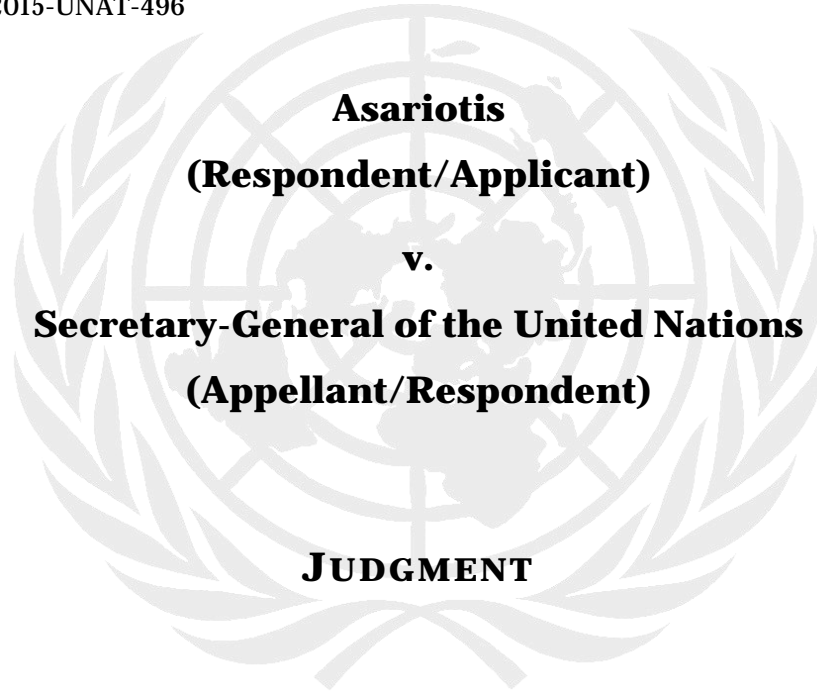




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-496



**Asariotis
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Rosalyn Chapman Judge Deborah Thomas-Felix
Case No:	2014-564
Date:	26 February 2015
Registrar:	Weicheng Lin

Counsel for Ms. Asariotis:	Self-represented
Counsel for Secretary-General:	Stéphanie Cartier

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General against Judgment No. UNDT/2013/144, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 19 November 2013 in the case of *Asariotis v. Secretary-General of the United Nations* (Impugned Judgment). On 20 January 2014, the Secretary-General filed his appeal from the Impugned Judgment and, after this Tribunal granted two extensions of time, on 24 July 2014 Ms. Regina Asariotis filed her answer.¹

Facts and Procedure

2. The following facts are uncontested:²

... The Applicant entered the service of [the United Nations Conference on Trade and Development (UNCTAD)] at the P-4 level on 9 December 2001. On 1 September 2005, she was promoted to the P-5 level and became Chief of the Policy and Legislation Section of the Trade Logistics Branch, Division for Services Infrastructure for Development and Trade Efficiency (renamed the Division on Technology and Logistics (DTL) in early 2008).

... Vacancy announcement 07-ECO-UNCTAD-416118-R-GENEVA (G) for the D-1 post of Head of the Trade Logistics Branch (hereafter “the disputed post”) was published on 26 November 2007. The Applicant applied for the post as a 30-day candidate on 24 December 2007.

... Upon the retirement of the Head of the Trade Logistics Branch on 31 January 2008, the Chief of the Transport Section, Mr. Rubiato, was appointed Officer-in-Charge of the Branch on 1 February 2008, pending the selection of a new Head.

... On 10 March 2008, the Applicant was interviewed for the disputed post. Four other internal 30-day candidates were also interviewed, including Mr. Rubiato.

... On 15 June 2009, a new Director, DTL, was appointed.

... On 15 July 2009, the Director, DTL, advised the Applicant that the disputed post would be re-advertised. However, this decision was subsequently reversed.

... On 28 July 2009, a temporary vacancy announcement for a period of three to six months was issued for the disputed post, and the Applicant applied on 6 August 2009. She was interviewed, but the candidate who had served as

¹ See Order No. 177 (2014) of 31 March 2014, and Order No. 189 (2014) of 24 June 2014.

² Impugned Judgment, paras. 3-23.

Officer-in-Charge of the Branch since 1 February 2008 was selected. The Applicant was notified of this on 19 January 2010.

... From February to April 2010, there was a second round of interviews for the disputed post as advertised in November 2007 [and the Applicant was interviewed again]. On 3 November 2010, the interview panel's recommendations were presented to the Geneva Central Review Board.

... By memorandum dated 7 April 2011, the Geneva Central Review Board informed the Under-Secretary-General for Management that [...] it was not in a position to endorse the recommendations made by UNCTAD, as the selection procedure had been flawed. It recommended that the post be re-advertised.

... By e-mail of 3 May 2011, the Director, DTL, informed the Applicant that [...] vacancy announcement No. 07-ECO-UNCTAD-416118-R-GENEVA (G), issued on 26 November 2007 in Galaxy, would be cancelled and reissued in the new online recruitment platform, Inspira, and she invited the Applicant to apply.^[3]

... On 26 August 2011, the post of Head of the Trade Logistics Branch was readvertised under job opening No. 11-ECO-UNCTAD SIDTED TLB-204438-R-GENEVA. [...] The Applicant applied for the post in October 2011. She was deemed eligible along with 23 other individuals, none of whom was on the roster of candidates preapproved for similar functions. The Applicant was selected for an interview, along with six other candidates.

... On 2 May 2012, [the Applicant] sent an e-mail to the Human Resources Management Section of UNCTAD, drawing attention to the composition of the interview panel and to her wish to not be evaluated by the same panel members as previously.

... On 10 May 2012, the Applicant once again drew the attention of the Chief, Human Resources Management Section, to the composition of the interview panel, emphasizing that the Tribunal had just ruled in her favour in Judgement UNDT/2012/066, with regard to a selection process for the same post with the same hiring manager.

... On 14 May 2012, the Chief, Human Resources Management Section, replied to the Applicant, acknowledging her message and stating that the panel's composition was in accordance with the regulations and that a Human Resources [(HR)] Officer of the United Nations Office at Geneva (UNOG) would participate on an ex officio basis.

³ Ms. Asariotis challenged the decision to re-advertise the vacancy announcement before the Dispute Tribunal in Geneva, which found in part for Ms. Asariotis. *Asariotis v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/066. The Appeals Tribunal affirmed the UNDT Judgment on the lawfulness of the decision to cancel the post, but reversed the UNDT's award of moral damages to Ms. Asariotis. *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

... The interview took place on 15 May 2012 with a panel consisting of Ms. Miroux, the hiring manager and Director of the Division; Ms. Molnar, Director of the Transport Division of the United Nations Economic Commission for Europe (ECE); Ms. Krylova, Chief of Branch in the UNCTAD Investment Division; and a [HR] Officer, UNOG, participating on an ex officio basis.

... The Applicant was not recommended for the post; only two candidates, including Mr. Rubiato, were recommended.

.... On 29 August 2012, the Geneva Central Review Board approved the selection process, and on 31 August 2012, the Secretary-General, UNCTAD, selected Mr. Rubiato for the post.

... On 1 September 2012, an Inspira-generated e-mail message was sent advising the Applicant that she had not been selected for the disputed regular post.

... On 18 September 2012, the Human Resources Management Section, UNCTAD, sent a message to all staff advising them of recent appointments, including that of Mr. Rubiato as Chief, Trade Logistics Branch.

... On 31 October 2012, the Applicant submitted a request for management evaluation of the decision to select Mr. Rubiato; on 21 December 2012 she received a reply indicating that the contested decision was being upheld.

3. On 21 March 2013, Ms. Asariotis filed an application with the Dispute Tribunal contesting the selection process, in particular the Administration's failure to notify her of the composition of the interview panel, and the final decision. A hearing took place on 6 November 2013, which the parties and the selected candidate attended.

4. On 19 November 2013, the Dispute Tribunal rendered the Impugned Judgment and found in favour of Ms. Asariotis. The Dispute Tribunal held that in failing to notify Ms. Asariotis of the names of the interview panel members, even though Ms. Asariotis had made clear that she did not wish to be interviewed by the same panel members who had interviewed her previously for the same post, one of her fundamental rights was violated as she was deprived of the possibility to contest the composition of her interview panel.⁴ The Dispute Tribunal also found that had Ms. Asariotis been informed of the panel's composition, she undoubtedly would have requested the replacement of one or more of its members, and that a reasonable manager would have acquiesced to that request as concerns at least two panel members.⁵ It noted that the presence of at least two of its members could justifiably create the appearance of a conflict of

⁴ Impugned Judgment, para. 45.

⁵ *Id.*, paras. 46 and 51.

interest, contrary to the provisions of Chapter 9.2 of the *Instructional Manual for the Hiring Manager on the Staff Selection System (Inspira)* (Manual), and such irregularity vitiated the entirety of the process.⁶ The Dispute Tribunal rescinded the appointment decision and set the alternative compensation in favour of Ms. Asariotis at USD 8,000 for material damages. It also awarded her USD 6,000 in moral damages.

Submissions

The Secretary-General's Appeal

5. The UNDT erred on a question of law in finding that staff members have fundamental rights relating to the composition of an interview panel. Insofar as the source of such alleged "right" is the Manual, the Manual lacks the legal authority to create any new rights for staff members or impose any obligations on the Organization beyond what is already established in the Staff Regulations and Rules, and administrative issuances. Furthermore, the UNDT erred in concluding that the objective of this statement in the Manual was to allow candidates to raise potential conflicts of interest between panel members and candidates with the Administration prior to interview, and thus allow for the replacement of one or more panel members.

6. The UNDT further erred in finding that had Ms. Asariotis been informed of who comprised the panel, she would have requested a change in the composition of the panel and the Administration would have granted such a request. Such finding was speculative and Ms. Asariotis did not claim before the UNDT that she would have requested a change in the composition of the panel or that she had been deprived of an opportunity to do so. Furthermore, mere participation of an interview panel member in previous selection processes cannot automatically create an appearance of a conflict of interest.

7. Additionally, the UNDT erred in procedure by declining to entertain the Secretary-General's request to hear the testimony of the *ex officio* member of the interview panel. In particular, that testimony would have changed the UNDT's finding that a reasonable manager would have changed the composition of the interview panel, and the outcome of the case.

⁶ *Id.*, paras. 52-53.

8. Consequently, the UNDT also erred in awarding compensation as no breach of Ms. Asariotis' rights has been established. The Secretary-General requests that the Appeals Tribunal vacate the Judgment in its entirety.

Ms. Asariotis' Answer

9. Ms. Asariotis submits that, notwithstanding the hierarchy of United Nations norms, the Secretary-General is strictly bound by his own rules and cannot arbitrarily argue that some of the rules which were issued for the purposes of ensuring procedural fairness shall be without legal effect. While manuals may rate lower in the hierarchy of United Nations norms than Administrative Instruction ST/AI/2010/3 (Staff selection system), they can nevertheless not be disregarded by the Secretary-General, and a number of UNDT cases have considered manuals in reaching their decisions.

10. Ms. Asariotis also challenges the Secretary-General's contention that the Manual does not create any right for staff members to request a change to an interview panel as this logically means that a staff selection process beset by bias and prejudice should be allowed to proceed without interference. Such interpretation is contrary to basic principles of procedural fairness, natural justice and human rights, and contravenes the principles reflected in Staff Rule 1.2(f), and Section 2.1 of Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), as well as United Nations core values concerning integrity, impartiality and fairness. Ms. Asariotis sets out additional arguments in support of her contention that the process was fraught by procedural irregularity and concerns regarding the panel's composition, claiming in particular that Ms. Krylova should not have been asked to participate in the interview panel.

11. As concerns the Secretary-General's second ground of appeal, the UNDT did not speculate but assessed the facts based on all the available evidence before it, namely, the fact that she had written to UNCTAD HR to raise her concerns about the interview panel. She submits there is no error by the UNDT in reaching these findings.

12. Regarding the Secretary-General's claim that the UNDT erred in procedure by declining to entertain the Secretary-General's request to hear the testimony of the *ex officio* member of the interview panel, the UNDT admitted into evidence the interview notes of the *ex officio* HR staff member but did not find it necessary to additionally hear oral testimony. This assessment was a

reasonable exercise of the Tribunal's case management discretion. Furthermore, the contents of the interview notes do not support the Secretary-General's argument that a different outcome would have ensued had the *ex officio* member testified before the UNDT.

13. Last, Ms. Asariotis submits that the UNDT's award of moral damages is in accordance with established jurisprudence of this Tribunal.

Considerations

Did the Dispute Tribunal err in procedure?

14. The Secretary-General submits that the Dispute Tribunal erred in procedure by declining to entertain the Secretary-General's request to hear testimony of the *ex officio* member of the interview panel. Having reviewed the submissions of the parties on this issue, we are not persuaded by the argument made by the Secretary-General on this ground. We note the detailed case management orders made by the Dispute Tribunal in this case and we are satisfied that they were a satisfactory response to issues raised by the Secretary-General during the case management process. Moreover, the Dispute Tribunal had the interview notes taken by the *ex officio* member of the panel in the course of the interview.

Did the Dispute Tribunal err in law?

15. Section 9.5 of the Manual provides:

Applicants convoked for interviews are normally notified at least five working days in advance. The invitation includes the date and time and means of the interview (telephone, video conference, face-to-face) and informs the applicant of the names of the assessors.

16. With regard to the aforesaid provision, the Dispute Tribunal opined:

.... The rule requiring the Administration to inform applicants of the names of the assessors is contained in the aforementioned Manual, a tool available to managers conducting selection processes. In order to determine the significance of this violation, the Tribunal must decide whether this irregularity deprived the Applicant of certain fundamental rights and could consequently have influenced the outcome of the selection process in question. Clearly, the sole objective of the Manual's author in stipulating the obligation to inform candidates of the names of the assessors on the interview panel was to allow candidates, if necessary, to draw the Administration's

attention, prior to the interview, to potential conflicts of interest between panel members and candidates, and thus to allow for the replacement of one or more panel members.

... It is clear that by depriving the Applicant of this information, the Administration prevented her from contesting the choice of panel members. This was therefore an infringement on her rights, notwithstanding the absence of a rule requiring the Administration to comply with such a request for the replacement of panel members.⁷

17. The Secretary-General contends that in so concluding the Dispute Tribunal erred in law. He argues that the Manual is no more than a document issued by the Office of Human Resources Management to provide technical guidance to hiring managers on how to use the Inspira programme, and that in effect it does no more than outline best practices. He refers, in particular, to the introduction to the Manual where it states that the Manual “provides guidance to the Hiring Manager on the process of filling vacant positions. It serves as a comprehensive step-by-step guide on the staff selection process.” Thus, as a technical guide for hiring managers (and not staff members at large), the Manual lacks the legal authority to create any new rights for staff members or impose obligations on the Organization beyond what is already established in the Staff Regulations and Rules, and administrative issuances. The Secretary-General argues that the Manual is simply a “tool” for managers and notes that the Dispute Tribunal itself referred to it in such terms.

18. Ms. Asariotis contends that manuals issued in respect of staff selection are not without legal relevance and argues that the Manual is a supplement to the procedural rules set out in Administrative Instruction ST/AI/2010/3. She points to Section 2.6 of ST/AI/2010/3, as follows:

This instruction sets out the procedures applicable from the beginning to the end of the staff selection process. Manuals will be issued that provide guidance on the responsibilities of those concerned focusing on the head of department/office/mission, the hiring manager, the staff member/applicant, the central review body members, the recruiter, namely, the Office of Human Resources Management (OHRM), the Field Personnel Division of the Department of Field Support, executive offices and local human resources offices as well as the occupational group manager and expert panel. Should there be any inconsistency between the manuals and the text of the present instruction, the provisions of the instruction shall prevail.

⁷ *Id.*, paras. 42-43.

19. Ms. Asariotis submits that this provision puts her contention beyond doubt, and she maintains that the final sentence of Section 2.6 implies that manuals shall be considered authoritative unless in any way inconsistent with the administrative instruction on staff selection. She notes that the Manual in issue here refers its readers to ST/AI/2010/3 under the heading “Reference Documents” and she points to Chapter 1.9 where it states: “The following documents provide additional information: ST/AI/2010/3 of 21 April 2010 on the staff selection system”.

20. While we note Ms. Asariotis’ arguments, as set out in her submission, we agree with the Secretary-General that the Dispute Tribunal erred in law in determining that Ms. Asariotis had an entitlement to be apprised of the composition of the interview panel, pursuant to the provisions of Section 9.5 of the Manual.

21. We hold that this particular Manual, being an “*Instruction Manual for the Hiring Manager on the Staff Selection system*” (emphasis added), does not have the legal force attributed to it by the Dispute Tribunal. We refer to our jurisprudence in *Charles* that “[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General’s bulletins and administrative issuances.”⁸

22. At most, the Manual in this appeal provides “guidance” on the “responsibilities” of the Hiring Manager, as envisaged by Section 2.6 of ST/AI/2010/3; it does not purport to vest a staff member with an entitlement to be apprised in advance of an interview of the names of the panel members.

23. Ms. Asariotis’ interview process was governed by Administrative Instruction ST/AI/2010/3, Section 7.5 of which provides:

Shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests, work sample tests or assessment centres.

24. This instrument does not impose an obligation on the Administration to inform the staff member of the composition of the interview panel prior to the interview. In the absence of any such statutory obligation, the UNDT’s reliance on the Manual as conferring “fundamental” rights on staff members constitutes an error of law.

⁸ *Charles v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-286, para. 23.

25. That being said, we now turn to a consideration of the factual matrix which presented in this case. The UNDT noted that on 2 May 2012, Ms. Asariotis drew the attention of the Human Resources Management Section (HRMS), UNCTAD, to the fact that she had been interviewed several times for the post in question and that there were ongoing proceedings before the UNDT with regard to her challenge to a prior selection process for the post.⁹

26. She advised *inter alia* as follows:

I assume that the assessment panel for the ongoing staff selection process will be composed in accordance with evaluation guidelines recently issued by HRMS UNOG, including as regards subject matter expertise. However in view of the fact that formal proceedings in relation to an earlier selection process for the same post and involving the same hiring manager are still ongoing, I hope you understand that I am somewhat concerned about being interviewed by a panel with substantially the same composition.¹⁰

27. On 10 May 2012, she provided the following information:

With reference to the correspondence below, I would like to let you know that an interview has now been scheduled for Tuesday 15 March (sic) at 2 pm in E7084.

Please also note that in the judicial proceedings relating to the first selection process for the post, under the responsibility of the same hiring manager, a judgment granting me compensation has yesterday been issued by UNDT (Judgment UNDT/2012/066). In the (sic) light of the decision, I would like to reiterate the concerns raised in my message.¹¹

28. Those communications put the Administration on inquiry as to, in the words of the UNDT, “the significance that [Ms. Asariotis] attached to the panel’s composition”.¹² This enquiry arose against the background where Ms. Asariotis had launched a legal challenge to a prior selection process concerning the same post. The UNDT found:

These messages, and the Applicant’s statements at the hearing, show that although the Applicant drew the Administration’s attention to the fact that she did not wish to be interviewed by the same panel members who had interviewed her previously for the

⁹ Impugned Judgment, para. 44. Judgment No. UNDT/2012/066 was handed down on 9 May 2012.

¹⁰ Answer Brief, Annex 7.

¹¹ *Ibid.*

¹² Impugned Judgment, para. 44.

same post, the names of the panel members were never formally communicated to her, as such depriving her of the possibility to contest the composition of the panel.¹³

29. Thus, in the particular circumstances of this case, we find no error of law or fact on the part of the UNDT in reaching the above conclusion. Nor do we find any legal or factual error on the part of the UNDT when it concluded that had Ms. Asariotis been informed of the composition of the panel in advance of her interview, she would have requested the replacement of the panel members.

30. The UNDT correctly held that the failures of the Administration in this regard vitiated the entirety of the process. Accordingly, for the reasons set out above, the UNDT's determination that the selection decision be rescinded is upheld.

Did the Dispute Tribunal err by awarding material and moral damages?

31. We are not persuaded by the arguments put forward by the Secretary-General on the issue of the material damages awarded to Ms. Asariotis. Had the interview process been properly regulated, the UNDT assessed Ms. Asariotis' chances of being selected for the post as one in seven, as she was one of seven candidates short-listed for interview. In arriving at pecuniary damages of USD 8,000, the UNDT had regard to the difference in salary and the career prospects Ms. Asariotis would have had if selected. In our view, the approach adopted by the UNDT was reasonable and we reject the argument that the UNDT's conclusion was speculative or inconsistent with the facts, as found by the UNDT.

32. Similarly, we are not persuaded by the arguments put forward by way of legal challenge to the award of moral damages. At paragraph 59 of its Judgment, the UNDT noted Ms. Asariotis' description of the "anxiety that the irregular process ha[d] caused her since May 2012" and that "her quality of life ha[d] been severely affected, as her attending physician ha[d] noted." Accordingly, the UNDT was "convinced" on the evidence before it that her distress was real. In all the circumstances, we are satisfied that the UNDT had ample evidence upon which to conclude, in accordance with our jurisprudence in *Asariotis*,¹⁴ that Ms. Asariotis' circumstances warranted an award of moral damages. The award and the quantum thereof were entirely reasonable.

¹³ *Id.*, para. 45.

¹⁴ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

33. For all of the reasons set out above, the appeal is dismissed.

Judgment

34. The appeal is dismissed and the Judgment of the Dispute Tribunal is upheld.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Thomas-Felix

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar