



JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. Kirill Kasyanov (Kasyanov) is a Russian interpreter at the P-4 level in the Department of General Assembly and Conference Management (DGACM) in New York. He applied for a P-4 position of Russian interpreter in the Conference Services Division in the United Nations Office at Geneva (UNOG) and was wrongly denied a lateral transfer as a 15-day candidate. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found in his favour and awarded compensation under the provisions of Article 10(5)(b) of the Statute of the Dispute Tribunal (UNDT Statute). This Tribunal amends the compensation and awards the equivalent of two months' net base salary.

Facts and Procedure

2. Kasyanov is a Russian interpreter at the P-4 level in DGACM in New York. He applied for a P-4 position of Russian interpreter in the Conference Services Division in the UNOG. The position was advertised on 31 December 2007, with a deadline of 29 February 2008. In addition to Kasyanov, one other 15-day candidate applied for the position. The latter applied after the 15-day period, while Kasyanov applied within the 15-day period. Nonetheless, both candidates were determined to be suitable. But ultimately a 30-day candidate was selected on 27 February 2008 for the P-4 position in Geneva. Kasyanov was informed of his non-selection in a letter dated 3 March 2008.

3. In the *Kasyanov* Judgment on merits, the UNDT found that, since Kasyanov was a 15-day mark candidate and a suitable candidate for the position, the selection of a 30-day mark candidate meant that Kasyanov "was not considered in accordance with ST/AI/2006/3 as was his legal right".¹ It directed the parties to provide written submissions as to the appropriate relief to be ordered.

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Submissions

Secretary-General's Appeal

8. The Secretary-General submits that the UNDT erred in law and exceeded its competence in ruling that Kasyanov had a right to be appointed to the P-4 position in Geneva. As established by the former Administrative Tribunal, the United Nations Charter vests the authority to appoint staff solely in the Secretary-General, who therefore has a broad scope of discretionary authority to make appointment decisions. In reviewing challenges to such decisions, the former Administrative Tribunal could not substitute its judgment for that of the Secretary-General, though it could ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. It held that a staff member does not have a right to promotion, but only to full and fair consideration and the same reasoning must apply to appointments. Therefore, the Secretary-General argues that the UNDT erred in holding that Kasyanov had a right to be appointed to the P-4 post.

9. The Secretary-General alleges that the UNDT contradicted itself in stating, on the one hand, that Kasyanov was the sole 15-day candidate who applied by the 15-day mark and who was therefore eligible for consideration at the 15-day mark while, on the other hand, it considered that "if despite best endeavours, it has not been possible to evaluate the 15-day candidates by the 30 day mark, they should be placed in a separate pool and

Staff Regulations and Staff Rules (ST/AI/234/Rev/1), the authority to decide on an

which they serve. The UNDT erred in law in finding that Kasyanov had a right to an appointment. The UNDT also erred in fact in finding that the calculations of the post adjustment in 2008 demonstrated that the post adjustment did not provide a useful calculation “for assessing the actual difference in costs that would be paid by an individual staff member”. The UNDT further erred in finding that Kasyanov was entitled to the entire amount of post adjustment, regardless of the actual expenses incurred, because he could have chosen his living standard and could have profited from the difference between the post adjustment in Geneva and New York.

14. The Secretary-General also argues that the UNDT erred in awarding the difference in the post adjustment between Geneva and New York for the period from February 2008 to February 2010. The decision on the selection of candidates was made on 27 February 2008 and, had Kasyanov been selected, he would likely not have been transferred to Geneva until May 2008. Under Section 10.4 of ST/AI/2006/3, staff members transferring to another duty station may be released up to two months.

20. On 31 August 2007, Officer-in-Charge, OHRM issued a memorandum, in which she stated, inter alia, that “internal candidates at the P-4 level, who are language staff, will be considered eligible to apply for P-5 language posts even if they do not meet the lateral move requirement that would otherwise be applicable”. However, a rule exempting all P-4 level language staff from the lateral move requirements of Section 5.3 is a rule or policy of general application within the meaning of ST/SGB/1997/1, Section 1.2. As such, it could only be given legal effect if it was duly promulgated, either through a Secretary-General’s Bulletin or an Administrative Instruction. No amendments to ST/AI/2006/3 reflecting the policy change in the 31 August 2007 memorandum were ever duly promulgated. OHRM therefore acted outside its scope of authority in implementing the policy.

21. Moreover, OHRM had no authority under Staff Rule 112.2(b) to exempt all P-4 level language staff from the lateral move requirement under Section 5.3. Rule 112.2(b) provides that an exception may be made on a case-by-case basis, but OHRM attempted, by memorandum, to promulgate a rule of general application that was inconsistent with the existing legislation. Similarly, Annex IV of ST/AI/2006/3 does not give OHRM the authority to promulgate rules and policies of general application that are inconsistent with the “statute”. Viewed in the context of the entire statute, OHRM was given authority to give effect to the Regulations and Rules provided in ST/AI/2006/3. This authority is not so broad as to allow OHRM to unilaterally promulgate rules of general application that are inconsistent with the statute.

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25. The UNDT determined that Kasyanov had a right to be appointed to the P-4 level position in Geneva because he was the only P-4 15-day-mark candidate requesting a lateral transfer. During the oral hearing held on 19 October 2010 the Secretary-General submitted that he did not contest the judgment on the merits. This does not then require adjudication.

26. The issue on appeal is the relief granted in the Judgment on compensation of 9 February 2010. The UNDT ordered the Administration to pay:

- (a) USD 25,000 for breach of Kasyanov's right to appointment, as well as the emotional stress of having to undertake court proceedings;
- (b) "Actual damages" in the amount of USD 22,932, based on the difference in post adjustment for Geneva and New York for the period from February 2008 to February 2010;
- (c) USD 12,000 as compensation for injury to career prospects; and
- (d) USD 20,000 as an alternative to partial specific performance of recording a lateral move in Kasyanov's personnel records.

27. The purpose of the award of USD 22,932, based on the difference in post adjustment for Geneva and New York, was to award the same living conditions in the different duty stations of the United Nations. Post adjustment is not intended as a profit for a staff member but as a means of maintaining the same level of income in spite of the different costs of living at different duty stations of the Organization. It does not accrue unless the staff member effectively lives at the duty station. Since Kasyanov did not move to Geneva he is not entitled to the subsistence allowance of Geneva but to that of New York, his duty station at the material time where he effectively lived. The award of this amount is therefore reversed.

28. The injury to Kasyanov's career prospects is remedied if the lateral transfer is recorded in his personnel records. But the Administration has waived its right to require language staff such as Kasyanov to undergo two lateral transfers before they may be promoted. Consequently, the partial specific performance demanded in the UNDT Judgment has taken place and the injury to his career prospects has therefore been repaired. Accordingly the damages of USD 32,000 (aggregate of paragraph 26(c) and (d) above) for injury to Kasyanov's career are also reversed.

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Judgment

33. For the foregoing reasons, the Appeals Tribunal grants the appeal in part, the UNDT Judgment is modified, and the compensation awarded by the UNDT is reduced to the equivalent of two months' net base salary as compensation for the violation of Kasyanov's rights during the selection process.

Dated this 28th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Painter

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar