General submits that the UNDT erred in law and fact in awarding compensation for moral damages in the present case. The Secretary-General does not contest the UNDT's main finding that Wu was wrongly denied an appointment and that the selection process was procedurally flawed.

Legal framework governing compensation

10. Under Article 10 of the UNDT statute, the UNDT may order compensation when it has made a determination on the merits of a case and found in favour of an applicant. Article 10(7) of the UNDT statute, however, expressly prohibits the award of exemplary and punitive damages. The prohibition on exemplary and punitive damages was not present in the statute of the former Administrative Tribunal. It was expressly introduced into the UNDT statute upon the recommendation of the Secretary-General. In making this recommendation, the Secretary-General noted that it would be inappropriate to use the public funds of the Organization to award compensation to individual staff members to punish the Organization.

Compensation for procedural errors

11. The Secretary-General submits that in recent years, the former Administrative Tribunal awarded compensation on the basis of procedural error alone, even where such error either did not result in a pecuniary loss or did not change the outcome of the proceedings. He contends that the continuing applicability of this jurisprudence needs to be revisited in view of the new express prohibition on exemplary and punitive damages in the UNDT statute. Awarding compensation in cases of procedural or administrative errors, where the staff member has shown no demonstrable financial loss, may be deemed to constitute an award of punitive or exemplary damages ordered solely to punish the Organization for failing to comply with its own rules and procedures.

Compensation for moral injury

12. The Secretary-General submits that the UNDT may award compensation for non-pecuniary loss, such as moral injury. In order for a claim for moral damages to be successful, the former Administrative Tribunal required the staff member to provide specific evidence demonstrating that moral injury had in fact occurred. The Secretary-General contends that the UNDT erred in asserting that monetary compensation was the only effective judicial remedy available for addressing a breach of rights. Even where moral injury was established, the former Administrative Tribunal did not always award monetary compensation where it determined that a favourable judgment itself constituted sufficient satisfaction. Particularly in view of the prohibition on awarding exemplary and punitive damages, a judgment pronouncing that the Organization acted wrongly vis-à-vis an applicant may, in appropriate cases, constitute a sufficient and effective judicial remedy for any moral injury suffered by an applicant.

Alleged errors of law and fact in awarding compensation in the present case

13. The Secretary-General contends that in the present case, the UNDT determined that moral damages were incurred by Wu based on two grounds: firstly, that the failure to follow procedures constituted a violation of due process rights; and secondly, that the allegedly late notification of Wu regarding the outcome of his application caused him emotional stress.

14. With respect to the first ground, the Secretary-General submits that in the present case, a judgment in favour of Wu provides a sufficient judicial remedy as it provides judicial confirmation that the Organization failed to comply with its own rules. Moreover, the award of compensation for moral damages based on procedural non-compliance alone is primarily punitive and, as such, constitutes an error of law.

15. Regarding the alleged delays in notifying Wu about the outcome of the selection process causing him emotional stress, the Secretary-General submits that the UNDT erred in law in characterizing the Administration's notification of the selection decision to Wu as "very late". The applicable rules do not prescribe a particular timeframe for providing such notification; and the UNDT does not have the authority to prescribe an appropriate timeframe, as the authority to promulgate rules regarding the administration



Tribunal and the UNDT. If the new internal justice system were to desist from this jurisprudence, it would run the risk of becoming ineffective.

21. In the present case, as the administrative decision was not and could not be quashed, its consequences have not been wiped out and the situation that would have existed if the decision had not been taken cannot be re-established merely by a judgment

Organization. He requests that the Appeals Tribunal uphold the UNDT Judgment and issue further orders as appropriate.

#### Considerations

26. Wu's application before the UNDT was decided in his favour. Wu had successfully demonstrated that the decision not to select him was wrong. He was a candidate for lateral entry to the P-4 post of Chinese Reviser. He had been holding a P-4 post since September 2006. Wu was entitled to be considered as a 15-day candidate (P-4 level lateral). He could not be considered along with certain 30-day candidates (P-3 level promotional). UNDT concluded that "the decision not to select the Applicant for one of the posts advertised under vacancy announcement ... was tainted by procedural flaws". The Secretary-General is the appellant before us. The Secretary-General does not challenge the above decision but seriously contests the award of two months' net base salary as compensation.

27.



of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b)

32. We do not find any reason to re-examine the judgments of the former Administrative Tribunal in Judgment No. 1047, Helke (2002) and Judgment No. 1122, Lopes Braga (2003). We note, however, that the Helke case concerned a violation of the rules of procedure and guidelines of the JAB and there was not an extensive discussion of the nature of the compensation awarded. In Lopes Braga, a promotion case, there was a finding that the violation of the applicant's due process rights caused him irreparable harm. We find the submission of the Secretary-General regarding these authorities quite extraordinary because in Ardisson<sup>3</sup> the Secretary-General's answer relies on Lopes Braga and indeed also on the UNDT Judgment in Wu impugned in this appeal in support of the submission that the amount of compensation had been correctly established. The Secretary-General's stand in the present appeal and in the answer filed in Ardisson are completely contradictory. Further, in the hearing before the UNDT the Secretary-General made a submission that a declaration recognizing the violation of Wu's rights would be appropriate compensation and that, should the UNDT consider that financial compensation was warranted, such compensation should be very modest. The Secretary-General now seeks to argue a different position on appeal, namely that the judgment in favour of Wu provides a sufficient judicial remedy and the award of compensation for moral damages is primarily punitive. It is not expected of the United Nations to raise such contradictory pleas. The United Nations should act as an ideal litigant and display a clear and consistent stand on all important issues. It is the ordinary litigants who take inconsistent and devious pleas because individual litigants have their self-interest in mind. They usually deviate from the truth and the correct interpretation of the law. The United Nations should be above reproach

neglect and emotional stress, for which he is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

34. The Secretary-General argues that the UNDT erred in awarding compensation on the ground that the delay in notifying Wu of the outcome of the selection process caused him stress. In his final observations to the JAB, Wu argued that he had suffered damage, including stress. The UNDT did not err in finding that Wu suffered stress based on this submission. In the absence of a specific timeframe in Administrative Instruction ST/AI/2006/3 for notifying unsuccessful applicants of a selection decision, the notification ought to be provided within a reasonable amount of time. Wu was advised in writing of the outcome of the selection process on 3 July 2008, after the successful candidates were appointed on 1 May 2008 and after he wrote to the Secretary-General on 17 June 2008 seeking administrative review of the decision not to appoint him. In arguing that Wu had constructive knowledge of the decision as from 5 May 2008, the Secretary-General seeks to take advantage of the Organization's failure to follow its own procedures. Accordingly, there was no error made by the UNDT in awarding compensation for the delay in notifying Wu of the selection decision.

Judgment

35. The appeal is dismissed and the UNDT Judgment is affirmed.

Dated this 1<sup>st</sup> day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Painter

(Signed)

Judge Simón

Entered in the Register on this 17<sup>th</sup> day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar  
United Nations Appeals Tribunal