Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

NIKOLARAKIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 24 August 2016, the Applicant, a Security Officer serving at the S-2 636.8

refutes the Respondent's method of calculation and rejects the amount of USD833.45 as insufficient compensation for harm suffered.

5. The Respondent confirmed that the Organization had deposited USD833.45 into the Applicant's bank account via payroll process in November 2016 without prior or specific notification to the Applicant.

the Tribunal whether they had resolved the dispute, and if not, the Applicant was ordered to file a response to the Respondent's reply by 12 December 2016.

11. On 12 December 2016, the parties filed a joint submission informing the Tribunal that they had not resolved the matter.

12. Although cases are generally considered by the Tribunal in chronological

16. On 15 February 2017, the Applicant's Counsel filed a motion requesting the Tribunal to reschedule the CMD for a date after 22 February 2017 on account of illness, indicating that Respondent's counsel was consulted and did not object.

17. On 16 February 2017, by Order No. 30 (NY/2017), the Tribunal granted the Applicant's motion and rescheduled the CMD for 28 February 2017.

18. On 28 February 2017, the parties attended a CMD, whereat it was agreed that the only remaining issue in dispute involved relief, notably the quantum of damages. The Respondent informed the Tribunal that the Administration had, on 10 November 2016, via payroll, deposited USD833.45 directly into the Applicant's bank account, the Tribunal having received no prior notification of this payment during the pending proceedings.

19. Neither the Tribunal nor the

22. On 21 March 2017, by Order No. 48 (NY/2017), the Tribunal, in light of the parties' submissions, ordered the parties to inform the Tribunal of a mutually agreeable date for a hearing on the issue of damages, and where the Applicant was to provide *viva voce* or other evidence regarding his request for moral damages.

23. On 24 March 2017, the Respondent filed a submission in compliance with Order No. 48 (NY/2017), indicating that the parties had discussed their availability, with Applicant's counsel expressing preference for 30 March or 4 April 2017.

24. On 27 March 2017, by Order No. 57 (NY/2017), the Tribunal scheduled a hearing for 4 April 2017 and instructed the parties to confirm their availability by 29 March 2017.

25. On 28 March 2017, the Applicant filed a submission in compliance with Order No. 57 (NY/2017), informing that the Applicant would be physically present at the hearing in the New York courtroom and that his Counsel would participate remotely from Geneva.

26. On 29 March 2017, the Respondent's Counsel informed the Tribunal of his attendance at the hearing.

27. On 4 April 2017, the Tribunal conducted a hearing on the issue of moral damages, whereat the Applicant gave sworn testimony.

Factual background

28. The Applicant 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.

29. 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.

The 2008 roster recruitment

30. In 2008, there was another recruitment exercise for the S-3 SSO position,

> order to make the process more efficient considering the level of operational activities in the coming months.

33. The vacancy announcement for JO #42689 was published on Inspira on 18 June 2015 for one month.

34. According to the MEU response, after JO #42689 was advertised, a number of additional staff members, who were rostered in the previous online jobsite, Galaxy, prior to 2010, received notifications from the OHRM that their roster membership was still valid. The DSS requested the OHRM to clarify the issue of legacy rosters and indefinite roster membership. On 23 July 2015, the OHRM replied to the DSS advising that:

> […] the S-3 selection[s] were made on 3 September 2008. Based on the existing ST/AI on Staff Selection (ST/AI/2006/Rev.1-9.3)

38. On 27 April 2016, the Applicant filed a request for a management evaluation challenging the decision to exclude him from the recruitment exercise. The Applicant primarily argued that, by conducting a roster recruitment for twenty posts to include candidates who were no longer on a valid roster, the Organization violated his right to full and fair consideration.

Response of the MEU

39. Subsequent to the Applicant's 24 August 2016 filing of the instant application, the 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,

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 the difference in salary between S-3 and S-2 level from the date on which*

consideration for continuing appointment until at least April 2021. […] the conversion for continuing appointment is not automatic and is contingent on the continuing operational needs of the Organization. […] you would also have to satisfy a myriad of other criteria, such as receiving at least "meets expectations" in the four of the most recent performance appraisals before conversion; to have at least seven years of service remaining before retirement; not have been subject to any disciplinary measure in the five years prior to consideration; and continuity of service must not be broken until 2021. Given the myriad conditions that you will require to meet by the time the conversion exercise takes place, the MEU considered that your prospects for conversion at this stage are purely theoretical and are thus not quantifiable. Accordingly, ꟼ Ꞇ Ꟍ

a. In agreement with the MEU and the USG/DM, an appropriate compensation of USD833.45 was offered and unilaterally paid to the Applicant via payroll

Requested relief

45. The Applicant seeks compensation for his exclusion from, and for not being fully and fairly considered for

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Furthermore, the Applicant's predicament has been compounded and his opportunities or

speak, “shortlisted” candidates. He lost the opportunity to compete with 12 candidates for 12 positions, thus he lost 12 opportunities for full and fair consideration.

62. The Tribunal agrees with the submission that the loss to the Applicant cannot be valued by how many individuals applied, since if 500 candidates applied he would receive around USD100. In the circumstances, this is an unreliable, unrealistic and irrational methodology. Pursuant to *Solanki* 2010-UNAT-044 (para. 20), the Tribunal has to take “a principled approach on a case-by-case basis” taking into account

> … the nature of the irregularity which led to the rescission of the contested administrative decision [and] the chance that the staff member would have beld 21 90Cd5(ipl)-3.ld p[(P(c)4(mot0(c)4(iss)na)uld)wo6( )-2027.5P ff

the S-3 level.

long serving, a strong candidate with a good record of service, and has been recommended for promotion by his reporting officers.

68. In *Neidermayr*, the Appeals Tribunal found that USD10,000 constituted an adequate remedy for the loss of chance which arose by reason of the prejudice suffered by the applicant in that case. The Appeals Tribunal, recognizing that the assessment exercise was problematic as the pool of candidates for the two recruitment exercises therein would have been 3 or 31 respectively, assessed a figure of compensation in the round, without entertaining a percentage chance.

70. The Applicant cannot be considered for conversion to continuing appointment unless he is at S-3 level. The Applicant has been recommended for promotion by both his reporting officers whenever the earliest opportunity arises. The infraction of 12 unlawful recruitments has compounded the improbability of another recruitment for S-3 level SSO's in the near future as hereinbefore mentioned. Although he currently

and he fears that because he has challenged several decisions of the administration, his prospects may be affected. He stated that he has suffered harm to his reputation and general well-being. During cross-examination the Applicant produced a recent medical note dated 30 March 2017, which was read out in court, the Applicant's Counsel not having previously seen it, and being in remote attendance in Geneva. Applicant's Counsel confirmed that there was no application or request for the medical note to be admitted in evidence, it was not submitted as evidence, and was duly handed back to the Applicant.

74. The Respondent has admitted fault for the irregularities which denied the Applicant being considered for selection. The Applicant has demonstrated by the performance evaluations attached to his submissions that he is a good performer with a good record, often performing higher-level functions. He is a well-respected member of the DSS, and is well valued by his supervisors. In all these circumstances, the Tribunal finds that this judgment constitutes sufficient satisfaction and the Applicant's belated claim for moral damages is not sustainable. The Tribunal appreciates that it has been difficult for the Applicant to challenge this decision. He is, in essence, between the devil and the deep blue sea. Naturally , a staff member must wonder whether a compensatory award from the Tribunal would thereafter deter the Administration from considering him for and granting him a future promotion. The Applicant should not feel any anxiety because he has challenged the administration's decisions as such is the lawful right of every staff member of the organization. Since the record speaks for itself, the Tribunal has every confidence that the management will take all this into account at the earliest available opportunity on consideration for his promotion.