Introduction

1. The applicant's substantive case was decided in her favour in Judgment UNDT/2009/030. It was held that the administration did not properly consider the applicant's formal application for an exception to apply for a post two levels above her own. The administration acted as though such an exception was not possible and did not turn its mind as to whether the applicant had a case for exception.

2. The substantive hearing was limited to questions of liability. Following judgment the parties attempted unsuccessfully to reach agreement on remedies due to the applicant. The Tribunal is now asked to decide the question of remedies.

3. The applicant did not seek rescission of the decision nor specific performance. In her original application she sought an order that –

> … the Secretary-General appropriately compensate Appellant for the violations of her terms of appointment and to ensure application of Section 5.2 of ST/AI/2006/3 in a manner which would allow for reasonable exception.

4. In the applicant's additional submissions on remedies that claim has been particularised to read –

a. Moral damages resulting from a failure to consider the Applicant's request for an exception.

b. Loss of chance to be selected for the contested post due to the rejection of her application for exception.

Applicant's submissions

5. In support of the claim for moral damages, the applicant submits that the question of the decision-maker's motive behind the decision is relevant. Sto rea 2.1951 18.865 -1.73

was within five years of retirement and this was conceivably her only chance to be promoted to a D-2 position after a long career with the UN.

6. In relation to the damages for loss of chance, the applicant invited the Tribunal to consider the positive value of the loss of chance of a benefit. She submits that she had a substantial chance of success to be selected for the post if her request

Respondent's submissions

10. The respondent contends that the applicant has not suffered any detriment, subject to any non-pecuniary loss she may have suffered. The respondent submits that if the unlawful decision had not been made the applicant would be in the same position as she is now—i.e., a P-5 staff member whose request for an exception was denied due to the fact that staff rule 112.2(b) does not allow for exceptions in circumstances such as this.

11. The unlawfulness of the administrative decision was the failure of the Assistant Secretary-General of the Office of Human Resources Management (ASG/OHRM) to turn her mind to the possibility of an exception and not to the applicant's ultimate disappointment that an exception was not granted. Even if the ASG/OHRM had turned her mind to the possibility of an exception, the exception would not have been granted as the applicant would not have been deemed eligible for the position. The applicant therefore did not lose the chance to be selected as a result of the unlawful decision.

12. The respondent acknowledges that the applicant was qualified for the position and that, had she been eligible, she would have been short-listed for further assessment but says that the question in issue is not the applicant's qualification for the post, but whether she was eligible to be considered for selection.

13. The respondent submits that pursuant to staff rule 112.2(b) and section 5.2 of ST/AI/2006/3 the ASG/OHRM could not have concluded that the applicant should be granted an exception, since this would have prejudiced the interests of other staff members or groups of staff members. These comprised: 1) The three candidates recommended for the position who were D-1 staff members. They would have been prejudiced in the sense that they would have lost the right to have their applications considered only with internal candidates of the same rank. 2) Other P-5 staff members at the P-5 1evel who may have applied for the position but did not do so

due to the mandatory language of section 5.2 may also have been prejudiced. This would have led to the negative consequences that the section was intended to avoid, namely the negative impact on staff morale and productivity caused by the selection of lower-graded candidates over higher-graded candidates.

14. In general terms, it is the case for the respondent that the granting of exceptions under staff rule 112.2(b) is extremely limited as it is intended to ensure that if injustice or patent maladministration would result from the application of the Rules an exception may be granted. The respondent did not identi

compensation. The Tribunal may not award punitive or exemplary damages. The term moral damages does not appear in the Statute.

19. The scheme of article 10.5 is to provide at least two remedies: the first in 10.5(a) is a remedy either in kind by way of rescission or specific performance or monetary compensation in lieu; the second is in 10.5(b). Although not expressly stated in the Statute it may reasonably be inferred from its context that compensation under this part of article 10 is for the purpose of compensating an applicant for losses other than the more easily quantifiable material losses available under article 10.5(a),

evidence before the Tribunal of what if any specific damage was caused to or suffered by the applicant arising directly out of this failure other than a submission by counsel that she was distressed.

22. At the video hearing of the substantive case it was submitted on behalf of the applicant that she had brought the case not out of personal interest but in the interest of the Organization.

23. The extent of damages may be influenced by the motivation of the decision-maker. For example, if it is established that the decision-maker acted out of personal animosity towards the applicant this would undoubtedly cause her distress additional to that arising from the mere fact of the wrongful decision. However, in this case there was no such evidence. It appears that the decision not to consider the exception was made because of a mistaken belief at the time that such an exception could not be made. In the absence of evidence that the decision-maker in this case was motivated by ill will to the applicant this cannot be a factor in the calculation of compensation in this case.

24. I accept the applicant's submission and therefore conclude that she must have suffered some distress at the unlawful decision to reject without consideration and in a peremptory manner the case she had put for an exception. While the respondent initially told the applicant that such an exception could not be made and persisted in this stance it subsequently conceded at the hearing before the Tribunal that this was in fact possible. If that concession had been made earlier the applicant would possibly have been spared the time and efforthave been spared the time and effrhw[wom)8.4(A t.1(o16 Tc7lica)4n)

112.2(b). As the respondent submitted, th

a. The respondent is to pay the applicant USD5,000 for compensation for her distress.

b. The respondent is to pay to the applicant ten percent of the difference between the salary she actually carries and that she would have received in the D-2 position on a continuous basis. The payments are to commence on the date the successful candidate started in the D-2 position and continue until the date of the applicant's mandatory retirement. The respondent is also to pay the applicant 10 percent of any additional allowances and benefits she would have received at the D-2 level including adjustment of her pension contributions and consequent retirement benefits.

(*Signed*)

Judge Coral Shaw

Dated this 28th day of April 2010

Entered in the Register on this 28th day of April 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York