Introduction

1. This case concerns the Administration's decision not to select the applicant for a vacant P-4 interpreter post. My principal judgment UNDT/2009/022, issued on 23 September 2009, found that the applicant was not considered for the vacancy in accordance with administrative instruction ST/AI/2006/3 as was his legal right and directing the parties to provide written submissions as to the appropriate relief to be ordered.

2. The issue before me now is the nature and scope of compensation that may be ordered by the Dispute Tribunal in this case. I ordered the parties to make additional submissions on compensation and conducted hearings on 18 November 2009 and 12 January 2010.

Clarification

3. The respondent submitted on the question of compensation that the applicant was one of the two suitable 15-day candidates. If the Administration accorded priority in accordance with sec 7.1, either the applicant or the other 15-day candidate, both of whom were suitable, would have been selected. Therefore, the applicant's loss is a 50 per cent chance of being selected and any award of compensation should be reduced by 50 per cent.

4. I reiterated at the hearing that, as stated in the first *Kasyanov* judgment, the applicant 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. Although there was, indeed, another candidate eligible (in principle) for consideration as a 15-day candidate, he failed to submit his application by the 15-day mark and was therefore precluded from consideration at the 15-day mark. It is not enough to be eligible as a 15-day candidate under sec 5.4 of ST/AI/2006/3; one has to *apply* by the 15-day mark

so that there would be something to consider. This point is plainly expressed in sec 6.2 of ST/AI/2006/3—

> Applications of candidates eligible to be considered at the 15-day mark but received before the 30-day mark shall nevertheless be transmitted for consideration to the department/office, provided that the head of department/office has not submitted to the central review body a proposal for one or more candidates eligible to be considered at the 15-day mark.

5. I was of the view that my judgment was sufficiently clear in that the applicant was the only eligible 15-day candidate at the 15-day mark; however, it became apparent from the respondent's submission that there was some lack of clarity on this point. I now think I have sufficiently addressed this issue at the hearing and in the preceding paragraphs of this judgment; therefore, it does not require any further discussion.

Applicant's submissions

6. The Tribunal should award compensation for "expectancy damages", being the loss of value to the applicant and incidental and consequential damages. The applicant was not initially able to quantify such loss, but submitted that it should be based on the difference between his current emoluments and the emoluments of the wrongfully denied post. (I subsequently ordered both parties to make submissions on the actual damages sustained by the applicant in this case, and this issue is addressed below.)

7. The Tribunal should consider the value of the effect of a lateral move at P-4 level on the applicant's potential for future promotion to P-5 level. Although the language staff are exempt from the requirements of sec 5.3 of ST/AI/2006/3, which states that "[s]taff members in the Professional category shall have at least two prior moves ... before being eligible to be considered for promotion to the P-5 level", this exemption does not apply to language staff who wish to be considered for a promotion to a non-language post. This lateral move would have been valuable even

for a promotion to a P-5 language post, since it could have strengthened his candidacy, although it was not an essential prerequisite. Although difficult to quantify, the potential advantage of an additional lateral (and geographical) move for promotion is pecuniary in character, with knock-on effects for the applicant's future career prospects.

8. The jurisdiction given by the Statute to award compensation does not depend upon civil or common law notions, and these complexities should not be introduced into what is essentially a simple concept expressed in ordinary language. The limitations on compensation argued by the respondent are inconsistent with the current practice of both the Administration and the Dispute Tribunal.

9. Although the breach did not cause the applicant mental suffering or oppression, the Administration was in breach of a significant contractual obligation and his legal rights cannot be regarded as having no, or nominal, value. The process of having to challenge the decision was burdensome, stressful, and time consuming.

10. The appropriate award is fifteen months' net pay compensation for breach of due process, loss of professional reputation and career prospects, income loss and breach of the duty of good faith and fair dealing and unnecessary delay in the proceedings. A lateral move should be recorded in the applicant's personnel records as having taken place as an appropriate compensatory measure.

Respondent's submissions

11. Although the respondent argued that any award should be limited to actual financial loss, which had not been shown in this case, a subsequent submission withdrew this contention. Had the applicant been appointed to the post in Geneva, there would have been no loss, because the purchasing power of his salary and any post adjustment in Geneva would have been identical to the purchasing power of the sums he received in New York. This post adjustment sum cannot form the basis for an award of compensation since the applicant would receive a profit at the

Meaning of compensation

17. Article 10.5 of the Statute of the Dispute Tribunal provides that the Tribunal may order, as one of the remedies, "[c]ompensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant". Exemplary or punitive damages may not be awarded: art 10.7.

18. In many domestic legal systems, damages for breach of contract are generally awarded to put the successful plaintiff, so far as money can do it, in the same situation as if the contract had been performed but only in respect of economic loss directly attributable to the breach. The reason for the limit expressed in the final qualification may be regarded as an accident of legal history, since it is obvious that some consequences of a breach of contract can be non-economic, and no doubt this limit reflects policy considerations either expressly or implicitly applied by the courts or legal authorities in the course of developing the various rules of liability. The notion of "compensation" does not imply any such qualification, which is artificial in the sense that it is not an inherent or necessary implication of the notion.

19. The prohibition against "exemplary or punitive damages" demonstrates that the General Assembly was alive to the categories of damages. The use of the term "compensation" as a word in ordinary parlance as distinct from "damages", a legal, technical term, was clearly deliberate and intended to avoid the implications and technicalities of the latter notion. Moreover, the statutes of the International Labour Organization Administrative Tribunal (art VIII) and the United Nations Administrative Tribunal (art 10) refer to "compensation", and the judgments issued by both tribunals demonstrate that the term "compensation" includes recompense for economic loss but is not confined to it. Both have ordered compensation for procedural violations and stress and moral injury. The cases are too numerous to cite. This provides additional support for the conclusion that the power to award "compensation" in art 10.5 of the Statute was intentionally differentiated from the power of domestic tribunals to award damages for breach of contract.

20. (I note that the Statute of the World Bank Administrative Tribunal (WBAT) (art XII) limits the compensation to be awarded by WBAT to amounts "reasonably necessary to compensate the applicant for the actual damages suffered". However, WBAT in a number of cases interpreted damages under its statute to include the Administration's failure to comply with its own procedures. See, eg, *Harou* (2002) Judgment 273, where the Tribunal concluded that "there were flaws in the procedures followed in relation to the redundancy decision and in the reasons advanced for the redundancy" which "were incompatible with the right to fair treatment", and ordered the respondent to pay the applicant compensation, and *Liu* (2008) Judgment 387, where it found that "the Applicant is entitled to some reparation for the failure to receive an evaluation of his performance at the end of the probationary period and the abrupt manner in which his appointment was terminated".)

21. In my view, the word "compensation" should be given the meaning it has in ordinary parlance without introducing notions of damages developed in various domestic jurisdictions. It comprehends the duty to recompense a staff member as nearly as money can do so for the breach of the contract and the direct and foreseeable consequences of that breach, whether economic or not. Further refinement is neither necessary nor useful.

22. The practical difficulty of measuring the amount of compensation to be awarded does not make such compensation punitive. The Statute does not provide that the staff member is to be partially compensated or that particular kinds of loss are not to be compensated. Nor is it assumed that contractual rights are other than valuable merely because they cannot be precisely measured. Giving the term "compensation" as ample a meaning as it reasonably bears is particularly important in the employment context, where restitution in the sense of placing the employee in the actual position in which he or she would have been if the breach had not occurred is often impossible in actuality. This is not to ignore the fact that the staff member's right has been acknowledged and, as it were, restored; nor is it in any way to punish the respondent for having breached it.

23. A similar line of reasoning has been adopted by the Tribunal (correctly, if I may respectfully say so) in a number of cases (see, eg, *Wu* UNDT/2009/084,

latter circumstances, it follows *a fortiori* that it should be awarded in the former. The amount payable under this head will, of course, depend on the circumstances but, in my view, should focus on the significance for the staff member in respect of his or her employment situation, including the impact on his or her career prospects and the ordering of his or her life to the extent to which these consequences are foreseeable, in short, the value of the right to him or her. Here, not only were the applicant's career prospects affected, but his life significantly changed because he was unable to go with his family to Geneva to take up the position to which he was entitled. These consequences were direct and foreseeable results of the breach of the applicant's contract. The first outcome is, of course, economic in character, though difficult to calculate; the latter is not economic but it was not trivial and the fact that it may be difficult to assess in monetary terms does not mean that it should not be given significance for the purpose of determining the compensation that should be awarded.

Breach of a right

27. The applicant's legal right to appointment was a valuable right and its violation warrants compensation. There was substantial impact on the applicant's life and work, which was entirely foreseeable and directly resulted from the breach. This is necessarily incommensurable and depends ultimately on one's judgment of what in all the circumstances appears just.

28. I award the sum of US

was delivered) and amounted to a total of US$15,706. These estimates were not contested by the applicant.

30. The respondent's submission is that, in substance, there was no loss because the applicant would have spent the difference in Geneva anyway, given that the adjustment is designed to reflect the differences in the cost of living between Geneva and New York.

31. The post adjustment index is calculated by the International Civil Service Commission (ICSC). A booklet prepared by the ICSC and entitled "The post adjustment system: what it is, how it works" (July 2005) states:

> Post adjustment is an amount paid in addition to net base salary, which is designated to ensure that no matter where United Nations common system staff work, their net remuneration has a purchasing power equivalent to that at the base of the system, New York. It is applicable to the United Nations Common System international staff in the Professional and higher categories.

The booklet further explains that much of the data used to compute post adjustment levels is collected through staff surveys. Post adjustment is computed on the basis of the following components: (i) differences in prices between the location where the staff member works and New York, (ii) local inflation, (iii) exchange rate of local currency relative to the United States dollar, and (iv) average expenditure pattern of staff members at a given location.

32. I do not accept the respondent's argument. It is obvious that the post adjustment is a statistical calculation covering a range of costs typically or likely to be paid in the different posts by reference to various items. However, this is not useful for assessing the actual difference in costs that would be paid by an individual staff member. The essential unreality of applying a statistically derived amount to an individual case is further demonstrated by the different amounts paid under this head to staff at different levels.

33. On the face of it, it is difficult to accept that the costs of living in New York and Geneva vary as much and as rapidly as the fluctuations in the tendered figures show (for instance, in April 2008 post adjustment in Geneva was USD2,259 more than that in New York, whereas in November 2008 it was USD250 less). If the respondent wished to make a persuasive argument that there is no “benefit” to the applicant from the post adjustment difference, far more information needed to be produced. In the end, however, the statistics are necessarily of little utility when dealing with individual cases. Moreover, the approach for which the respondent contends would give the Organization a windfall at the applicant’s expense: had it complied with its legal obligations, it would have been obliged to pay the applicant the amount of his entire emoluments. But because it breached its contract, it can pay him less on this argument. It is not an answer to point to its paying the post adjustment to the successful candidate since this should be seen as a payment made with the applicant’s money. Lastly, the fact that the Organization pays part of the emoluments due to an employee by reference to its calculations of different costs of living explains how it derives the ultimate figure and is interesting but irrelevant. The Organization contracted to pay all staff members who work in Geneva with a certain amount of money as financial compensation for their work, without regard to their actual expenditure. For professional staff, that amount is arrived at, in part, by the Organization’s decision to calculate the emoluments by reference to what is called “post adjustment”. Even if the applicant chose to live in a tent and survive on fishing, he would still have received the total emoluments, including the post adjustment. By not going to Geneva, he lost that part of the income that he did not receive because the stayed in New York. In short, he contracted to be paid, and was entitled to receive, the total sum.

34. The alternative way of putting the respondent’s argument, though not articulated by counsel for the respondent, is that since the cost of living in New York, as inferred from the lower post adjustment, is lower than that in Geneva, to award the applicant compensation for the difference in cost adjustment would be to give him a

"profit". Again, the assumption is that I should infer that the applicant would, or would probably, have incurred the costs on which the adjustment is based. The inference simply is not justified.

35. In my view the only practical way to approach this issue is to look at the cash difference, as is usual when assessing pecuniary losses. If a staff member had a right to a specific amount as compensation for his work and he was unlawfully deprived of that money, he is entitled to get it back. The respondent's views on, however informed, whether the applicant would or would not have chosen to maintain the same standard of living he had in New York (whatever that standard was) are immaterial.

36. I suggested in *Sefraoui* UNDT/2009/095 that, in general, the Tribunal should apply the test of the preponderance of evidence to the determination of facts. In relation to the question of damages, however, there is no inappropriate assumption (that the Administration's decisions are correct) underlying the usual rule that the plaintiff – here the applicant – must prove his or her damages and the respondent establish any mitigation he claims. In the present case the applicant did not put forward any useful explanation as to how future actual damage should be calculated and also did not object to the respondent's estimates or the basis thereof for the period of February 2007–September 2009. However, there is obviously no reason why the economic loss should be limited to the date of the first judgment, although it is not easy to calculate the extent of future economic loss, which must necessarily involve a significant degree of speculation. A mere guess is not a proper basis for fact finding. There should be a rational basis for determination even though the matter is inherently uncertain. There is no substantive evidence as to how long the applicant would have remained in Geneva, but it is reasonable to infer that the applicant would probably have remained in Geneva for at least two years. Beyond that is to enter into unacceptable speculation. Following the 12 January 2010 hearing, I ordered the respondent to provide an estimate of the post adjustment between New York and Geneva between the period of October 2009 and February

2010. The respondent submitted that the difference amounted to USD7,226 for that time period. Accordingly, I award for economic loss the difference in emoluments payable from February 2008 to February 2010, namely USD22,932.

Injury to career prospects

37. Paragraph 5.3 of ST/AI/2006/3 requires staff members in the professional category to have at least two prior lateral moves for a promotion to the P-5 level. The respondent submitted that this requirement did not apply to language staff by virtue of a memorandum signed by the Officer-in-Charge, Office of Human Resources Management (OHRM), dated 31 August 2007, purporting to grant an exemption from this provision. Thus, it was contended, this lateral move would have been of no value to the applicant in terms of his promotion prospects.

38. The 31 August 2007 memorandum, addressed to "Chiefs of Administration, Chiefs of Personnel at Offices Away from Headquarters and Executive Officers, UNHQ", stated:

> As you know, language staff are not included in the managed reassignment programme under ST/AI/2007/2 and will be covered by a special programme designed for them, and limited to them, taking into account the special characteristics of this group of staff.
>
> With respect to the application of the lateral move requirement as a condition for eligibility to apply for promotion to P-5, a review of the situation in Conference Services at several duty stations has revealed the existence of a particular problem for language staff, due to the combination of two factors: (i) candidates must have passed a competitive language examination, thereby eliminating most external candidates, and (ii) in the absence of a systematic mobility programme adjusted to the special needs of language services in the past few years, few if any internal candidates would be eligible to be promoted to the P-5 level. As a result, key positions could not be filled for several years.
>
> Consequently, special provisions for language staff will be introduced, following consultation with DGACM, and ST/AI/2006/3 will be amended accordingly.

> Pending the development of these special provisions, 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.

39. The undertaking in the penultimate paragraph has not been fulfilled; certainly ST/AI/2006/3 has not been amended. The respondent submitted that the applicant benefited from the application of this memorandum, having applied and been deemed eligible for a P-5 post advertised in October 2008 and that his future promotion prospects would be similarly unaffected.

40. Quite apart from the question whether the memorandum was within the authority of the Officer-in-Charge, OHRM, as distinct, for example, from the Assistant Secretary-General, administrative instructions cannot be amended by memoranda or by officials who lack proper delegated authority. Under sec 1.2 of ST/SGB/1997/1, "Rules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative instructions". Sec 4.2 provides that administrative instructions shall be promulgated and signed by the Under-Secretary-General for Administration and Management or by other officials to whom the Secretary-General has delegated specific authority. It was not submitted by the respondent in this case that such authority was delegated to the Assistant S

lateral move refused him would generally benefit his career prospects should be

Mitigation of damages

44. The respondent submitted that the applicant had failed to apply for other advertised P-4 posts in Geneva and, consequently, that he had failed to mitigate his damages, and, accordingly, any compensation awarded to him should be reduced. The respondent also submitted (and the applicant did not dispute) that on 8 April 2008, approximately one month after the selection process for the subject post was completed, another P-4 interpreter position in Geneva was advertised for which the applicant was rostered and therefore could have been considered. Prior to the selection process, however, the applicant decided that due to family reasons he was no longer willing to move to Geneva.

45. To succeed in his claim with respect to the mitigation of damages, the respondent would have to show that the applicant would probably have succeeded in being selected for these posts. The Administration, of course, is peculiarly in a position to establish this since the reasons for selecting the ultimately successful candidate forms part of its records. It is insufficient merely to raise the possibility of mitigation. Accordingly, I am not satisfied that the respondent's submission established that the applicant would probably have been successful and thus failed to mitigate his damage. The respondent's case on mitigation should therefore be rejected.

Conclusion

46. The respondent is ordered to pay USD59,932 by way of compensation to the applicant.

47. The decision in the memorandum of 31 August 2007, signed by the Officer-in-Charge of OHRM, has no legal effect.

48. I order by way of partial specific performance under art 10.5(a) of the Statute a lateral move to be recorded in the applicant's personnel records as having

taken place as a prerequisite for satisfying sec 5.3 of ST/AI/2006/3. Of course, this cannot provide him with the advantage that might be derived from actually working in Geneva but merely fulfils the formal requirement of the administrative instruction. Without deciding whether art 10.5(a) so requires