UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2011-216

Finniss

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Kamaljit Singh Garewal, Presiding Judge Luis María Simón Judge Mary Faherty
Judgment No.:	2012-UNAT-210
Date:	16 March 2012
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant:	Katya Melluish/Seth Levine
Counsel for Appellant/Respondent:	Wambui Mwangi

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by the Secretary-General of the United Nations on 2 June 2011 against Judgment No. UNDT/2011/060 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 31 March 2011 in the case of *Finniss v. Secretary-General of the United Nations*. FP filed an application for intervention on 18 July 2011. On 21 July 2011, Mr. Finniss filed an answer to the Secretary-General's appeal. He subsequently also filed a response to FP's application for intervention.

2. Mr. Finniss challenged his non-selection for a P-5 post before the UNDT. At the hearing the UNDT examined three witnesses, but did not keep a record of their testimonies. We hold that this failure has resulted in a mistrial of the case before the UNDT. The UNDT Judgment is set aside and the case is remanded for a fresh decision by a different judge. The application for intervention is disallowed.

Facts and Procedure

3. Mr. Finniss joined the Organization in November 2004 as Chief Resident Investigator with the Investigations Division, Office of Internal Oversight Services (ID/OIOS), in the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC). In September 2005, he was redeployed as Regional Coordinator of ID/OIOS to the United Nations Office at Nairobi (UNON). He was appointed Acting Operations Manager of Unit 2 of ID/OIOS, UNON, in February 2006. On 1 May 2006, Mr. Finniss received a fixed-term appointment at the P-4 level.

4. On 25 January 2008, a vacancy announcement (VA) was circulated for the post of Senior Investigator at the P-5 level with the New York Office of ID/OIOS (New York post). Mr. Finniss applied and was interviewed by a three-member Interview Panel. His name was included in the list of four recommended candidates that the Interview Panel submitted to the OIOS Review Board. On the basis of the advice of the OIOS Review Board, the Under-Secretary-General for OIOS (USG/OIOS) decided to select a candidate other than Mr. Finniss to fill the New York post. Mr. Finniss was placed on the roster of the

pre-approved candidates. The OIOS Executive Office informed Mr. Finniss of his non-selection for the New York post on 23 October 2008.

5. On 22 October 2008, another VA was circulated for the post of Senior Investigator at the P-5 level with the Vienna Office of the ID/OIOS (Vienna post). Mr. Finniss applied, took a written test and was interviewed by a three-member Interview Panel. The Interview Panel submitted a list of three recommended candidates, including Mr. Finniss, to the OIOS Review Board. On the basis of the advice of the OIOS Review Board, the USG/OIOS chose a candidate other than Mr. Finniss to fill the Vienna post. Mr. Finniss was placed on a roster of pre-approved candidates. The OIOS Executive Office informed Mr. Finniss of his non-selection for the Vienna post on 7 April 2009.

6. Mr. Finniss initiated two appeal proceedings,[1] one on 24 October 2008 and the other on 12 April 2009, against the decisions not to promote him to either the New York post or the Vienna post.[2] His appeals were transferred to the UNDT in Nairobi following the abolition of the Joint Appeals Board.

7. In Judgment No. UNDT/2011/060, in which both of Mr. Finniss' appeals were consolidated, the UNDT concluded that the decision with respect to the New York post "was unlawful as the selection process was tainted by prejudice", and the decision with respect to the Vienna post was "unlawful in that the Respondent was unable to prove that [Mr. Finniss'] candidacy had been fully and fairly considered". The UNDT also concluded that "there was a failure of procedure and a violation of [Mr. Finniss'] rights during both selection exercises". The UNDT ordered that Mr. Finniss be awarded compensation in the amount of 18 months' current net base salary for the "illegal action of the PCO [Programme Case Officer], [FP], which resulted in his candidacy not being given the full and fair consideration it deserved" during the selection process for the New York post. In addition, the UNDT ordered that Mr. Finniss be compensated in the amount of six months' current net base salary for the violation of his right to full and fair consideration during the selection process for the Vienna post.

[1] In connection with his non-selections, Mr. Finniss also filed a third appeal from a decision not to pursue his complaint against another staff member as a disciplinary matter. He subsequently withdrew that appeal.
[2] In October 2009, another VA was circulated for the P-5 post of Senior Investigator with UNON. Mr. Finniss was selected for this post from a roster of pre-approved candidates.

8. The UNDT criticized FP for his "appalling conduct" and for his harboring prejudice against Mr. Finniss, which prejudice was transferred into the selection process to Mr. Finniss' detriment. The UNDT also criticized the other two members of the Interview Panel for their "lackadaisical attitudes" and for having "allowed [FP]... to drive the process to the detriment of [Mr. Finniss]".

9. On 6 May 2011, the Representative of the Secretary-General requested a one-month extension of the deadline for filing an appeal as she was waiting for the UNDT Registry to provide the typed notes of the oral evidence. By Order No. 49 (2011) dated 12 May 2011, Judge Garewal, Duty Judge, granted an extension of 20 days from the day on which she would receive the requested record from the UNDT Registry. Judge Garewal considered that, while his representatives were present at the oral proceedings, the Secretary-General was entitled to the record of the testimonies made at those proceedings from the relevant UNDT Registry.

10. On 13 May 2011, the Registrar of the UNDT informed the Representative of the Secretary-General of "the decision of the Tribunal not to share the said notes".

Submissions

Secretary-General's Appeal

11. The Secretary-General submits that the UNDT erred in law in establishing the burden and standard of proof in cases alleging discrimination. On the basis of Mr. Finniss' vague allegations and its broad reading of a judgment from a national jurisdiction, the UNDT concluded that it was entitled to infer improprieties in a staff selection process, even in the absence of clear and convincing evidence adduced by Mr. Finniss. Such an approach is at odds with the unambiguous jurisprudence of the Appeals Tribunal on the need for clear and convincing evidence to support allegations of discrimination, bias or other improper motives in a selection process.

12. The Secretary-General also submits that national laws and jurisprudence are not applicable to the United Nations. Regarding the standard of proof in cases alleging discrimination, there is no gap in the internal administrative law of the Organization. The Appeals Tribunal has consistently held that the staff member bears the burden of proving his or her allegations of discrimination by a preponderance of the evidence.

13. The Secretary-General further submits that the UNDT erred in fact and law or exceeded its competence in concluding that the selection process for the New York post was tainted by prejudice and was not conducted in conformity with administrative instruction ST/AI/2006/3; that the PCO harboured prejudice against Mr. Finniss; that the PCO was allowed to drive the selection process to the detriment of Mr. Finniss; that the Interview Panel's determination of an otherwise ineligible candidate's eligibility demonstrated its bias and prejudice towards Mr. Finniss; that the Interview Panel deliberately downgraded Mr. Finniss for improper reason; and that Mr. Finniss was not fully and fairly considered for the Vienna post.

14. The Secretary-General maintains that the UNDT exceeded its competence and erred in law and fact in awarding Mr. Finniss a total of 24 months' net base salary as compensation. Although Mr. Finniss was ultimately not selected, the UNDT did not find any error or impropriety with the final decisions taken by the USG/OIOS. Nevertheless, the manner in which the UNDT calculated the compensation for Mr. Finniss far exceeded the permissible parameters set by the Appeals Tribunal in *Hastings*.[3]

15. The Secretary-General avers that the UNDT's refusal to provide the Secretary-General with any record of the oral proceedings when the UNDT had relied extensively on oral testimony to reach its conclusions gravely compromises his right to appeal.

Mr. Finniss' Answer

16. Mr. Finniss submits that the UNDT did require him to prove that he was the victim of discrimination which caused him prejudice on the balance of probabilities or preponderance of the evidence. It is for the UNDT, and not the Secretary-General, to decide whether or not the evidence is "clear and convincing". This is clearly not an appropriate ground of appeal. It is an abuse of the process for the Secretary-General to seek to re-litigate the case in a different forum. It is not the role of the Appeals Tribunal to reconsider the evidence except where the UNDT's decision is shown to be manifestly unreasonable. The appeal should thus be dismissed out of hand. The fact that the UNDT was unable to find a particular aspect of Mr. Finniss' case proved to the requisite standard demonstrates that it carefully considered all the evidence, and only drew conclusions where there was sound evidence upon which it

[3] *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011- UNAT-109.

could rely. If the UNDT departed from the usual formulation of the standard and burden of proof, it did so only in so far as it had regard to the particular evidential difficulties raised by discrimination cases.

17. Mr. Finniss also submits that there is no provision in either the Statute or the Rules of Procedure of the UNDT for recording or transcribing the proceedings before the UNDT. Mr. Finniss states that the Secretary-General does not explain why his right to appeal was compromised by his lack of a transcript of the UNDT oral proceedings. Counsel for Mr. Finniss took and retained the notes of proceedings and used them to prepare closing submissions. It should be assumed that the counsel for the Secretary-General did the same.

18. Mr. Finniss maintains that while he alleges a number of errors of fact, the Secretary-General has failed to argue that those factual errors resulted in a manifestly unreasonable decision. Indeed, none of the errors alleged by the Secretary-General are sufficiently significant to have a direct impact on the ultimate decision of the UNDT.

Application for Intervention by FP

19. FP submits that, while he was not a party to the UNDT proceedings and therefore had no notice and opportunity to appear and defend himself, the UNDT referred to him by name in Judgment No. UNDT/2011/060 impugning his character and professionalism and causing damage to his reputation.

20. It is unnecessary for the UNDT to use FP's name. It should have used his initials or other redacted references, as it did with other persons it identified only as "MO" and "AM". The UNDT Judgment therefore breached Article 12 of the Universal Declaration of Human Rights, which states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

21. FP requests that the UNDT Judgment be vacated; and that Judgment UNDT/2011/060 be removed from the UNDT website and all other public records, or be reissued with his name redacted. FP also requests that the case be remanded to the UNDT for a new hearing in which he be given an opportunity to be heard in order to protect his reputational interests. FP further requests that the Appeals Tribunal order payment of compensation for his costs and attorney fees in pursuing his application for intervention.

Mr. Finniss' Comments on FP's Application for Intervention

22. Mr. Finniss maintains that FP's application for intervention should not be entertained. The alleged damage to his reputation is not a triable interest. The UNDT Judgment and its publication are protected by absolute privilege.

23. Mr. Finniss submits that, if FP is permitted to intervene, Article 10(8) of the UNDT Statute under which the UNDT may refer his "appalling" conduct to the Secretary-General for possible action to enforce accountability would have no force.

Considerations

On intervention

24. It has been pointed out, at the beginning of the explanatory statement of the application for intervention, that the damages alleged by FP supposedly come from some of the conclusions and terms expressed in the UNDT Judgment under appeal. The Judgment has not acquired the status of res judicata precisely because an appeal has been submitted by one of the parties.

25. Theoretically speaking, if the Judgment is vacated, no prejudice against FP will exist, because the conclusions in the Judgment would stand legally substituted by the conclusions in the appellate judgment. If the Judgment is affirmed, its conclusions about the wrong-doing of the management, including FP's conduct as the PCO during the impugned selection process, could not be considered harmful for him, as responsible for the administrative misconduct, irrespective of the language and style used by the Judge.

26. Therefore, we do not find that the Judgment, when final, could be considered unlawful or in breach of FP's individual rights within the meaning of Article 12 of the Universal Declaration of Human Rights.

27. It must be taken into account that whenever an administrative decision is impugned, the administrative acts of the staff member involved can be subject to examination and may be commented upon in a positive or negative way. This is a natural consequence of being a staff member of an international organization like the United Nations, exercising public

functions which are subject to public disclosure, analysis, discussion and evaluation, precisely because of the public nature of the duties.

28. Transparency of activities of public servants and their accountability determine that their work can be open to criticism and their personal rights to intimacy, honour or reputation are not affected. Hence, there are no grounds to allow FP to intervene because he is not a party to the case and the Judgment does not affect his rights as a staff member; it only refers to his duties as a public servant.

29. A staff member's right to be heard and to defend himself of any accusation of wrong-doing can be exercised when the administrative or judicial proceedings involve him directly. In such cases the staff member could intervene, for example, if he is the beneficiary of the impugned administrative decision and the rescission of the decision could directly impact his rights as a staff member.

30. For the foregoing reasons, this Tribunal holds that the application for intervention does not fulfill the requirements of Article 6(2) of the Statute of the Appeals Tribunal and Article 16 of its Rules of Procedure.[4]

On merits

31. Coming to the merits of the appeal, a question of some complexity must be addressed at the outset. As there is no written record of the testimonies of the witnesses examined by the Dispute Tribunal, namely DN (another candidate), MD (one of the Interview Panel members) and Mr. Finniss, the Secretary-General claims that he has not been able to effectively prepare his appeal. The lack of a written record of witness statements has also seriously affected our ability to decide on the present appeal.

[4] Article 6(2) of the Statute of the Appeals Tribunal reads: "(f) Intervention by persons not party to the case whose rights may have been affected by the judgement of the Dispute Tribunal and whose rights might therefore also be affected by the judgement of the Appeals Tribunal". Article 16 of the Rules of Procedure of the Appeals Tribunal provides: "(1) Any person for whom recourse to the Appeals Tribunal is available under article 6.2 (f) of the statute may apply to intervene in a case at any stage thereof on the grounds that his or her rights may have been affected by the judgement of the Dispute Tribunal and might, therefore, be affected by the judgment of the Appeals Tribunal."

32. How did this situation come about? Let us examine the background. Mr. Finniss was a candidate for two P-5 posts. The PCO was FP. Mr. Finniss' case was that his candidature was not fully and fairly considered since the PCO harboured animosity towards him.

33. The UNDT examined Mr. Finniss, DN and MD, but it did not examine the PCO. The UNDT did not keep a written record of the testimonies of these witnesses. However, reference was made to what some witnesses stated and passages of their statements were quoted. Some very scathing remarks were also made against the PCO.

34. It was all very well for the UNDT to keep notes of the evidence and rely on those notes to draft the Judgment. But the notion of justice and fair trial mandates that witness statements shall form part of the case records. This is particularly important if the Judgment is appealable and heavy reliance has been placed on what the witnesses said before the UNDT.

35. In an appeal before us the appellant has to confine his or her case to the five grounds mentioned in Article 2(1) of the Statute of the Appeals Tribunal, including committing an error in procedure.

36. The UNDT Judgment was pronounced on 31 March 2011. After obtaining a copy of the Judgment, the Secretary-General contemplated filing an appeal, but he was handicapped by the absence of the record of the testimonies. The Representative of the Secretary-General contacted the UNDT Registry on 13 April 2011 in this regard and was informed that there were no audio-recordings of the proceedings, but the UNDT Registry would provide typed notes of the oral evidence.

37. The Secretary-General then requested a one-month extension of the time limit to file an appeal. We granted the extension request in part and ordered the Secretary-General to file an appeal within 20 days from the date on which he received the requested record from the UNDT Registry.

38. Anyhow, no record of witness testimonies was handed over to the Secretary-General, and no record has been made available to us. There has been a complete mistrial of the case. The UNDT relied heavily on witness statements and quoted extensively what they said in paragraphs 58, 70 and 72 of the Judgment.

39. While appraising the testimony of a witness, this Tribunal is entitled to examine the complete statement of the witness in order to form a balanced view on his or her credibility before deciding whether the evidence can be accepted. This cannot be done in the absence of the written record. Therefore, there has been a grave error of procedure.

40. We are also of the view that, in the absence of a written record of testimonies, we cannot confirm if the procedure under Article 17 (Oral Evidence) of the Rules of Procedure of the Dispute Tribunal was complied with. It appears that the three witnesses were examined by the UNDT, not at the instance of Mr. Finniss, but on its own motion. We are also unable to confirm if the witnesses made a declaration under Article 17(3) of the Rules of Procedure of the Dispute Tribunal before giving their statements. We are furthermore unable to confirm if the witnesses were cross-examined by the opposing party under Article 17(1) of the said Rules of Procedure. In the absence of any written record nothing is clear about the procedure followed by the UNDT.

41. In view of the above, we set aside the UNDT Judgment. The case is remanded to the UNDT for a fresh hearing based on the pleadings already on record. The parties shall be provided the opportunity to call witnesses. The testimony of the witnesses shall be reduced to writing after they make a declaration. The Presiding Judge may put questions to the witnesses. The UNDT President shall nominate some other judge to hear and decide the case.

42. Before parting we are constrained to observe that the UNDT used intemperate language while describing certain actions and conduct of witnesses and the PCO. It also named them in the Judgment. This was unfortunate and unnecessary. The names of the witnesses and the PCO shall be redacted from the impugned Judgment.

Judgment

43. The UNDT Judgment is set aside. The case is remanded to the UNDT for a fresh hearing and decision by a different judge based on the pleadings already on record in a manner consistent with this Judgment.

Original and Authoritative Version: English

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

(*Signed*)	(*Signed*)	(*Signed*)
Judge Garewal, Presiding	Judge Simón	Judge Faherty

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

(*Signed*)

Weicheng Lin, Registrar