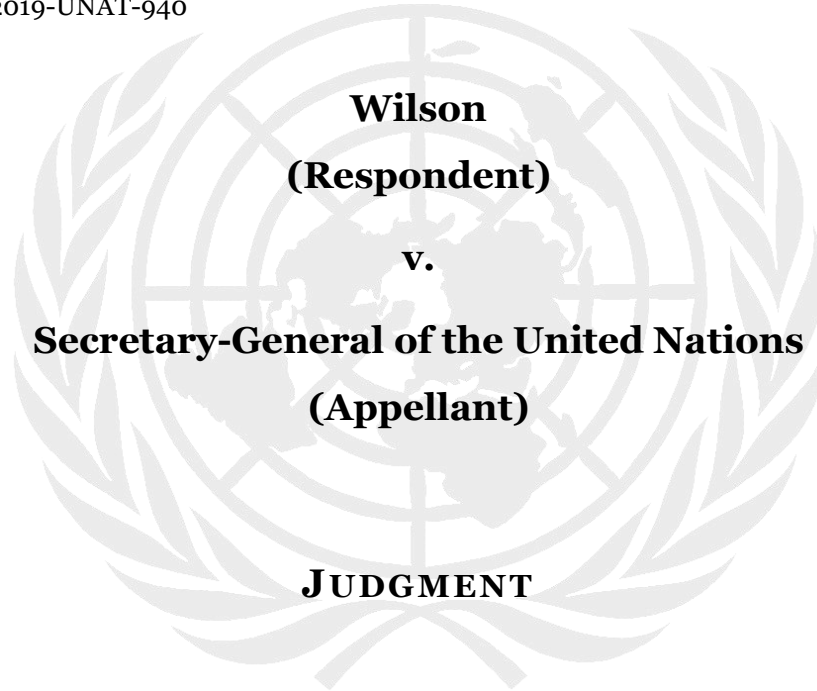




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-940



**Wilson
(Respondent)**

v.

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

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Dimitrios Raikos
Judge John Raymond Murphy

Case No.: 2019-1236

Date: 28 June 2019

Registrar: Weicheng Lin

Counsel for Mr. Wilson: Sètondji Roland/George G. Irving

Counsel for Secretary-General: Nathalie Defrasne

REISSUED PER JUDGMENT NO. 2020-UNAT-999

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/136, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 21 December 2018, in the case of *Wilson v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 18 February 2019, and Mr. Anthony Kreil Wilson filed his answer on 8 March 2019.

2. On 20 February 2019, Mr. Wilson filed a cross-appeal, to which the Secretary-General filed an answer on 22 April 2019. On 17 May 2019, Mr. Wilson filed a motion for withdrawal of his cross-appeal “[p]ursuant to the terms and conditions of a confidential settlement agreement”. The Secretary-General did not submit a response to the motion.

Facts and Procedure

3. At the material time, Mr. Wilson was the Chief of the Financial Information Operations Service in the Department of Management (DM) at the D-1 level.

4. On 28 July 2016, Job Opening 63461 (JO) was posted on Inspira with a deadline of 25 September 2016. The posting title was Chief of Enterprise Application Centre, NY, at the D-1 level, and the job code title was Chief of Service, Information Technology Resource Management. The JO required a candidate to have an:

Advanced university degree (Master’s degree or equivalent degree) in computer science, information systems, mathematics, statistics or related field. A first-level university degree in combination with qualifying experience may be accepted in lieu of the advanced university degree. [Projects IN Controlled Environments (Prince2)] or [Project Management Professional (PMP)] certification is desirable.

The JO also required a candidate to have “[a] minimum of fifteen years of progressively responsible experience in planning, designing, development, implementation and maintenance of [enterprise resource planning (ERP)] systems”.

5. A total of 110 job applications were received, including from five rostered candidates. Mr. Wilson, who applied on 29 July 2016, was among the rostered candidates.

6. The Assistant Secretary-General of the Office of Information and Communications Technology and Chief Information Technology Officer (ASG/OICT or CITO) determined that three of the rostered candidates, including Mr. Wilson, met the requirements of the JO and that two of the rostered candidates only partially met the requirements of the JO. The CITO concluded that Ms. SS was the most suitable rostered candidate for the position and, on 11 October 2016, the CITO selected her for the post.

7. On 12 October 2016, Mr. Wilson filed a request for management evaluation of the decision not to select him for the JO. On the same day, he filed an application for suspension of action with the Dispute Tribunal.

8. By Order No. 241 (NY/2016) dated 19 October 2016, the UNDT rejected Mr. Wilson's application for suspension of action on the ground that the contested decision had already been implemented since the selected candidate, Ms. SS, had accepted the offer of the post. On 21 November 2016, Mr. Wilson received a response dated 18 November 2016 from the Management Evaluation Unit (MEU), upholding the contested decision.

9. On 7 February 2017, Mr. Wilson filed an application with the Dispute Tribunal, challenging the contested decision not to fully and fairly consider his candidacy during the selection exercise for the JO.¹

10. Before the Dispute Tribunal, the parties filed several motions addressing, *inter alia*, production of documentary evidence, issues of receivability, and dates for the court case management hearings. The Dispute Tribunal issued several orders. For instance, in Order No. 98 (NY/2017) dated 19 May 2017, it granted Mr. Wilson's request for leave to file additional evidence. In Order No. 124 (NY/2017) dated 29 June 2017, the Dispute Tribunal ordered the Secretary-General to file, in a redacted form if necessary, the information and documentation indicated in Mr. Wilson's motion of 8 February 2017, as they all "appear[ed] to be relevant" for the case.

11. With the permission of the Dispute Tribunal, the parties suspended the proceedings and attempted an informal resolution of the case. On 6 November 2017, the parties informed the Dispute Tribunal of their failure to reach an agreement, and the UNDT proceedings were resumed.

¹ In this application, Mr. Wilson also contested the decision not to fully and fairly consider his candidacy for Temporary JO 52485, Director, Information Systems and Technology, at the D-2 level, but he later withdrew this aspect from his UNDT application.

12. On 2 April 2018, the parties filed their closing submissions.

13. On 24 October 2018, Mr. Wilson filed a motion to introduce additional evidence, appending two documents. He stated that the new evidence, which had come to his attention on the same date (24 October 2018), showed that the selected candidate, Ms. SS, had been unlawfully placed on the roster before being selected for the relevant position, and she had been improperly favoured during the selection process for the JO as a rostered applicant.² On 19 November 2018, he filed another motion to introduce further additional evidence, appending the e-mail exchanges among an Administrative Officer of OICT, a Human Resources Officer of the Office of Human Resources Management and the CITO, all dated 14 September 2016. Mr. Wilson indicated that this evidence had come into his possession only on 16 November 2018.

14. The Dispute Tribunal rejected Mr. Wilson's motions of 24 October 2018 and 19 November 2018 for leave to introduce additional evidence, "which appear[ed] to refer to additional procedural irregularities",³ on the ground that no additional submission and/or evidence were permitted into the record, after the parties had filed their closing submissions on 2 April 2018.

15. On the merits, the Dispute Tribunal granted Mr. Wilson's application and ordered the rescission of the contested decision not to select him for the JO. The UNDT determined that the contested decision was unlawful for three main reasons:

- A) During the screening review, the CITO, as the hiring manager, erred in finding that Ms. SS' Master's degree in public administration was related to, and therefore relevant for, any of the required specifically mentioned areas (computer science, information systems, mathematics, statistics) and wrongly determined that she fulfilled the educational requirement for the JO. There was no evidence that Ms. SS held a first-level university degree in any of the above-mentioned areas, which could have replaced the required Master's degree, together with qualifying work experience;

² Mr. Wilson sought to introduce into evidence an e-mail from the Executive Officer, DM to the CITO, dated 1 June 2016 and an e-mail from Ms. SS to the CITO, dated 14 June 2016.

³ Impugned Judgment, para. 82.

- B) In addition, during the screening review for the JO, the CITO erred in finding that Ms. SS exceeded the requirement of working experience by introducing an additional criterion of field experience, which was not included in the said JO, calling it “crucial” and using it to assess only Ms. SS’ candidacy but not others’; and
- C) The CITO was not impartial, in light of the report of the Ethics Office dated 3 May 2017, which indicated on the basis of the testimonies during the Ethics Office’s investigation that the CITO harbored antagonism towards Mr. Wilson and had tried to undermine his career. In the view of the Dispute Tribunal, the CITO “should have recused herself because of her previous statement regarding [Mr. Wilson]”.⁴

16. The Dispute Tribunal thus concluded that all those irregularities not only ran counter to the requirements found in the Hiring Manager’s Manual (version 3.0, October 2012), but also violated Mr. Wilson’s fundamental rights to be fully and fairly considered for the JO and to have an equal opportunity to be promoted to an appropriate higher level, pursuant to the United Nations Charter and the International Covenant on Economic, Social and Cultural Rights.

17. As remedies, the Dispute Tribunal ordered the Secretary-General to rescind the contested decision and “to restart the selection process by conducting a *de novo* full and fair evaluation, including a new comparative analysis of the rostered candidates which fulfill all the requirements for the post, as detailed in the Job Opening”.⁵ The Dispute Tribunal ordered this special remedy due to the particular circumstances of the case: (a) Ms. SS’ failure to meet the educational requirement for the JO; (b) the application by the CITO of the additional criterion of “field experience”, which was not included in the JO and applied only to Ms. SS’ candidacy and not to others; (c) evidence of a strong bias by the CITO against Mr. Wilson; and (d) Mr. Wilson’s significant chance of selection for the JO. The UNDT recommended that the new assessment exercise should be conducted by a different hiring manager. As an alternative to rescinding the contested decision and restarting the selection process, the Dispute Tribunal ordered the Secretary-General to pay Mr. Wilson three months’ net base salary.

⁴ *Ibid.*, para. 79.

⁵ *Ibid.*, para. 92(a) (Italics in original).

Submissions

The Secretary-General's Appeal

18. The Administration properly conducted the selection exercise for the JO in accordance with the applicable legal framework. Ms. SS had already been rostered from a 2015 selection exercise for a similar position, Chief of Service for Strategic Information and Communication Technology Management, at the D-1 level.⁶ The CITO therefore reasonably decided that the candidates from the 2015 roster could be reviewed for the 2016 selection exercise given the similarity in positions. The procedures set out in Administrative Instruction ST/AI/2010/3 (Staff selection system) were properly followed. Nothing in the assessment of the candidates shows any evidence of discrimination or bias against Mr. Wilson.

19. The Dispute Tribunal erred in requiring that the first-level university degree had to be in the same field as the one for the advanced university degree and exceeded its jurisdiction in concluding that Ms. SS did not meet the education requirement. The JO called for a range of functions, not simply those related to computer science or information systems; it included reporting to governance bodies and management of procurement and human resources. The JO did not specify anything with regard to the nature of the first-level university degree. Nothing in the JO forbade the CITO from selecting someone with a first-level university degree and an extensive professional experience in the field required for the position. Indeed, the education requirement for the JO for which Ms. SS was rostered was “substantially similar” to that of JO 63461.⁷ Moreover, the central review body that cleared Ms. SS for the 2015 exercise was chaired by Mr. Wilson.

⁶ In his answer, Mr. Wilson includes a table showing JO 41653 for which Ms. SS had been rostered in a 2015 selection exercise and JO 63461 for a side-by-side comparison. According to the table, the job title for JO 41653 was “Chief, Strategic Management Service”, and not “Chief of Service for Strategic Information and Communication Technology Management”, as stated by the Secretary-General in his appeal. Moreover, the job title for JO 63461 was “Chief of Service, Information Technology Resource Management”, and not “Chief of Service, Strategic Information and Communication Technology Management”, as presented by the Secretary-General in his appeal.

⁷ According to the table included in Mr. Wilson’s answer, the “Education” section for JO 41653 read:

Advanced university degree (Master’s degree or equivalent) in IT related field, such as computer science/engineering, mathematics, business administration or related field is required. A first-level university degree in combination with two additional years of qualifying experience may be accepted in lieu of the advanced university degree. [Information Technology Infrastructure Library (ITIL)] foundation certification is required. [Presumably, Pointwise Mutual Information (PMI)], Prince 2 Foundation or an equivalent license is desirable.

20. The Dispute Tribunal exceeded its jurisdiction and erred in finding that an additional criterion had been used to evaluate Ms. SS. As is clear from her evaluation, the CITO did not focus solely on Ms. SS' field experience. She validly evaluated Ms. SS' experience in relation to the responsibilities enumerated in the JO. She did not use any additional criterion to evaluate Ms. SS' experience, but simply reviewed her experience as a whole, no matter where she might have gained it. Moreover, it is undeniable that the Organization's work in field missions is a significant component of its mandate.

21. The Dispute Tribunal erred in law in finding that the CITO had shown evidence of bias during the selection process. While the Ethics Office concluded that Mr. Wilson's report of irregularities in a selection process constituted a protected activity, it did not make any findings with regard to the allegations of bias on the part of the CITO against Mr. Wilson. The excerpts of the report of the Ethics Office do not constitute proper evidence of bias on the part of the CITO. Neither do they provide the full picture and cannot constitute reliable and credible evidence of bias.

22. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Mr. Wilson's Answer

23. The Secretary-General has failed to establish any of the five grounds of appeal set forth in Article 2(1) of the Appeals Tribunal Statute. He has merely proceeded to relitigate the same issues and facts that were adjudicated by the Dispute Tribunal.

24. Throughout the process, the Administration has repeatedly lied, misrepresented facts and suppressed key evidence. For instance, the CITO lied to the MEU that JO 41653 and JO 63461 contained identical requirements, on the basis of which the MEU upheld the contested decision. During the UNDT discovery phase, the Secretary-General suppressed key evidence, which proved that Ms. SS had been favoured and the outcome was predetermined. Mr. Wilson was provided such evidence only in October and November 2018 after the 2 April 2018 closing arguments. In his appeal, the Secretary-General falsely represented that the job titles for JO 41653 and JO 63461 were similar when they had completely different functions, responsibilities and

For the education requirement for JO 63461, see paragraph 4 above.

evaluation criteria. Moreover, he ignored Mr. Wilson's courtesy alert and did not correct the error.

25. The question as to whether the selection exercise for the JO had been properly conducted cannot be properly answered without access to all the pertinent documentation, including the evidence that was improperly withheld by the Secretary-General. The Dispute Tribunal erred in refusing to admit the evidence that Mr. Wilson discovered in October and November 2018 and that he promptly submitted to the Dispute Tribunal prior to the issuance of its Judgment. The Secretary-General has not denied or refuted this evidence. The Appeals Tribunal should admit this evidence in light of the exceptional circumstances pursuant to Articles 2(5) and 8(1) of the Appeals Tribunal Statute as it confirms Mr. Wilson's contention that the selection outcome had been predetermined before the rostered candidates were evaluated. There can be no defense of discretion to blatantly violate the Staff Regulations and Rules, nor can there be any presumption of regularity when the outcomes of selection cases have been predetermined with manipulation and favouritism.

26. Regarding the process of the Ethics Office, the witness statements were provided to the Ethics Office in person followed by written signed statements. The witnesses' names and functional posts were not disclosed in order to protect them. But the Dispute Tribunal could have subpoenaed them to testify and for cross-examination by the Secretary-General. However, the Secretary-General did not request such a procedure, nor did he move for the production of the full Ethics Office report. Now before the Appeals Tribunal, the Secretary-General merely repeats the same arguments that were rejected by the Dispute Tribunal. If the Appeals Tribunal considers that the UNDT committed a reversible error by not ordering the production of the full Ethics Office report nor identifying the witnesses into evidence, this is not the grounds for determining that there was not bias on the part of the CITO against Mr. Wilson. It would solely be the grounds for remanding the case to the Dispute Tribunal.

27. The Secretary-General repeats and reargues the merits of the present case without citing any relevant legal basis in support. Disagreement with the findings of the Dispute Tribunal is not a legal ground for an appeal. The Secretary-General has put forward some arguments that are the exact opposite of his position before the Dispute Tribunal in other cases.⁸

28. The Dispute Tribunal correctly determined that Ms. SS did not meet the education requirements for the JO. The necessity for rostered candidates to meet the requirements of the JO had been specifically included in the application confirmation notice. Just because an applicant had been placed on a roster for a previously advertised JO does not mean that s/he does not need to strictly meet all of the evaluation criteria included in a subsequent JO where the responsibilities and evaluation criteria are different. In the present case, JO 41653 for which Ms. SS had been rostered and JO 63461 for which she was selected were not “substantially similar”, as claimed by the Secretary-General, and certainly not “identical”. In this regard, the Secretary-General is again making arguments that are the complete opposite of his position in other cases before the Dispute Tribunal.⁹

29. Mr. Wilson requests that the Appeals Tribunal dismiss the Secretary-General’s appeal in its entirety.

Considerations

Motion to withdraw cross-appeal

30. On 17 May 2019 Mr. Wilson filed a motion for withdrawal of his cross-appeal as a “full, final and entire withdrawal of the Cross-Appeal, including on the merits, with no right of reinstatement”. The Secretary-General advised that he had no comments on the motion.

⁸ As examples, Mr. Wilson refers to *Smoljan v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/104, para. 31 (not appealed) and *Zillner v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/079, para. 41 (not appealed).

⁹ Mr. Wilson cites *Cicek v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/043, which was upheld by the Appeals Tribunal in Judgment No. 2016-UNAT-636. In para. 55 of that judgment, the UNDT concluded that “the Organization is obliged to ensure that candidates fully meet a JO requirements [sic]. It is also obliged, as a matter of principle, to exclude those who do not fully meet those requirements, even if they are internal candidates and not far from meeting them.”

31. The Appeals Tribunal has consistently held that “a party may withdraw an appeal simply by giving notice and need not necessarily provide any further justification”.¹⁰ The same rationale applies to a party’s withdrawal of a cross-appeal.

32. Accordingly, the motion is granted and Mr. Wilson’s cross-appeal is stricken from the record.

The merits

33. The central issues in this case are whether the Administration properly conducted the selection exercise for the JO in accordance with the applicable legal framework, and whether the selection process was tainted by bias. These are factual determinations, which, without the relevant evidence, cannot be made.

34. It is clear from the record that the UNDT did not consider the whole of the evidence in arriving at its decisions. Its determination of the facts is therefore unsustainable given the lack of a full and proper examination of the evidence.

35. The principal allegations raised by Mr. Wilson were procedural irregularities during the selection process and bias of the hiring manager. Mr. Wilson submitted to the UNDT that further evidence on these issues was available. He provided additional documents in October and November 2018 but the UNDT refused to admit them. Even though the UNDT acknowledged that there were “additional procedural irregularities”, it did not seek any evidence thereof but chose to base its decision on a limited factual foundation.¹¹

36. The UNDT based its finding of bias on selected extracts of a report from the Ethics Office. These selected extracts did not positively establish any bias and did not explain how, if at all, the potential bias to which it referred was connected to the selection process. The excerpts had very little evidentiary value in the absence of the whole report. Yet, the UNDT made no enquiry in this regard.

¹⁰ *von der Schulenburg v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-515, para. 12, quoting, *inter alia*, *Chowdhury v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-441, para. 13.

¹¹ Impugned Judgment, para. 82.

37. It follows that certain facts remain unresolved at the UNDT level, not only in respect of the findings of the Ethics Office, but also in respect of the allegations of procedural irregularities and suppression of key evidence by the Secretary-General.

38. The need for factual determinations based on the whole of the relevant evidence requires the case to be remanded to the UNDT for a rehearing *de novo* pursuant to Article 2(3) of the Statute of the Appeals Tribunal.

Judgment

39. Judgment No. UNDT/2018/136 is vacated and the case is remanded to the Dispute Tribunal for a full consideration of its merits by another Judge.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Murphy

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar