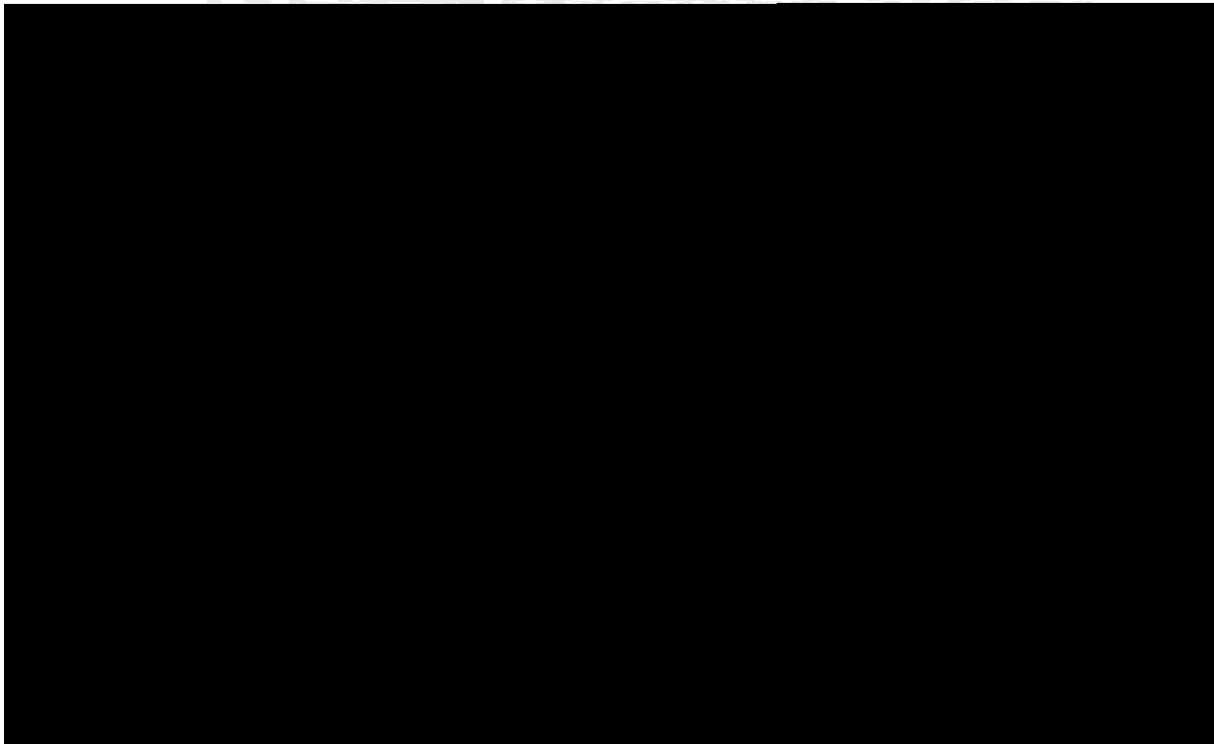




UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D 'APPEL DES NATIONS UNIES

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Judgment No. 2017-UNAT-712



Counsel for Mr. Krioutchkov: Self-represented

Counsel for Secretary-General: Nathalie Defrasne

JUDGE D



3. The UNDT found several procedural irregularities which led to the impugned selection decision. Based on these irregularities, the UNDT ordered that the impugned selection decision be rescinded, or alternatively, that Mr. Krioutchkov be paid USD 2,000 as compensation in lieu of rescission. The UNDT set the amount by taking into account Mr. Krioutchkov's "chances of being selected, knowing that only two candidates were shortlisted and interviewed, but also that he was not recommended by the panel"? The UNDT also took into account "the difference between the salary [Mr. Krioutchkov] [wa]s paid at his current grade and step and his potential income after promotion as of December 2011, when the selected candidate took up his new functions"<sup>3</sup> and the fact that, unsuccessful in his applications for promotion, he remained at the P-3 level at the time the Judgment was issued. Additionally, referring to *Hastings*,<sup>4</sup> the UNDT limited the projection of the difference in salary to two years.

4. The UNDT awarded moral damages in the amount of USD 3,000. The UNDT found that the award was warranted "in light of the uncertainty and sense of neglect occasioned to the [Appellant] by the inordinate delay in communicating his non-selection and the unresponsive and dismissive-not to say mocking- attitude of the concerned UNON officials".<sup>5</sup> The UNDT held that "although art. 10.5(b) of its Statute was recently amended with the aim of hardening the standard of proof of the non-pecuniary harm suffered, the new rule [did] not apply to the present case, by virtue of the principle of non-retroactivity of norms" because the amendment had not been "in effect at the time the application at bar was filed in 2014".<sup>6</sup>

#### Submissions

##### Mr. Krioutchkov's Appeal

5. Mr. Krioutchkov appeals the amount of compensation awarded by the UNDT in lieu of rescission of the impugned decision. He contends that had the UNDT properly relied on the Appeals Tribunal's findings in *Hastings*, the compensation awarded would have been based on "earnings", including "gross salary, [p]ost [a]djustment, [m]obility and [n]on-removal elements of mobility and hardship allowance as well as [d]ependency [a]llowance", rather than "salary";

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<sup>2</sup> *Ibid.*, para. 82.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, referring to *Hastings v. Secretary-General of the United Nations*

and would have also included the difference in the Organization's pension contribution. Thus, the correct amount should have included "the difference in earnings for two years ... and pension contribution[s] by the [O]rganization ... adjusted by the number of candidates (2)". The alternative compensation awarded would have

provides for the applicability of the amendment to Article 10(5) of the UNDT Statute to cases where the staff members' UNDT applications were filed prior to the entry into force of such an amendment.<sup>7</sup>

11. The Secretary-General requests that the Appeals Tribunal grant his cross-appeal and vacate the UNDT's award of compensation for moral damages.

#### Considerations

##### *Preliminary issue: Oral hearing*

12. As a preliminary matter, Mr. Krioutchkov requests an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute (Statute) and Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. In addition, we do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. Thus, the request for an oral hearing is denied.

##### *Amount of compensation in lieu of rescission*

13. Mr. Krioutchkov submits that the UNDT erred on a question of law and fact, resulting in a manifestly unreasonable decision, as its award of compensation in lieu of rescission of the impugned decision was inadequate. He specifically argues that according to the Appeals Tribunal's findings in *Hastings*, the compensation awarded should have been based on "earnings", including "gross salary, [p]ost adjustment, [m]obility and [n]on-removal elements of mobility and hardship allowance as well as [d]ependency allowance", rather than "salary"; and should have also included the dif thc tcecle sdif thl gnz.6() 5. )t.5(c)-5

... As part of its judgement, the Dispute Tribunal may only 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 for harm, supported by evidence, which shall normally not

or whether a case was particularly egregious or otherwise presented particular facts justifying compensation beyond the two-year limit.<sup>12</sup>

17. In the instant case, the UNDT found that Mr. Krioutchkov's non-selection for the post of Chief, RTU (P-4), UNON, under JO 11-LAN-UNON-18526-R-NAIROBI, was unlawful. The UNDT therefore rescinded the selection of the successful candidate and awarded compensation in lieu of such rescission pursuant to Article 10(5) (a) of its Statute. In assessing the amount of compensation, the UNDT, as evidenced from paragraph 82 of the impugned Judgment, considered, *inter alia*, Mr. Krioutchkov's chances of being selected, "knowing that only two candidates were shortlisted and interviewed, but also that he was not recommended by the panel", as well as the "difference between the salary he [wa]s paid at his current grade and step and his potential income after promotion as of December 2011, when the selected candidate took up his new functions".

18. We find no fault with the UNDT's award of compensation of USD 2,000. The UNDT considered the chances of success as well as the difference of net base salary between the one



20. We vacate the award of moral damages, concluding that the Dispute Tribunal erred in law by not applying the UNDT Statute as it existed at the time it rendered its Judgment. As an award of damages takes place at the time the award is made, applying the amended statutory provision is not the retroactive application of law. Rather, it is applying the existing law.<sup>15</sup> Since Mr. Krioutchkov did not present evidence to sustain an award of moral damages, as required by the amended UNDT Statute, the UNDT made an error of law.

Judgment

21. Mr. Krioutchkov's appeal is dismissed. The Secretary-General's cross-appeal of the award of moral damages is granted. Judgment No. UNDT/2016/052 is affirmed, except for the award of moral damages, which is vacated.

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<sup>15</sup> *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 32, citing *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684, para. 63 (full bench). See also *Tsoneva v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-713, para. 11.

