



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

Judgment No. 2014-UNAT-397



**Finniss
(Respondent/Applicant)**
v.
**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Richard Lussick
Judge Rosalyn Chapman

Case No.: 2013-445

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Alexandre Tavadian

Counsel for Appellant/Respondent: Rupa Mitra

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/200, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 19 December 2012 in the case of *Finniss v. Secretary-General of the United Nations*. The Secretary-General of the United Nations appealed on 19 February 2013 and Mr. James Finniss answered on 18 April 2013.

Facts and Procedure

2. The following findings by the UNDT are uncontested:¹

... James Finniss entered into service with the Organization in November 2004 as Chief Resident Investigator (“CRI”) of the ID/OIOS [Investigations Division, Office of Internal Oversight Services] in the United Nations Organization Mission in the Democratic Republic of the Congo. He remains in the Organization at the date of this judgment. Mr. Finniss['] performance has been consistently rated as “Frequently exceeds performance expectations”.

... He has a background of over 20 years of investigatory experience in the Australian Police Force. He received two years training as a Police officer and following a graduate programme focusing on fraud investigation, obtained a Master’s in Business Administration (“MBA”).

... In September 2005, Mr. Finniss was redeployed as Regional Coordinator of the ID/OIOS Regional Office in the United Nations Office at Nairobi (“UNON”) to facilitate the implementation of General Assembly Resolution 59/287 which expanded the mandate of the investigation unit to include the investigation of Sexual Exploitation and Abuse (“SEA”).

... The role of the OIOS is to investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances, and to transmit the results of these investigations to the Secretary-General. These results together with appropriate recommendations guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken. The OIOS Investigations Division assists the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization.

... At the material time, the Investigations Division comprised the offices of the Director in New York, the Deputy Director in Vienna and three regional offices in

¹ Judgment No. UNDT/2012/200, paras. 22-67 and 3-11 (footnotes omitted).

New York, Vienna and Nairobi. Each regional office was managed by a P-4 Operations Manager and was designated as a Unit.

... In February 2006, Mr. Finniss was appointed Operations Manager - Unit 2 of ID/OIOS which gave him management responsibility for the day-to-day operations of ID/OIOS in Africa and Haiti. On 1 May 2006, he was granted a Fixed-Term Appointment at the P-4 level. At that time the Unit 3 Operations Manager in New York was Mr. Florin Postica. The Unit 1 Operations Manager was located in Vienna.

... The responsibilities of each of the Regional Operations Managers were the same although the functions varied because of the nature of the work generated by each duty station. For example, as the UNON office had responsibility for peacekeeping its investigation workload was significantly greater than the other regions and the Operations Manager was tasked with providing briefings on African matters to Headquarters. In New York the Operations Manager was given responsibility for requests from the then Administrative Law Unit ("ALU") and for providing information from the Investigations Division for the preparation of annual reports.

... At that time, ALU was responsible for checking investigation reports submitted from investigators at the three duty stations. In May 2006 Mr. Postica was asked by the then Deputy Director OIOS to advise ALU to submit all requests through him so that he could coordinate them. In an email dated 11 May 2006 she advised the three Operations Managers that Mr. Postica's new function was to contact the assigned investigator to follow up on any issues the investigator may have regarding the sharing of the requested documents. In the same email she expressed her concerns to the Operations Managers about the quality of some of the material in the case files prepared by investigators.

... On 13 May 2006 the Deputy Director OIOS told all staff in the ID that Mr. Postica and another had been designated as ID liaison for the preparation of the 2006 OIOS annual report. Apart from these documented changes there was no alteration to the reporting lines from investigators to Operations Managers to the Deputy Director.

... From August 2006 a new person was appointed as Officer in Charge ("OIC") of ID and shortly after that relationship between the new OIC/ID and the Deputy Director in Vienna became fractious. Only a month or so after his appointment, the correspondence between them had become angry and personalised.

... In June 2007 a critical report entitled "Review of the OIOS Investigations Division, United Nations" by Erling Grimstad ("Grimstad Report") was submitted to the Under-Secretary-General OIOS ("USG/OIOS"). A number of the witnesses at the hearing who had read the report agreed that, in general, its conclusions about certain topics were accurate. They particularly agreed about the extent of the management problems and conflicts among ID managers, the mismanagement of staff and the

ongoing conflict at the management level involving mainly the Deputy Director in ID/OIOS Vienna office and the Acting Director at Headquarters in New York.

... The Tribunal heard evidence of similar problems and behaviours which continued after the release of the Grimstad Report. Mr. Postica told the Tribunal that the conflict between the Deputy Director and the Acting Director was a serious impediment to the work being done in the OIOS.

... Although their communications were almost exclusively by phone or email and they seldom if ever met in person, the relationship between Mr. Finniss and Mr. Postica was similarly problematic. One of the main areas of difference between them identified at the hearing was a conflict about the extent of Mr. Postica's responsibility over Mr. Finniss' work following the change to his functions in May 2006. Mr. Postica denied that he had overreached his responsibility in his communications to Mr. Finniss and told the Tribunal that he acted in his professional duty to comply with instructions.

... Whatever the merits of the dispute between Mr. Postica and Mr. Finniss, the animosity between them is evident from the numerous and complex email threads that passed between them during 2006 and 2007, many of which were copied to others including their supervisors.

... This animosity came to a head in April 2007 when Mr. Finniss expressed his displeasure at Mr. Postica in an email to the then Deputy Director, ID Vienna Office dated 5 April 2007 which was copied to Mr. Postica and all the team leaders in Unit 2 as well as to the then Acting Director, ID. In that email Mr. Finniss said that he was extremely disappointed by the tone, tenor and insulting nature of an email Mr. Postica had sent him. He alleged he had sought to elicit a more collegiate and collaborative approach from Mr. Postica but any professional rapport was short lived.

... On 14 April 2007 Mr. Postica wrote to Mr. Finniss "I will not respond to the personal attacks contained in the malicious piece of fiction below..." and "Finally, I started my career twenty-two years ago as a Prosecutor, and since then nobody insulted me more..."

... The correspondence was finally closed down by an order from the then Acting Director OIOS on 16 April 2007. In his email he stated:

Dear Colleagues,

This is to close firmly the chapter on vitriolic public exchanges and encourage all to focus at work at hand.

This is also to discourage strongly the deliberate efforts to misconstrue any pragmatic and specific criticism of substandard performance or management style as insult, humiliation, denigration, defamation and such.

That the quality of draft reports submitted for my signature leaves much to be desired is a fact, not fiction. Why this is happening after they went through at least 5 levels of scrutiny before landing on my desk is mystery inside enigma to me.

I believe we would be all better off by focusing on solutions to this mystery rather than looking for insults and excuses.

Please no more broadcasts in the style of World War II propaganda.

I should appreciate more focus on the job to be done.

I don't anticipate any response to this message. I have too much work on my plate.

... The reasons for and the merits of the dispute between the two Operations Managers are not directly relevant to the claim before the Tribunal but the resulting ill feeling between them is relevant to the issue of bias.

... Mr. Postica told the Tribunal that he had discussed this exchange with the then Acting Director, ID and other investigators who told him that they had never seen him as upset before. He said the allegations made by Mr. Finniss hurt him greatly and personally and he remained upset at the memories of it. This statement and the tone of the emails were in contrast to his adamant denials during his evidence that the conflicts between him and Mr. Finniss were acrimonious and personalised.

... The Tribunal finds, as a matter of fact, that although the disagreements between the two concerned professional matters, the manner in which they dealt with them was personalised and acrimonious. Both descended to personal attacks and retaliations. This animosity was symptomatic of the unhealthy environment described in the Grimstad Report, which prevailed in the OIOS at that time.

The vacancy and selection process for the New York Post

... Mr. Finniss applied for the New York Post on 2 February 2008. The competencies, education and work experience required for the post were as follows:

Competencies

1) Professionalism: Expert knowledge, understanding and experience in the field of corruption, fraud and financial crime investigations; experience as a criminal prosecutor with a national, governmental or international law enforcement authority proven ability to, supervise complex serious financial Investigations, produce reports and review and edit the work of others; ability to interview witnesses in complex white collar cases. 2) Communication: Excellent drafting ability- and communication skills (spoken and written); proven ability to communicate complex concepts orally; ability to prepare written reports that are clear, concise and meaningful. 3) Technological awareness: fully proficient computer skill and use of relevant software and

other applications involved in criminal and administrative investigations. 4) Teamwork: Excellent Interpersonal skills and ability, to establish and maintain effective partnerships and working relations in a multi-cultural, multi-ethnic environment with sensitivity to and respect for diversity, including gender balance. 5) Accountability: Delivers outputs for which one has responsibility in accordance with ID/OIOS standard operating procedures; operates in compliance with organizational regulations and rules; supports subordinates; provides oversight and takes responsibility for delegated assignments. Managing: Leadership and supervisory skills and ability to coach, motivate, mentor and develop staff; leadership: Mature judgment and initiative, imagination and resourcefulness, energy and tact; proven ability to provide strategic direction, to plan and establish priorities for fraud and corruption investigations and analysis; proven track record of excellent management and technical leadership skills in fraud and corruption investigations. Provides leadership and takes responsibility for incorporating gender perspectives and ensuring the equal participation of women and men in all areas of work; demonstrates knowledge of strategies and commitment to the goal of gender balance in staffing.

Education

Advanced University Degree (Master's Degree or equivalent) preferably in law, or related areas of investigation. A first level university degree in combination with qualifying experience may be accepted in lieu of the advanced university degree.

Work Experience

A minimum of ten years of progressively responsible experience in professional investigatory work in law enforcement, government, national or international investigation agency, inducing criminal and/or administrative investigations, or equivalent experience in the private sector or equivalent specializing in Internal white collar fraud and/or corruption Investigations. At least 5 years of experience at the managerial level, three years' experience in international Investigations, and at least 3 years of experience as a government, national or international prosecutor strongly preferred.

... Under the then applicable rules and regulations [ST/AI/2006/3 (Staff Selection System) abolished and replaced by ST/AI/2010/3], Mr. Finnis was a 30-day candidate. He was short-listed for an interview. The interview panel comprised Mr. Postica as the Programme Case Officer ("PCO"), Mr. Michael Dudley, Deputy Director, ID/OIOS, and Mr. Uren Pillay, the then Special Assistant to the USG/OIOS.

... The interviews were conducted by telephone. Mr. Finnis was critical of the questions asked of the candidates by the interview panel. He believed they were not

suitably framed for the managerial requirements of a P-5 position for the Operations Unit.

... On this issue the Tribunal is not in a position to judge whether the questions were appropriately weighted for a P-5 post but notes that as all of the candidates who were interviewed were subjected to the same questions there could be no disadvantage to any one candidate. Additionally, once the Respondent agreed to provide the list of the questions asked and the interview panel's notes of answers to the questions at the hearing, the Applicant did not pursue the point with any vigor.

... The candidates' evaluation scores were entered into the *Galaxy* by the PCO. The *Galaxy* evaluation score sheets for four of the candidates for this selection process including Mr. Finniss were submitted to the Tribunal. Mr. Finniss received the lowest aggregate score. Another candidate, Mr. Dean Norley was scored significantly higher. Mr. Norley gave oral evidence and had no objection to his scores being discussed or identified.

... The candidates were evaluated under five headings: competencies, experience, education, languages and other skills. Each topic had a space for written comments and the last four required a numerical score. Two of the numerical scores awarded are in contention in this case: experience and education.

Experience Score

... Mr. Finniss' score for experience was 27/50. Mr. Norley scored 35 /50.

... The evidence is that Mr. Finniss had over 20 years of relevant experience for the post. Under the experience heading for Mr. Norley the panel recorded that he had "relevant investigatory experience" and "many years of experience in the Australian Police." Mr. Norley told the Tribunal that he had 16 years of experience as a police officer before his first position with the United Nations in 2008 when he was reporting to Mr. Finniss.

... Mr. Dudley accepted in his oral evidence that Mr. Norley had less years of experience than Mr. Finniss. However, Mr. Pillay said that he did not agree that Mr. Finniss had the most experience and, based on the interviews, other candidates including Mr. Norley had higher relevant work experience. He further said that as Mr. Finniss had not scored highly in the interview he could not have been the best candidate.

Education Score

... Mr. Finniss' score for education was 12/20. Mr. Norley scored 15/20.

... The evidence is that Mr. Finniss' MBA met the education evaluation criteria for the vacancy. Mr. Norley had no educational qualification relevant to this post. The interview panel noted that "Mr. Norley holds a First University degree and will obtain a Masters Degree in Management and Leadership, which are consistent with the

requirement of this position.” In so doing, it took account of a qualification that Mr. Norley had not yet attained.

... The differences in the scores were put to the members of the interview panel. Mr. Dudley told the Tribunal that Mr. Postica suggested the scores and put them to the other two panel members for their agreement. He described it as a collaborative effort. Mr. Postica, Mr. Dudley and Mr. Pillay each told the Tribunal that the numerical scores given were not just based on the Personal History Profile (“PHP”) of the candidates but on their performances at the interview. Mr. Dudley said that Mr. Finniss’ responses were not as good as they expected for the position, and he could have provided better evidence of his narrative. Mr. Postica said that he could have provided more accurate and detailed answers. On the other hand Mr. Pillay said that he gave a good interview, nothing was terrible.

... Mr. Norley and two other candidates, excluding Mr. Finniss, were recommended for selection. This list was transmitted to the Office of Internal Oversight Services Review Board (“ORB”).

... The ORB reviewed the recommendations and observed that although Mr. Finniss had not scored as highly as other candidates, he had met the competencies of the position and therefore should have been a recommended candidate. There followed several communications between the ORB and the interview panel members regarding Mr. Finniss being on the recommended list of candidates to the USG/OIOS. The first email from the ORB to Mr. Postica was dated 25 July 2008. It said:

The ORB Members are of the opinion that Mr. James Finniss meets the evaluation criteria and query why the candidate was not included into the recommended list.

... Mr. Postica replied on 28 July 2008 that the recommended candidates performed better during their interviews. Hence, they were recommended and Mr. Finniss was not.

... On 30 July 2008, Ms. Ndiaye, a member of the ORB wrote to Mr. Dudley advising that the ORB did not support Mr. Finniss’ exclusion from the recommended list, since it seemed that he has been found to meet all the requirements for the post. It required a “more convincing explanation as to why he is not recommended in spite of apparently meeting the criteria evaluation.”

... On 30 July 2008, Mr. Dudley wrote to Ms. Ndiaye copying one of the ORB panel members. He accused the ORB of “replacing (their) personal judgment over that of the interview panel which actually assessed the candidates.”

... On 31 July 2008, Ms. Ndiaye wrote to Mr. Dudley stating:

“Since the evaluation in Galaxy reflects that Mr. Finniss met all the evaluation criteria, the fact that others performed better is not a convincing argument. The staff selection process requires that all applicants found suitable be placed in

the roster. If Mr. Finniss is not found suitable for a roster of P-5 Senior Investigator, this should be clearly explained.”

... On 1 August 2008, Mr. Dudley replied to Ms. Ndiaye seeking clarification of her position that “the staff selection process requires that all applicants found suitable be placed in the roster.” He wrote: “This is not my understanding, but I have no problem accepting it in this case.” However later the same day Mr. Dudley wrote again to Ms. Ndiaye:

I regret to inform you and the ORB that there are serious problems with the ORBs demand to include Mr. Finniss. It was my mistake in conceding so quickly, but the problem is that the scoring of interviewed candidates does not make him the 4th or even the 5th ranked person. His objective evaluation was, therefore, considerably below the recommended candidates and other candidates not recommended.

... Correspondence between the ORB, Mr. Postica and Mr. Dudley continued and no resolution of the impasse was reached until on 6 October 2008, the USG/OIOS wrote to Mr. Dudley and Mr. Postica:

Dear Both,

I note with some concern that the issue of the P5 in ID is still not solved but remains the same as when I left.

In an e-mail to Michael before I left for Chile and after having read all the evaluations I stressed that it was obvious that we had problem as the evaluation as put in print did not justify the exclusion of Mr. Finniss on the recommended list. I pointed to the fact that we had a problem of consistency in the evaluation, which also had been noted by the ORB and in fact was what triggered the whole situation.

ORB advised two different ways: either to 1. change the evaluation of Mr. Finniss or 2. to include Mr. F in the list. Nr 1 is not an option. Nor is it an option to create some extra-Galaxy-process.

Therefore I recall this message to Michael where I advised you that I had reviewed the candidates' evaluation in GALAXY and came to the conclusion that James Finniss met the evaluation criteria. Therefore he had to be included into the recommended list. Please proceed.

Otherwise, the ORB will send the case back to me as the DH with these recommendations, namely either 1 or 2. So please proceed, we have to choose our fights and not to loose [sic] more time on this issue, which also blocks other processes.

As i also wrote to Michael - this is a reminder to us to be observant on the necessity to be consistent in GALAXY presentations. For the future, PCOs

should be more focused on proper justification and documentation on their cases in GALAXY which allow us to avoid any unnecessary delay in the candidates' review and selection.

Best,

[USG/OIOS]

... The next day Mr. Postica wrote to the USG/OIOS advising that he had made the necessary changes to the system. Mr. Finniss was added to the list of recommended candidates following which the ORB endorsed the selection exercise.

... The final list of recommended candidates was sent to the then USG/OIOS who made the selection decision. Mr. Finniss was not selected but was placed on the roster for similar functions on 21 October 2008, in accordance with Section 9.3 of ST/AI/2006/3.

... On 23 October 2008, Mr. Norley was told that he had been selected for the New York Post. He emailed Mr. Finniss this news. On the same date, Mr. Finniss received a memorandum from the then OIC Executive Office, OIOS informing him that the selection for the New York Post had been completed and that his name had been placed on the roster.

... Mr. Norley told the Tribunal that he was surprised to have been selected for the post. Before he submitted his application, the subject of whether his graduate diploma met the standard of Bachelor's degree had been questioned by the Administration. He said that at the time of his interview Mr. Dudley knew that he was educationally ineligible for the post.

... In spite of this he was selected and it was only when the Office of Human Resources Management ("OHRM") conducted a check of his educational qualifications was it determined that he did not fulfill the requirements specified in the vacancy announcement for the New York Post.

... OHRM then informed Mr. Norley and OIOS that it was not in a position to approve the recommendation of his selection. The head of office selected another candidate, for the New York Post from the recommended list that had been cleared by the ORB. This candidate was not Mr. Finniss.

...

... On 22 October 2008, another P-5 vacancy with ID/OIOS was advertised for the post of Senior Investigator, in Vienna ("Vienna Post"). Mr. Finniss applied for this vacancy. He was interviewed and recommended for the position, but was not selected. On 6 April 2009, he was again placed on the roster. On 11 January 2009 the Applicant challenged his nonselection for both posts in two separate Applications before the Joint Appeals Board ("JAB").

... These Applications were transferred to the United Nations Dispute Tribunal (“the Tribunal”) on 1 July 2009 in accordance with ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice). The Tribunal consolidated the two Applications and held an oral hearing of them in September 2010. On 31 March 2011 the Tribunal issued a judgment in favour of Mr. Finniss: *Finniss* UNDT/2011/060.

... The Secretary-General appealed the UNDT Judgment. On 16 March 2012, in judgment *Finniss* 2012-UNAT-210, the United Nations Appeals Tribunal (“UNAT”) upheld the Secretary-General’s appeal and remanded the matter for a “fresh decision by a different judge.” In September 2012 the Applications came before the undersigned Judge.

... At pre-hearing case management conferences, the areas of factual and legal dispute between the parties were identified and defined before the oral hearing scheduled to be held on 18 September 2012. In the course of this process the Respondent challenged the receivability of the Applicant’s challenge to the selection process for the New York Post.

... By Order No. 120 (NBI/2012) dated 12 September 2012, the Tribunal ruled that this issue was receivable.

... In a submission dated 14 September 2012, the Respondent admitted liability for a breach of the selection procedures in section 7 of ST/AI/2006/3. He accepted that as a 30-day mark candidate, Mr. Finniss should have been selected for the New York Post on 21 October 2008, instead of being rostered for similar positions.

... The Respondent also submitted that at the time of the alleged events the Organization’s understanding of the application of the 30-day provision had not been clarified by the Tribunal as done in *Kasyanov* UNDT/2009/022 and *Charles* UNDT/2012/020.

... The Respondent accepted that had the selection process been undertaken in strict accordance with section 7 of ST/AI/2006/3 as since interpreted by the Tribunal, Mr. Finniss would have been appointed to the New York Post, as he was the only suitable 30-day candidate.

... Before the commencement of the oral hearing Mr. Finniss formally withdrew his challenge to the selection process for the Vienna Post. His claims are limited to damages and compensation for the alleged breaches only in relation to the selection process for the New York Post. The issues before the present Tribunal are therefore significantly reduced from those dealt with in the first hearing and on appeal.

3. On 19 December 2012, the UNDT in Nairobi issued Judgment No. UNDT/2012/200. The UNDT found that Mr. Postica’s role as PCO was vitiated by his bias towards Mr. Finniss; that the evaluation scores accorded to Mr. Finniss by the interview panel did not objectively reflect the

facts about his education and work experience; that the selection exercise was unlawful as it breached ST/AI/2006/3; and that the Secretary-General had failed to demonstrate to a minimal standard that the selection decision was otherwise made in a regular manner.

4. The UNDT awarded compensation as follows:²

a. The difference in salary between the P-5 post to which he should have been appointed on 21 October 2008 and the P-4 salary that he earned at the time of the contested decision up until his promotion in January 2010. [On 1 January 2010, Mr. Finniss was selected from the roster for a Senior Investigator post, at the P-5 level, in Nairobi, and at the time of the appeal, he remains in that position.]

b. Interest on the [foregoing] from the date Kasyanov UNDT/2009/022 became executable to the date of payment of the compensation at the US Prime Rate applicable on the date of execution of Kasyanov UNDT/2009/022.

c. USD 50,000 as moral damages.

d. The total sum of compensation, interest and damages awarded to the Applicant shall be paid within 60 days of the date that this judgment becomes executable. Interest will accrue on the total sum from the date of this judgment at the current US Prime rate until payment. If the total sum is not paid within the 60-day period an additional five per cent shall be added to the US Prime Rate until the date of payment.

5. The UNDT also decided to refer the case to the Secretary-General, pursuant to Article 10(8) of its Statute “for appropriate action to be taken to enforce the accountability of those staff members [the members of the interview panel and the ultimate decision maker] who were responsible for the biased assessment and unlawful non-selection of Mr. Finniss”.³

6. The Secretary-General appeals the UNDT Judgment.

Submissions

The Secretary-General’s Appeal

7. The Secretary-General submits that the UNDT erred in considering whether the *actual* bias on the part of Mr. Postica affected the results of the interview panel as a whole, when the UNDT merely determined that there could have been a *perception* of bias. The UNDT therefore

² Impugned Judgment, para. 122.

³ *Ibid.*, para. 125.

erred in fact and in law in proceeding to an assumption of *actual* bias, thereby undermining the further findings in the Judgment.

8. The Secretary-General contends that the UNDT erred in law and fact in finding that it was highly probable that Mr. Finniss' evaluation by the interview panel was affected by personal bias and animus. The UNDT made no finding that the other two panel members were themselves biased against, or affected by animus towards, Mr. Finniss. The UNDT also made no findings of fact to support the conclusion that Mr. Postica had a "presence and influence" as PCO on the interview panel members that tainted the assessment by the other two members.

9. The Secretary-General claims that the UNDT erred in referring staff members involved in the selection procedure for the New York post to the Secretary-General for accountability when there was insufficient basis to do so. In particular, the UNDT erred in making a referral for "biased assessment" when the UNDT's assumption of actual bias lacked any basis and when it made no findings of personal ill-feelings on the part of the other two panel members or the USG/OIOS. In any event, even a finding that the three panel members and the USG/OIOS failed to acknowledge the possibility of an appearance of bias on the part of Mr. Postica would not warrant a referral to the Secretary-General.

10. The UNDT also erred in making a referral for "unlawful non-selection" when, at the time of the non-selection, the Administration could not have been aware of its unlawfulness. Finally, the UNDT erred in requiring the Administration to make a minimal showing to satisfy the presumption of regularity, thereby shifting the presumption to one of irregularity.

11. In light of the above, the Secretary-General submits that the UNDT erred in awarding moral damages to Mr. Finniss. In the alternative, the Secretary-General submits that the UNDT erred in awarding a high sum of moral damages based on a "significantly different and more egregious case" (*Muratore*).⁴

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

⁴ *Muratore v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/129.

Mr. Finniss' Answer

13. Mr. Finniss submits that the UNDT correctly concluded that Mr. Postica's evaluation was biased. The Secretary-General's submission ignores that the UNDT made several explicit findings of animosity of Mr. Postica against him. The UNDT identified the correct test for bias and correctly applied it to the facts of the case. While the UNDT was only required to determine that it was "likely" or "probable" that the evaluation was influenced by bias, she found that it was "highly probable".

14. Mr. Finniss further contends that the UNDT rightly found that Mr. Postica's bias against him influenced the outcome of the selection process. In order to conclude that his evaluation was a direct result of bias, the UNDT merely needed to determine that the other panel members were either unable or unwilling to prevent Mr. Postica's bias from impacting on the assessment. The other two panel members knew that Mr. Postica was unable to assess him objectively, yet they failed to take steps to prevent an arbitrary and biased evaluation.

15. Mr. Finniss submits that the UNDT rightly referred the case to the Secretary-General for possible action to enforce accountability. First, he submits that the referral does not satisfy any of the grounds of appeal in Article 2 of the Statute of the Appeals Tribunal and is therefore not an appealable decision. Furthermore, a referral could have been ordered even if the outcome had been favorable to the Administration in which case the Administration could not have appealed. Moreover, the referral of cases by the UNDT or the Appeals Tribunal is without prejudice to Secretary-General's decision of whether or not to initiate proceedings. Second, Mr. Finniss contends that the UNDT was entitled and justified to refer the case to the Secretary-General since the conduct of the panel members amounted to an abuse of power. Third, the Secretary-General's interpretation of Article 10(8) to the effect that referrals of cases to the Secretary-General be held to a high standard of personal wrongful action by a manager or other staff member is erroneous. Finally, the referral of the USG/OIOS was based on Mr. Finniss' non-selection due to his poor evaluation, not "the technical breach of ST/AI/2006/3".

16. Mr. Finniss submits that the award of moral damages by the UNDT was appropriate, lawful and proportionate.

17. Mr. Finniss requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

18. The UNDT found that Mr. Postica's role as PCO was vitiated by his bias towards Mr. Finniss; that the evaluation scores accorded to Mr. Finniss by the interview panel did not objectively reflect the facts about his education and work experience; that the selection exercise was unlawful as it breached the Administrative Instruction ST/AI/2006/3 on Staff Selection; and that the Secretary-General had failed to demonstrate to a minimal standard that the selection decision was otherwise made in a regular manner. Before the oral hearing conducted by the UNDT, the Secretary-General admitted his responsibility for a breach of ST/AI/2006/3.

Appeal against finding of bias

19. The Secretary-General challenges the finding by the UNDT that the PCO's evaluation of Mr. Finniss was tainted by actual bias.

20. The guidelines in paragraph 9 of ST/AI/2006/3 provide that candidates need to be evaluated against pre-approved evaluation criteria. It is reasonable to expect that the selection process is not only fair but also seen to be fair. Thus, as a matter of fair process, there is no room for extraneous considerations such as bias, prejudice and discrimination.

21. Given the open animosity and ill-feeling between the PCO and Mr. Finniss, the Administration should not have included the former on the interview panel. On the other hand, the PCO ought to have recused himself from the interview panel.

22. We refer to the persuasive holding by the Administrative Tribunal of the International Labour Organization (ILOAT) in *Varnet v. UNESCO*, Judgment No. 179, where the ILOAT stressed that:

It is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the person affected by the decision to suspect its author of prejudice.

Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule. It applies also to members of bodies required to make recommendations to decision-making bodies. Although they

do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken.

23. The Secretary-General complains that the UNDT simply equated the appearance of bias with actual bias and proceeded to an analysis of whether the PCO's actual bias affected the evaluation of the interview panel as a whole.

24. The open history of animosity and ill-feeling left the impartiality of the PCO open to question on reasonable grounds. In the circumstances, the test for apparent bias applied by the UNDT--whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the interview panel was biased--was correct.

25. The Secretary-General submits that while the UNDT concluded that there could have been a perception of bias on the part of Mr. Postica, it never concluded that he harbored any actual bias.

26. The Appeals Tribunal is of the view that the UNDT did not need to make a finding of actual bias before proceeding to make other findings in the Judgment. What was required of the UNDT thereafter was to assess whether Mr. Postica's animosity compromised his impartiality in the evaluation of Mr. Finniss.

27. After assessing the evaluation by the interview panel, the UNDT came to the conclusion that the evaluation scores accorded to Mr. Finniss by the interview panel did not objectively reflect the facts about his education and work experience. Consequently, the UNDT held that "given the presence and influence of Mr. Postica as PCO on the interview panel members and the illogical and incorrect scoring of Mr. Finniss, it is highly probable that his evaluation was affected by bias and personal animus".⁵

28. The Appeals Tribunal affirms this finding, as upon the facts a reasonable apprehension of bias is sufficient to establish that the irrational scores were a direct result of bias. The Administration has a statutory duty to offer selection processes which are both fair and seen to be fair.

29. The Secretary-General submits further that the UNDT erred in finding that it was highly probable the evaluation of Mr. Finniss given by the interview panel was affected by actual bias.

⁵ Impugned Judgment, para. 90.

30. Although Mr. Finniss made no allegation of bias against either of the other panel members, on the totality of the evidence and the preponderance of probabilities, the UNDT was right in holding that the other two panel members were either unable or unwilling to prevent Mr. Postica's bias from infecting the outcome of the evaluation.

31. From the foregoing, the appeal on these grounds fails.

Appeal against the award of moral damages.

32. The Secretary-General appeals against the award of moral damages or in the alternative submits that the UNDT erred in basing its award on the UNDT judgment in *Muratore*⁶ which was fundamentally different from the case at hand.

33. In that case, the UNDT found that the flaws in three selection processes deprived Mr. Muratore of a "very real chance of obtaining continuing employment" which in turn "might have increased his chances of having his contract renewed; instead, his employment... was ended...at the expiration of his final contract".⁷

34. The Secretary-General submits that unlike Mr. Muratore, Mr. Finniss successfully obtained the third post he applied for, and did not see his contract with OIOS expire as a result of the irregularities in the selection processes.

35. The issue here is whether Mr. Finniss was entitled to damages for the breach of his contractual rights and the significant stress and humiliation that was caused not only by his non-selection for a post to which he was legally and actually entitled, but also by the stress and humiliation caused by Mr. Postica's role in the selection process. We affirm the decision of the UNDT that Mr. Finniss was entitled to compensation.

36. In the view of this Tribunal, the reference to the *Muratore* case was by way of citing the applicable jurisprudence, for guidance; as each case is ultimately decided on its own facts. The UNDT was best placed to calculate on the evidence the appropriate level of compensation, and we find no reason to disturb the award of USD 50,000 in moral damages. The appeal on this ground fails.

⁶ *Muratore v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/129.

⁷ *Ibid*, para. 78.

Referral

37. The Secretary-General appeals against the referral of staff members involved in the selection procedure for the New York post to the Secretary-General for accountability when there was insufficient basis to do so.

38. We do not find any merit in this submission as the referral of the USG/OIOS and the other staff members was based on the conduct of the

[s]election exercise [that] was so seriously flawed beyond the admitted procedural error that it reflected badly on the Organization which is committed to ensuring and upholding the highest standards of efficiency, competence and integrity of its staff members in the discharge of their functions as international civil servants.⁸

39. We affirm the referral.

Judgment

40. The appeal is dismissed in its entirety, and the UNDT Judgment is affirmed.

⁸ Impugned Judgment, para. 123.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar