



**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

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

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 be

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

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.

