



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-209

Marsh
(Respondent/Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Kamaljit Singh Garewal
Judge Jean Courtial

Judgment No.: 2012-UNAT-205

Date: 16 March 2012

Registrar: Weicheng Lin

Counsel for Respondent/Appellant on Cross-Appeal: Self-represented

Counsel for Appellant/Respondent on Cross-Appeal: Stéphanie Cartier

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by the Secretary-General of the United Nations against Judgment No. UNDT/2011/035 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 23 February 2011 in the case of *Marsh v. Secretary-General of the United Nations*.

2. In this case, Mr. Carl Marsh challenged the administrative decision not to select him for a promotion to a P-4 position. The Dispute Tribunal determined that there was no flaw in the selection process with regard to the composition of the Interview Panel, but that it was unlawful to consider the candidacy of Mr. Marsh along with another application which was submitted after the 30-day mark. Therefore, 2,500 Euros was awarded for material damage and the same sum for moral damage. Both parties challenge the Judgment.

3. The Appeals Tribunal holds that the opinions that one or two members of the Interview Panel expressed regarding Mr. Marsh's prior application for a position that was previously advertised at a higher level did not constitute any bias or impediment for those persons to be part of the Interview Panel, under the circumstances of the present case. The opinions were expressed in a different context not about the personal quality of Mr. Marsh but as a general remark about his suitability for a P-5 position as a P-3 staff member.

4. During the selection process Mr. Marsh received the objective consideration and equal treatment that all candidates are entitled to.

5. Relying on its jurisprudence, this Tribunal stresses that not every violation of due process rights will necessarily lead to an award of compensation. However, in this case the lost chance of being selected, even if slight, and the loss of a better chance of being recommended or included in the roster had material and financial consequences, and also deprived Mr. Marsh of an opportunity to improve his status within the Organization. Therefore, the award of the moderate compensation of 2,500 Euros set by the UNDT for material damage did not constitute an error in fact or law. Neither was it erroneous for the UNDT to award a lump sum of 2,500 Euros for moral damage, since the particular circumstances of the case support the conclusion that the staff member in fact was morally prejudiced by the irregularity of the selection process and its outcome.

Facts and Procedure

6. Mr. Marsh joined the United Nations in September 1982 as a Security Officer at the S-1 level. He subsequently served at various duty stations and in field missions. At the material time, in March 2005, Mr. Marsh was a P-3 Programme Management Officer with the Division for Operations, United Nations Office on Drugs and Crime (UNODC) in Vienna.

7. On 17 March 2005, a vacancy announcement (VA) was circulated for the P-4 post of Chief, Staff Development Unit (SDU), Human Resources Management Service (HRMS), United Nations Office at Vienna (UNOV). Mr. Marsh had previously worked for HRMS at the P-3 level as a Training Officer. Mr. Marsh submitted his application on 16 April 2005, thus becoming eligible as a 30-day-mark candidate. The VA elicited 178 applications.

8. Eight candidates, including Mr. Marsh, were short-listed and summoned for a written test. On 30 June 2005, three of the short-listed candidates, including Mr. Marsh, were called in for an interview. The five-member Interview Panel included the Chief, HRMS, and the Director of the Division for Management (DM).

9. On 5 July 2005, on the basis of the recommendations of the Interview Panel, the Chief, HRMS, proposed through the Director, DM, to the Central Review Board a list of two candidates. Mr. Marsh's name was not on that list.

10. On 22 July 2005, following the endorsement by the Central Review Board, the Director, DM, selected on behalf of the Executive Director, UNODC, who is also the Director-General of UNOV, a candidate from the list. It should be noted that the chosen candidate had submitted her application for the VA only after the 30-day mark.

11. Mr. Marsh was verbally informed of his non-selection on 28 July 2005. On 1 September 2005, he made a request to the UNOV Executive Director for a suspension of the decision to appoint the chosen candidate to the P-4 post. On 20 September 2005, Mr. Marsh made a similar request to the Vienna Joint Appeals Board (Vienna JAB).

12. On 28 September 2005, the Director, DM, informed Mr. Marsh that he would be reassigned from HRMS to the Division for Operations with effect from close of business on Friday, 30 September 2005. But on 30 September 2005, Mr. Marsh was informed that the Division for Operations was not ready to receive him and that he was authorized to take

annual leave from 3 to 7 October 2005. Mr. Marsh took up his functions in the Division for Operations on 10 October 2005.

13. On 24 October 2005, Mr. Marsh wrote to the Secretary-General requesting administrative review of the decision not to appoint him to the P-4 post and the decision to place him on annual leave for five days. He followed up with an appeal to the Vienna JAB.

14. On 29 January 2008, the Vienna JAB submitted its report to the Secretary-General. The Vienna JAB concluded that the decision not to appoint Mr. Marsh was lawful. It reviewed Mr. Marsh's allegation of bias against the Director, DM and the Chief, HRMS, who had sat on the Interview Panel, but found that Mr. Marsh had failed to provide conclusive evidence to substantiate his allegations. However, the Vienna JAB concluded that the decision to place him on a five-day annual leave amounted to procedural abuse. It consequently recommended that Mr. Marsh be re-credited with five days of annual leave and moreover be paid a minimum of 5,000 Euros as compensation. The Secretary-General accepted the Vienna JAB's conclusions and recommendations. The five days of annual leave were converted into five days of special leave with full pay for Mr. Marsh, and he was paid 5,000 Euros.

15. Mr. Marsh accepted a post at the L-4 level as Project Coordinator in Doha in April 2008. He subsequently filed an application with the former Administrative Tribunal. That application was transferred to the UNDT on 1 January 2010.

16. In Judgment No. UNDT/2011/035, the UNDT found that Mr. Marsh had failed to establish that the composition of the Interview Panel was irregular. The UNDT also found that there was no indication of any particular animosity towards Mr. Marsh in the opinions expressed by one of the two senior officials sitting on the Interview Panel about Mr. Marsh's suitability for the post of Chief, SDU, when it was advertised (but later withdrawn) at the P-5 level in 2004. But the UNDT agreed with Mr. Marsh that the fact that the chosen candidate had applied after the 30-day mark and therefore should not have been considered along with other 30-day mark candidates including Mr. Marsh who had applied on time resulted in an irregular process. Nevertheless, the UNDT determined that, even assuming that the proper procedure had been followed, Mr. Marsh would only have had a "slight chance" of being selected for the P-4 post, but "his chances of being recommended and therefore placed on the roster would have been substantially increased". The UNDT ordered that Mr. Marsh be

paid a total of 5,000 Euros in compensation: 2,500 Euros for material damage and 2,500 Euros for moral damage. The UNDT dismissed Mr. Marsh's application in respect of the issue of the five-day annual leave, as it considered that the re-crediting of five days of annual leave and the award of 5,000 Euros constituted "ample compensation for the moral damage suffered".

17. On 5 April 2011, the Secretary-General appealed the UNDT Judgment. On 23 May 2011, Mr. Marsh filed an answer and a cross-appeal. The Secretary-General filed an answer to the cross-appeal on 11 July 2011.

Submissions

Secretary-General's Appeal

18. The UNDT erred in fact in concluding that Mr. Marsh had a serious chance of being rostered. This contradicts the UNDT's own finding that Mr. Marsh had a weak chance of being selected for the post if the procedural irregularity had not occurred. This is also factually inaccurate as the Interview Panel unanimously concluded that Mr. Marsh did not meet the requirements of the post. If he did not meet the post requirements, Mr. Marsh then had no chance of being either selected or rostered. Given the determination by the Interview Panel, even if the chosen candidate had not been considered, Mr. Marsh would not have ipso facto joined the pool of the recommended candidates. The UNDT's factual error formed the basis for its manifestly unreasonable decision to award compensation.

19. The UNDT erred in fact and law and exceeded its competence in awarding compensation for material damages when Mr. Marsh suffered no prejudice as a result of the procedural irregularity, and in awarding compensation for moral damages in the absence of actual prejudice and specific evidence supporting a claim of moral damages.

Mr. Marsh's Answer

20. Mr. Marsh submits that the UNDT did not err in concluding that he had a slight chance of being recommended and/or selected and a chance of being rostered. Whether or not he had such a chance is to be viewed afresh as the evaluations of the candidates are null and void following the UNDT's determination that the selection process was irregular and unlawful.

21. The UNDT's award of 2,500 Euros for material damages is similar to the approach adopted by the UNDT in *Lutta*, which was upheld by the Appeals Tribunal.¹

22. The UNDT did not error in awarding 2,500 Euros as compensation for moral damages. In his appeal to the Vienna JAB, Mr. Marsh stated that he had suffered emotional distress. The Secretary-General never made a serious attempt to refute those claims during the UNDT proceedings.

Mr. Marsh's Cross-Appeal

23. The UNDT erred in law and/or fact in finding that the Interview Panel was constituted in accordance with the provisions of the relevant administrative issuances. A selection process must be considered irregular if those charged with evaluating all candidates had earlier voiced an opinion about the suitability of one of the candidates. In the present case, the two most senior members of the Interview Panel had expressed doubts about Mr. Marsh's suitability for the post prior to the interview process. Their participation in the selection process compromised its integrity and impartiality.

Secretary-General's Answer to the Cross-Appeal

24. The UNDT properly determined that prior observations regarding Mr. Marsh's suitability for a separate and higher level post do not create a conflict of interest such as to render the interview process inherently unfair in the absence of any evidence of impropriety. Due deference must be accorded to the fact finding done by the UNDT.

25. It should be noted that the Vienna JAB also examined the evidence that Mr. Marsh had provided in support of his allegations of a conflict of interest on the part of the two most senior members of the Interview Panel, but concluded that Mr. Marsh had failed to substantiate his allegations.

Considerations

26. The issues submitted by the parties before this Tribunal must be examined in logical order. Therefore, the first matter to address refers to the legality or illegality of the composition of the Interview Panel as raised by Mr. Marsh in his cross-appeal.

¹ *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117.

27. This Tribunal holds that the opinions that one or two members of the Interview Panel could have expressed regarding Mr. Marsh's suitability for a different position of a higher level than the one he was applying for did not constitute any bias or impediment on the part of those persons to become part of the Interview Panel, under the circumstances of the present case. Those staff members were the natural candidates to be part of the Interview Panel because of their seniority in offices directly related to the position to be filled. Furthermore, they were not the only members on the Interview Panel. Their opinions were not found to be improperly motivated by the Vienna JAB or proven to be so from any evidence submitted by Mr. Marsh to the UNDT. Those opinions were expressed in a different context not about Mr. Marsh's personnel quality, but as a general remark about his suitability for a P-5 position as a P-3 staff member.

28. Hence, there are no grounds on which to conclude that the interview process was unfair or that the Interview Panel's non-recommendation of Mr. Marsh was due to the allegedly adverse views held by two members of the Interview Panel. Contrary to Mr. Marsh's assertions, the records show a proper and professional proceeding during the interviews and the report of its outcome was based on evaluations objectively motivated, and Mr. Marsh was accorded the objective consideration and equal treatment that all candidates are entitled to.

29. Therefore, the UNDT's conclusions dismissing the alleged illegality of the selection process must be sustained.

30. The second issue in this case concerns the Secretary-General's challenge against the UNDT Judgment regarding Mr. Marsh's chance of being selected, recommended for promotion or included in the roster, despite the admitted irregularity resulting from the inclusion of a non-30-day mark candidate. The Appeals Tribunal shares the UNDT's view on this subject matter.

31. It results from the detailed report of the Interview Panel that the Panel felt that Mr. Marsh, unlike the other two candidates interviewed, did not meet the requirements of the post. Seeing that one of those candidates had applied within the 30-day mark and was recommended for the post, the UNDT correctly concluded that Mr. Marsh's chance of being selected was "slight". But that does not mean that the chance did not exist at all, or that he did not have a better chance of being recommended or included in the roster, as determined

by the UNDT. Without a third candidate being considered, the Interview Panel's evaluation of the interviews and the overall selection process outcome could have been different: with a smaller pool of finalists perhaps Mr. Marsh could have obtained a better result. This is not an unreasonable conclusion, which constitutes a basis for the award of compensation for the consequences of the irregularity.

32. As stated in *Wu*,² while not every violation of due process rights will necessarily lead to an award of compensation, we do not find reasons to differ from the UNDT's determination on this matter. Certainly, the lost chance of being selected, even if slight, and the loss of a better chance of being recommended or included in the roster had in this case material and financial consequences, and also deprived Mr. Marsh of an opportunity to improve his status within the Organization. Therefore, the award by the UNDT of the moderate compensation of 2,500 Euros for material damage does not constitute an error in fact or law. Neither is it erroneous for the UNDT to award Mr. Marsh a lump sum of 2,500 Euros for moral damages, since the particular circumstances of the case support the conclusion that the staff member was in fact morally prejudiced by the irregularity of the selection process and its outcome.

Judgment

33. The appeal and the cross-appeal are dismissed. The UNDT Judgment is affirmed.

² *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042, para. 33.

Original and Authoritative Version: English

Done this 16th day of March 2012 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Courtial

Entered in the Register on this 7th day of May 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar