UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2012-296

Marshall

(Respondent and Appellant

on Cross-Appeal/Applicant)

v.

Secretary-General of the United Nations

(Appellant and Respondent

on Cross-Appeal/Respondent)

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Inés Weinberg de Roca Judge Richard Lussick
Judgment No.:	2012-UNAT-270
Date:	1 November 2012
Registrar:	Weicheng Lin

Counsel for Respondent & Appellant on C/A/Applicant: George G. Irving

Counsel for Appellant & Respondent on C/A/Respondent: Amy Wood

JUDGE MARY FAHERTY, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations and a cross-appeal filed by Mr. Ian Marshall against Judgment No. UNDT/2011/205, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 30 November 2011 in the case of *Marshall v. Secretary-General of the United Nations*. The Secretary-General appealed on 6 February 2012. Mr. Marshall filed his answer to the appeal and a cross-appeal on 23 March 2012. The Secretary-General filed an answer to the cross-appeal on 24 September 2012.[1]

Synopsis

2. The issue for consideration by this Tribunal is whether the Dispute Tribunal, having regard to the nature of the complaint in this case, erred in law and fact in its findings that the relevant standard for the initiation of a preliminary investigation was not met.

3. Staff Regulation 1.2 (then in force) provides as follows:

> [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations

The obligation imposed on a staff member by virtue of this Staff Regulation does not require a nexus between the alleged misconduct and the workplace.

4. Any reasonable or logical reading of the Staff Regulation 1.2 mandated the Organization to investigate when Ms. Pecanin, the Complainant and a staff member, in her letter of 15 August 2005, called Mr. Marshall's conduct into question. Therefore, insofar as it determined otherwise, the Dispute Tribunal erred in law and fact.

5. The Appeals Tribunal finds that the Dispute Tribunal applied an unduly restrictive interpretation to former Staff Rule 101.2(d). We do not find it necessary, however, to consider the present case in terms of Staff Rule 101.2(d), having regard to our finding as to the scope of former Staff Regulation 1.2.

[1] Mr. Marshall's cross-appeal was transmitted to the Secretary-General on 26 July 2012.

6. We uphold, however, to the extent set out in our Judgment, the Dispute Tribunal's finding that the Ad hoc Panel's report was deficient. We concur also with the UNDT's finding that the failure of the Ad hoc Panel to adhere to the requirements of ST/AI/371, and indeed the mandate it itself had set, called into question all of the steps taken by the Organization post 30 September 2005.

7. We are of the view that there was no valid procedural basis for any of the post 30 September 2005 decisions taken by the Administration in light of the deficiencies of the Ad hoc Panel.

The compensation awarded by the UNDT

8. The Secretary-General appeals against the award of compensation to Mr. Marshall for non- economic harm by way of moral damages. He submits that the UNDT erred in law and exceeded its competence in so doing. The UNDT awarded 24 months' net base salary for "the substantial and grave mishandling by the Administration in this matter", as well as nine months' net base salary for "the stress and moral damages suffered".

9. The Appeals Tribunal is satisfied that the UNDT erred in law and fact in awarding compensation of such a magnitude to Mr. Marshall. We are satisfied that the decision to award compensation was based, in large part, on the Dispute Tribunal's erroneous finding that the Organization was not entitled to investigate allegations of misconduct in this case.

10. In the course of its Judgment, the UNDT took cognisance of the due process violation visited on Mr. Marshall in having to endure a substandard preliminary investigation and ultimately a baseless disciplinary process. This was more than a mere procedural breach and, insofar as the UNDT addressed this issue in terms of compensatory relief for the harm caused to Mr. Marshall as a consequence of his involvement in the process over a period of more than 15 months, it was entitled to do so. The Dispute Tribunal was entitled to accept evidence from Mr. Marshall that he suffered stress as a result. However, the UNDT does not have unfettered discretion with regard to the quantum of damages it can award in cases such as the present and damages must be proportionate to the harm suffered. In the circumstances of the case, and on the basis of what transpired in relation to the imposition by the Administration of a "do not hire" status on him, the proper award to Mr. Marshall for the

mishandling by the Administration of what commenced as a legitimate enquiry is four months' net base salary.

11. Having regard to the foregoing, the Appeals Tribunal vacates the Orders set out in Paragraph 203 (d) and (e) of the UNDT Judgment and substitutes therefor an Order that Mr. Marshall be compensated in the amount of four months' net base salary.

12. With regard to the issue of the special post allowance (SPA), the Order of the UNDT, as set out at paragraph 203(c), is vacated save to the extent that Mr. Marshall is entitled to receive the SPA from 19 October 2005 to the applicable date in December 2005.

The "cautionary note"

13. There was no error on the part of the UNDT when it determined that the cautionary language contained in OHRM's letter of 19 December 2006 to Mr. Marshall constituted a "disciplinary sanction by stealth".

14. There was no legal or other basis for the caution in circumstances where the Organization dropped the charges set out in the memorandum of 8 August 2006 and closed the case in accordance with paragraph 9(a) of administrative instruction ST/AI/371. While the memorandum containing the cautionary language may not have been placed on Mr. Marshall's personnel file, he is nonetheless entitled to the excision of the cautionary language from the memorandum in question. The UNDT Order as recited at paragraph 203 (a) and (b) is hereby affirmed.

The cross-appeal

15. Mr. Marshall's cross-appeal is dismissed save in respect of the "do not hire" status issue, a factor which is incorporated into this Tribunal's total award to him of four months' net base pay by way of compensation for all the procedural deficiencies visited on him by the Administration.

Facts and Procedure

16. Mr. Marshall joined the United Nations Mission in Ethiopia and Eritrea (UNMEE) in Asmara in January 2001 as a Communications Assistant at the FS-3 level. In that year, he began a relationship with Ms. Pecanin, the Complainant. In January 2002, the Complainant

was recruited to serve with UNMEE as a Telephone Billing Assistant at the FS-2 level. In 2003, Mr. Marshall was promoted to the FS-4 level, at which point he became the Complainant's direct supervisor. In March 2005, a child was born to Mr. Marshall and the Complainant. The couple ended their relationship in June 2005.

17. In late July 2005, a "peers' group meeting" was convened to help Mr. Marshall and the Complainant resolve problems between them. As a result of a suggestion from the meeting, Mr. Marshall was temporarily assigned to Addis Ababa for one month as of 1 August 2005.

18. On 15 August 2005, the Complainant wrote a memorandum entitled "Seeking Protection" to the Chief, Personnel Section, UNMEE, in which she alleged that she had been subject to verbal and physical assault by Mr. Marshall over a period of time, and that such assaults had occurred for the most part after Mr. Marshall had consumed excessive amounts of alcohol. The Complainant expressed her fear for her and her child's safety.

19. On 8 September 2005, the Special Representative of the Secretary-General for UNMEE established an Ad hoc Panel to conduct a preliminary fact-finding investigation. On 30 September 2005, the Ad hoc Panel submitted its report, in which it concluded that the Complainant's allegations "might be well-founded".

20. On 17 October 2005, the Chief Administrative Officer (CAO), UNMEE, transmitted the report of the Ad Hoc Panel and a series of other documents to the Chief, Personnel Management and Support Service (PMSS), Department of Peacekeeping Operations (DPKO), and recommended that the matter should be referred through PMSS to the Office of Human Resources Management (OHRM) for further action.

21. On 25 October 2005, Mr. Marshall was informed that his temporary assignment to Addis Ababa, originally planned for one month, would now be extended as a result of the official complaint filed by the Complainant against him, and would remain in effect while the matter was under investigation. Mr. Marshall was further informed that, while in Addis Ababa, he would retain his FS-4 post and another staff member would perform the duties of the FS-5 post in Asmara that Mr. Marshall had been performing and for which he had received an SPA.

22. On 6 December 2005, the Government of Eritrea issued a demand that all non-national UNMEE staff members, including Mr. Marshall and the Complainant, leave the country. Accordingly, UNMEE officials and staff members began leaving Eritrea by the end

of 2005, pending the closure of the mission. As from that date, Mr. Marshall would not have been able to return to his former position in Asmara.

23. On 14 February 2006, a meeting was convened in Addis Ababa by the Chief of Administrative Services, UNMEE, and attended by the Chief Civilian Personnel Officer, Senior Administrative Officer, the UNMEE Staff Representative and Mr. Marshall. At the meeting, it was suggested that Mr. Marshall had a problem with excessive alcohol consumption and that he should consider the possibility of obtaining treatment. Mr. Marshall denied having such a problem and refused any treatment for alcohol abuse.

24. In March 2006, DPKO referred Mr. Marshall's case to OHRM for disciplinary action. On 8 August 2006, Mr. Marshall was charged with inter alia misconduct for verbally harassing and physically assaulting the Complainant. Mr. Marshall provided his response to the charges of misconduct. On 19 December 2006, the Assistant Secretary-General, OHRM, informed Mr. Marshall in writing that, upon review of the investigation file, his case was being closed and that no disciplinary action would be taken against him. However, at the end of her letter, the Assistant Secretary-General "cautioned" Mr. Marshall that he should be mindful of the need to avoid in the future the appearance of a conflict of interest between his professional duties and personal interests.

25. On 22 January 2007, Mr. Marshall wrote to the Secretary-General requesting administrative review of the aforementioned decision and the "harm that [had] been done to [him], [his] family and [his] professional reputation". Mr. Marshall then filed an appeal with the Joint Appeals Board (JAB) contesting the decision to initiate a preliminary investigation against him and to include the cautionary note mentioned above.

26. On 13 August 2008, the JAB issued its report in which it found no wrong-doing on the part of the Administration. On 6 October 2008, Mr. Marshall was informed in writing of the decision by the Secretary-General to accept the JAB's findings.

27. UNMEE's mandate terminated on 31 July 2008. Thereafter, Mr. Marshall was separated from service with the Organization upon the expiration of his fixed-term appointment on 31 December 2008.

28. On 30 March 2009, Mr. Marshall submitted an application to the United Nations Administrative Tribunal. The matter was not heard prior to its abolition and, on 1 January 2010, the case was transferred to the Dispute Tribunal.

29. On 30 November 2011, the Dispute Tribunal issued Judgment No. 2011/205. The Dispute Tribunal found that the disciplinary process carried out against Mr. Marshall did not comply with the requirements of due process and that, therefore, the Organization abused its authority. Furthermore, the Dispute Tribunal found that these processes caused damage to Mr. Marshall's professional and social reputation, especially when adverse material was publicly disseminated regarding personal information and criminal allegations against him, as well as moral damage and extreme stress as a result of the Organization's mishandling of his case and the international custody battle he had to face. Finally, the Dispute Tribunal found that Mr. Marshall's removal from his job did not comply with the requirements established within the Organization. Consequently, the Dispute Tribunal ordered the rescission and nullification of the cautionary note of 19 December 2006, the removal of the said note from the personnel record, the payment of the difference between the salary he received while in Addis Ababa and the SPA earlier granted him, the payment of compensation based on the substantial and grave mishandling in this case, and the payment to Mr. Marshall by the Organization of an award of nine months' net base salary in relation to the stress and moral damages suffered.

Submissions

Secretary-General's Appeal

30. The Secretary-General states that the Dispute Tribunal erred on questions of law and fact in concluding that the Administration gravely mishandled the preliminary investigation and subsequent charge of misconduct against Mr. Marshall. In this regard, the Secretary-General maintains that the Dispute Tribunal erred in finding that the relevant standard for the initiation of a preliminary investigation had been breached.

31. In the Secretary-General's view, the Dispute Tribunal erred in finding that Mr. Marshall was improperly charged with misconduct on the basis of acts that were not prohibited by the relevant Staff Regulations and Rules.

32. Furthermore, the Secretary-General considers that the Dispute Tribunal erred in finding that the investigation breached Mr. Marshall's right to privacy and constituted an abuse of authority.

Mr. Marshall's Answer

33. Mr. Marshall submits that the Secretary-General has failed to articulate sufficient grounds for overturning the UNDT Judgment, and that he has engaged in trying to reargue the case in another forum.

34. Mr. Marshall also submits that the UNDT correctly found that his rights to due process had been violated and that he was wrongly charged with misconduct since the complaint arose from a dispute over custody issues and there were no records of prior complaints, or history of civil or criminal charges or physical evidence of any violence or evidence of any adverse effect of his relationship with the Complainant on the workplace.

35. In the view of Mr. Marshall, contrary to the assertions made by the Secretary-General, he had objected to the decision that resulted in turning a one-month voluntary reassignment into permanent removal from his post and functions in Asmara.

36. Mr. Marshall states that the cautionary note coupled with the hidden directive not to hire him for any position clearly amounted to veiled disciplinary measures.

Mr. Marshall's Cross-Appeal

37. Mr. Marshall submits that the egregious and secret action by the Administration to impose on him a "do not hire" status constitutes a separate compensable source of damage over and above the amounts already awarded by the UNDT. He should be compensated for the period of his "do not hire" status, including almost two years he went without employment following the closure of the mission at the end of 2008; for the delays in addressing the continued harm to his career and reputation; and, for the continued loss of opportunity due to the Administration's failure to rectify his official records of service.

38. Mr. Marshall also submits that he should be paid USD 20,000 in legal costs based on the Secretary-General's continued abuse of process and misrepresentation of evidence.

Secretary-General's Answer to Cross-Appeal

39. The Secretary-General submits that Mr. Marshall's claims in respect of his non-selection for the 11 posts for which he had applied and the decision to impose on him a "do not hire" status are not receivable because he did not seek administrative review or management evaluation of any of those decisions. Consequently, his claim for increased award of compensation is legally unsustainable.

40. The Secretary-General also submits that Mr. Marshall's claim for legal costs is likewise legally unsustainable as he has not produced any evidence to show that the Secretary-General has abused the appeals process.

Considerations

The Secretary-General's appeal

41. Having regard to the parties' submissions, the first issue for consideration is whether the Dispute Tribunal erred in law and fact in its finding that the relevant standard for the initiation of a preliminary investigation was not met in this case.

42. The UNDT's starting point was the letter sent by the Complainant to UNMEE on 15 August 2005, the subject of which was entitled "Seeking Protection".

43. At paragraphs 87-89 of its Judgment, the UNDT summarised the letter in part and at paragraph 91 went on to state:

> In fact there was nothing in the letter that delineated any cause or facts for investigation that related to the workplace or which was alleged to have occurred in connection with work. Armed with a complaint letter which read more like a magazine feature article on gender-based violence in the home rather than abuse in the workplace as defined by the relevant staff rules, and in the circumstances having failed to delineate the focus of its assignment, the panel's report was grossly lacking in a critical aspect of its work objective.

44. The letter of 15 August, while detailing the issues summarised by the Dispute Tribunal Judge, also made it apparent to the recipient that the very serious allegations contained therein (not averted to in the UNDT Judgment) were being made by one UN employee against another UN employee. Prima facie, it suggested (irrespective of the veracity of the

allegations) that the conduct of Mr. Marshall was putting the other employee in fear for her safety and well-being. Moreover, the Complainant alleged that she had been physically and verbally assaulted by Mr. Marshall.

45. In the face of the claims made in the letter, what was the Organization's obligation?

46. In such circumstances, the Organization's remit, in the first instance, was to consider whether the substance of Ms Pecanin's allegations fell within the preserve of the Staff Regulations and Rules. If this consideration was answered in the affirmative, the Organization's then remit was to consider, following the necessary fact-finding investigation and any preliminary report verifying the allegations, whether the findings of fact merited invoking disciplinary measures against Mr. Marshall.

47. With regard, therefore, to the Organization's starting point, Staff Regulation 1.2 (then in force) provides as follows:

> [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations

The obligation imposed on a staff member by virtue of this Regulation does not require a nexus between the alleged misconduct and the workplace.

48. Any reasonable or logical reading of Staff Regulation 1.2 mandated the Organization to investigate when the Complainant, in her letter of 15 August 2005, called Mr. Marshall's conduct into question.

49. Therefore, insofar as it determined otherwise, the Dispute Tribunal erred in law and fact. Furthermore, we find no basis in law or fact for the pronouncements made by the UNDT in paragraphs 112-113 of its Judgment. The reason for setting up the Ad hoc Panel (see below) in September 2005 was for it to conduct an "investigation into the possible misconduct".

50. The Appeals Tribunal is further satisfied that the Dispute Tribunal applied an unduly restrictive interpretation to former Staff Rule 101.2(d). We do not find it necessary, however, to consider the present case in terms of Staff Rule 101.2(d), having regard to our finding as to the scope of former Staff Regulation 1.2.

51. For the Organization to embark on a preliminary fact-finding investigation into the claims about Mr. Marshall's conduct it was required, by Statute, to have "reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed". On any reading of the letter "Seeking Protection", the statutory prerequisite set out in ST/AI/371 (Revised Disciplinary Measures and Procedures) was satisfied.

52. Article 2 of ST/AI/371 provides as follows:

> (a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it;
>
> (b) Unlawful acts (e.g. theft, fraud, possession or sale of illegal substances, smuggling) on or off United Nations premises, and whether or not the staff member was officially on duty at the time;
>
> (c) Misrepresentation or false certification in connection with any United Nations claim or benefit, including failure to disclose a fact material to that claim or benefit;
>
> (d) Assault upon, harassment of, or threats to other staff members;
>
> (e) Misuse of United Nations equipment or files, including electronic files;
>
> (f) Misuse of office; abuse of authority; breach of confidentiality; abuse of United Nations privileges and immunities, [sic]
>
> (g) Acts or behaviour that would discredit the United Nations.

53. As noted by the Dispute Tribunal Judge, the practical guidelines for all staff members, bodies and panels whose responsibility it is to conduct preliminary fact-finding investigations are set out in the OIOS Manual of Investigation Practices and Policies of 2005. Paragraph 55 provides as follows:

> The fundamental requirement of fairness during a fact finding investigation is that the investigator has to approach the matter with an open mind. An investigator who has formed a concluded opinion on the matter prior to the start of an investigation must not undertake the investigation. Of course, an investigator may be suspicious and those suspicions may strengthen or lessen during the investigation. However, the task of the investigator is to establish facts and draw reasonable conclusions from those facts. It is a dispassionate professional exercise. Allegations from an informant or Programme Manager are simply allegations. The investigator will attempt to ascertain the facts by interviewing witnesses, by seeking documentary or other evidence, such as

> expert opinions or site visits on the basis of which ID/OIOS will make its recommendations to the Programme Manager.

The Ad hoc Panel

54. While the Organization could initiate a preliminary fact-finding investigation on a "reason to believe" basis, the findings of such an investigative body (if the matter is to proceed) should comply with the requirements of Article 3 of ST/AI/371, which provides:

> If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses or any other document or record relevant to the alleged misconduct.

55. In the present case, the Ad hoc Panel's stated "Methodology" was "to establish the veracity of the allegations outlined" and "to establish whether any substantiation existed for consideration of further investigation of possible misconduct". (Original emphasis omitted) Moreover, the acknowledged purpose of the interviews it carried out was to "attempt to establish the facts salient to the case, to validate or obtain additional information".

56. With regard to the report duly produced by the Ad hoc Panel, we concur with the Dispute Tribunal's effective finding that reliance by the Panel on what was "plausible" or on what someone "strongly believed" and the Panel's ultimate assessment that "the allegation might well be founded" (emphasis added) did not satisfy the requirements of ST/AI/371. In particular, we are satisfied that the report did not satisfy the requirement of Article 3 of ST/AI/371.

57. We uphold, therefore, to the extent set out above, the finding of the Dispute Tribunal with regard to the work of the Ad hoc Panel.

58. It follows that the failure of the Ad hoc Panel to adhere to the standards required by ST/AI/371, and indeed the standards necessitated by the mandate it itself had set, called into question all of the steps taken by the Organization post 30 September 2005. Such steps included the decision taken by Management in October 2005 to forward the report for further action and the decision taken in August 2006 to charge Mr Marshall with verbally and physically assaulting the Complainant and with acting in a manner unbecoming of his

status as an international civil servant . We are of the view that there was no valid procedural basis for any of the afore-said decisions, in light of the deficiencies of the Ad hoc Panel.

The compensation awarded by the UNDT

59. The Secretary-General appeals against the award of compensation to Mr. Marshall for non- economic harm and by way of moral damages. He submits that the UNDT erred in law and exceeded its competence in so doing. The UNDT awarded 24 months' net base salary for "the substantial and grave mishandling by the Administration in this matter", as well as nine months' net base salary for "the stress and moral damages suffered".

60. The Appeals Tribunal is satisfied that the UNDT erred in awarding compensation of such a magnitude to Mr. Marshall. We are satisfied that the decision to award compensation was based, in large part, on the UNDT's erroneous finding that the Organization was not entitled to investigate allegations of misconduct in this case, and that the Organization's role ought to have been limited to being the conduit through which Mr. Marshall and Ms Pecanin's disputes could have been directed "to the relevant authorities, namely a family court".

61. We are satisfied that the Dispute Tribunal also relied on its erroneous conclusion that the decision taken by the Administration to investigate the allegations of misconduct amounted to an abuse of power and an invasion of Mr. Marshall's privacy. We have already set out the legal basis for the Organization's entitlement to take action in this case.

62. We are further satisfied that there was no legal basis in this case for the UNDT to factor into its consideration on compensation Mr. Marshall's and the Complainant's dispute concerning their child, or any issues connected therewith. Mr. Marshall himself acknowledged (as recited in paragraph 160 of the UNDT Judgment) that such issues were in contention between them prior to any process embarked on by the Administration.

63. It is established that, notwithstanding the decision taken in August 2006 to commence disciplinary proceedings against Mr. Marshall, all "charges" were "dropped" and the case was closed in accordance with paragraph 9(a) of ST/AI/371. Thus, Mr. Marshall was never the subject of sanction by way of suspension (with or without pay) or by way of dismissal and the loss of earnings which would have resulted from such sanction.

64. As already set out herein, the Administration's legitimate enquiry was vitiated by the shortcomings of the Ad Hoc Panel and the consequent effect on the Administration's actions.

65. It is well established in the case law of this Tribunal that not every violation of an employee's due process entitlements will result in an award of compensation. The issue of the SPA aside, Mr. Marshall did not suffer any loss of earnings in the period from August 2005 to December 2008 and, as set out in the UNDT Judgment, his contract of employment came to an end, not because of a termination, but rather due to the expiration of that contract in December 2008.

66. In the course of its Judgment, the UNDT took cognisance of the due process violation Mr. Marshall suffered in having to endure a substandard preliminary investigation and, ultimately, a baseless disciplinary process. This was more than a mere procedural breach and, insofar as the UNDT addressed this issue in terms of compensatory relief for the harm caused to Mr. Marshall as a consequence of his involvement in the process over a period of more than 15 months, it was entitled to do so. The Dispute Tribunal was entitled to accept evidence from Mr. Marshall that he suffered stress as a result. However, the UNDT does not have unfettered discretion with regard to the quantum of damages to be awarded and damages must be proportionate to the harm suffered. In all the circumstances of the case, and on the basis of what transpired in relation to the imposition by the Administration of a "do not hire" status on him (an issue which is considered below under the heading "Mr. Marshall's cross-appeal"), the proper award to Mr. Marshall for the mishandling of what commenced as a legitimate enquiry lies in the region of four months' net base salary.

67. Having regard to the foregoing, the Appeals Tribunal vacates the Orders set out in Paragraph 203(d) and (e) and substitutes therefor an Order that Mr. Marshall be compensated in the amount of four months' net base salary. It orders that the Secretary-General pay, within 60 days from the date this Judgment is issued to the parties, interest on the award of compensation at the US Prime Rate applicable on 8 August 2006 (when Mr. Marshall was charged with misconduct), calculated from 8 August 2006 to the date of payment of the compensation. If payment of the compensation is not made within 60 days, an additional 5 per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment.

The special post allowance

68. The Secretary General contends that the issue of the SPA was not properly before the UNDT. We reject that contention. Mr. Marshall's move to Addis Ababa only arose in the context of the allegations made by the Complainant. Thus, the issue of the loss of his SPA is inextricably linked to the decision "regarding the charges of misconduct" in respect of which administrative review was sought on 27 January 2007.

69. In the course of his deployment in Asmara, Mr. Marshall was in receipt of an SPA. Following his voluntary reassignment on a temporary basis to Addis Ababa on 1 August 2005, he was no longer eligible for this allowance. Mr. Marshall's stay in Addis Ababa extended beyond the originally agreed one month and it appears that he did not raise any issue in this regard until 19 October 2005, when he requested to be allowed to resume his former functions in Asmara. On 25 October 2005, Management extended his reassignment to Addis Ababa unconditionally and indefinitely in view of the official complaint that Ms. Pecanin had lodged on 15 August 2005. The Secretary-General appeals the award by the UNDT to Mr. Marshall of the allowance for the period from 1 September 2005 to the period for which it was originally granted.

70. Having regard to the findings of this Tribunal as to the shortcomings of the Ad hoc Panel, we find that Mr. Marshall is entitled to receive the difference in pay (i.e., the SPA) from 19 October 2005 when he queried his continued reassignment to the relevant date in December 2005 when the relevant UNMEE staff had to leave Eritrea. As the Administration should not have continued to involve Mr. Marshall in a disciplinary process based on the findings of the Ad hoc Panel's report of 30 September 2005 (in view of the unsatisfactory nature of that report), there was no basis for his continued reassignment. Contrary to the finding of the UNDT, we see no basis for deeming his reassignment in Addis Ababa for the month of September 2005 "illegal", as this period covered the fact-finding enquiry being done by the Ad hoc Panel and we note that Mr. Marshall did not, in any event, query the prolonged stay until 19 October 2005.

71. The Secretary-General contends that the issue of Mr. Marshall's continued entitlement to an SPA became moot after 6 December 2005, in view of the directive of the Eritrean Government. We agree with this argument and find no basis for the continued

payment of an SPA beyond the relevant date in December 2005 when the affected United Nations personnel left Eritrea.

72. The Order of the UNDT as set out at paragraph 203(c) is, thus, vacated save to the extent indicated above, namely, that Mr. Marshall is entitled to receive an SPA from 19 October 2005 to the applicable date in December 2005.

The "Cautionary note"

73. There was no error on the part of the UNDT when it determined that the cautionary language contained in OHRM's letter of 19 December 2006 to Mr. Marshall constituted a "disciplinary sanction by stealth".

74. There was no legal or other basis for the caution in circumstances where the Organization dropped the charges set out in the memorandum of 8 August 2006 and closed the case in accordance with paragraph 9(a) of ST/AI/371. While the memorandum containing the cautionary language may not have been placed on Mr. Marshall's personnel file, he is nonetheless entitled to the excision of the cautionary language from the memorandum in question. The UNDT Order as recited at paragraph 203(a) and (b) is hereby affirmed.

Mr. Marshall's cross-appeal

75. Mr. Marshall appeals the Dispute Tribunal's failure to award him compensation for the fact that he was not successful in any of the eleven posts he applied for between 24 June 2005 and 25 May 2010. The UNDT found "[Mr. Marshall] had not established a direct connection between the allegations against him, the purported managerial action taken against him and failure to fully and fairly consider him for any of the eleven posts to which he had applied between 2005 and 2010".

76. When deciding this issue, the UNDT had before it the Secretary-General's production of documentation, pursuant to an UNDT Order dated 21 September 2010. The documentation related to the selection exercises carried out for all eleven posts. One such exercise, carried out in 2007 in respect of the post of Telecommunications Technician, recorded that Mr. Marshall was accorded a "do not hire" status. It appears that on 9 September 2005 a recommendation was made that he be given this status, a

recommendation approved on 6 December 2006. As acknowledged by the Secretary-General, the assignment of the particular status "may have been related to the events surrounding the Investigation Decision and the Caution Decision".

77. As a consequence of the "do not hire" status, Mr. Marshall's name was not put forward for the post of Telecommunications Technician in 2007. The Secretary-General acknowledges that Mr. Marshall should not have been accorded this status and that the processing of his application for this post was thereby affected. (The status was removed from the Nucleus human resources management system on 6 October 2010.) However, for the Telecommunications Technician post, there were 265 candidates and only two candidates were technically cleared.

78. The "do not hire" status does not appear on any of the selection exercises carried out in respect of the other ten posts for which Mr. Marshall applied. Perusal of the information contained in the available documents suggests that four of the posts applied for by Mr. Marshall were at the F-6 and F-7 levels.[2] Two selection exercises record that Mr. Marshall was not cleared for the respective positions. Other selection exercises merely record that his applications for the posts were "pending assessment".

79. Overall, having regard to the content of the selection exercise documents, we do not find that the UNDT acted in a manifestly unreasonable manner in determining that no direct link was established between the allegations against Mr. Marshall and the failure to select him for the posts in question. However, it was acknowledged by the Secretary-General that the according of the "do not hire" status was wrong and that the timing of the status (that is the recommendation that it be imposed and its approval) may have been because of the events of September 2005 (the setting up of the Ad hoc Panel) and December 2006 (the imposition of the caution). In all probability, that was the case. Certainly, the status was known to the selection committee for the 2007 Telecommunication Technician post and Mr. Marshall was denied clearance for this post and was thus, as acknowledged, excluded from a selection process for which he would otherwise have been considered. There is no way to determine whether he would have been the successful candidate.

[2] Paragraph 5.2 of Administrative Instruction ST/AI/2006/3 (Staff Selection System) reads: "Staff members shall not be eligible to be considered for promotion to posts more than one level higher than their personal grade."

80. In our determination of four months' net base salary by way of compensation to Mr. Marshall for the procedural breaches and shortcomings in this case (see above), we took into consideration the wrongly imposed "do not hire" status.

Mr. Marshall's application for legal costs against the Secretary-General

81. The claim in this regard is rejected. No abuse of process has been established.

Judgment

82. The Secretary-General's appeal is thus allowed, to the extent set out above. The compensation awarded by the UNDT is hereby substituted by an award of four months' net base salary for Mr. Marshall, together with payment to him of an SPA from 19 October 2005 to the applicable date in December 2005.

83. Mr. Marshall's cross-appeal is dismissed save to the extent that portion of his cross-appeal is factored into the afore-said four months' net pay compensatory award.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Faherty, Presiding	Judge Weinberg de Roca	Judge Lussick

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar