



**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

FINNISS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Seth Levine, OSLA

Garvin Irwin, OSLA

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant has challenged the decision not to select him for the post of Senior Investigator, P-5 level with the Investigations Division, Office of Internal Oversight Services (“ID/OIOS”) in New York (“New York Post”) a vacancy for which he had applied and for which he believes he was qualified.

## **Background**

2. Mr. Finniss submitted his application for the New York Post on 2 February 2008 and was interviewed, on 9 April 2008.

3. He was not selected for the New York Post but on 21 October 2008, his name was placed on the roster of pre-approved candidates (“roster”). 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 non-selection for both posts in two separate Applications before the Joint Appeals Board (“JAB”).

4. 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.

5. 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.

6. 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.

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

8. 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.

9. 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.

10. 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.

11. 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.

### **Naming of Names**

12. The Respondent has requested that, in this judgment, the Tribunal refers to the Respondent's witnesses by their official titles as at the time of the selection exercise rather than by their names.

13. In support of that request the Respondent noted that the proceedings were conducted in public and that the witnesses appeared voluntarily, they stated their names for the record and none of the Respondent's witnesses sought anonymity. However he submitted that the Applicant is targeting one witness for public humiliation and that the Tribunal should not entertain this.

14. The Applicant and his witness have no objection to the use of their names in the judgment. The Applicant submitted that there is no express provision within the UNDT Statute, Rules and/or Practice Directions that permit an order of anonymity of participants in the United Nations internal justice system. Therefore there is no reason to 'anonymise' any witness from the Tribunal's judgment.

### **Consideration on Naming of Names**

15. The General Assembly Resolution 63/253<sup>1</sup> reaffirmed that the new system of internal justice was to ensure respect for the rights and obligations of all staff members and the accountability of managers and staff members alike. The provisions of Article 9 of the Statute of the Dispute Tribunal provide for oral hearings to be held in public unless exceptional circumstances require them to be closed. Article 11.6 of the Statute provides that: "The judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal."

16. The Tribunal must therefore balance the need for accountability with the protection of personal data in each case according to its circumstances.

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<sup>1</sup> A/63/253 (Administration of Justice at the United Nations), adopted on 24 December 2008

17. The statute does not define “personal data”, but for the purposes of judgments, it is unlikely to include names. Applicants are routinely named by the UNDT and UNAT in the headings of published cases except in circumstances where anonymity is granted by the Tribunal.

18. The Tribunal emphatically does not entertain the naming of any person in a judgment for the purpose of humiliation, although it is accepted that adverse findings against an individual may cause some embarrassment to that person.

19. In the present case, the actions and behaviours of some staff members and managers have been called into serious question. In the circumstances of this case, having balanced the private effects of naming individuals against the public requirement for open justice and accountability, the Tribunal has decided to name all those individuals who appeared and gave evidence. Any person who did not give oral evidence before the Tribunal will be referred to in this judgment by their functional title at the time of the contested decision.

### **Issues**

20. The overall issue is whether the Administration complied with Section 7 and Annex II of ST/AI/2006/3 and with the Organization’s guidelines on competency based selection at the evaluation and selection stages. Following the admission of liability by the Respondent, the specific issues under this main heading which remain for decision by the Tribunal are:

- a. Whether the selection process for the New York Post was vitiated by bias, prejudice, or discrimination born of personal animus and
- b. If so, what remedies are due to the Applicant arising from that.

## Facts

21. During Case Management, the Parties submitted a document that identified the facts in the case that are agreed or are in dispute. The following factual narrative is based on those agreed facts supplemented by the evidence given by witnesses at the oral hearing. Findings of disputed facts are also included as they arise.

22. James Finniss entered into service with the Organization in November 2004 as Chief Resident Investigator (“CRI”) of the ID/OIOS 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”.

23. 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”).

24. 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<sup>2</sup> which expanded the mandate of the investigation unit to include the investigation of Sexual Exploitation and Abuse (“SEA”).

25. 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.<sup>3</sup> The OIOS Investigations Division assists the

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<sup>2</sup> A/RES/29/287 (Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations), adopted on 13 April 2005

<sup>3</sup> A/RES/48/218 B (Review of the efficiency of the administrative and financial functioning of the United Nations), adopted on 29 July 1994

Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization.

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

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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...”

38. 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.

39. 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.

40. 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.

41. 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**

42. 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, including 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.

43. Under the then applicable rules and regulations,<sup>4</sup> Mr. Finniss 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.

44. The interviews were conducted by telephone. Mr. Finniss 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.

45. 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,<sup>5</sup> the Applicant did not pursue the point with any vigor.

46. 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.

47. 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.

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<sup>4</sup> See ST/AI/2006/3 (Staff Selection System) abolished and replaced by ST/AI/2010/3

<sup>5</sup> The Parties advised the Tribunal that these were not produced at the first hearing of the case in September 2010

### **Experience Score**

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

49. 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.

50. 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**

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

52. 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.

53. 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.

54. 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”).

55. 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.

56. 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.

57. 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.”

58. 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.”

59. 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.”

60. 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.

61. 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]

62. 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.

63. 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.

64. 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.



65. 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.

66. 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.

67. 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.

68. On 30 October 2009, a Senior Investigator post, at the P-5 level, for the role of Operations Manager at the Nairobi duty station was advertised in *Galaxy*. Mr. Finniss was selected from the roster for this post on 1 January 2010, and as at the date of the hearing, remains in that position.

69. Apart from providing the outcome of the selection process the Respondent provided no evidence to the Tribunal about the selection or the reasons for it.

### **Applicant's submissions**

70. The Applicant submitted that:

- a. There was a history of personalized animus between Mr. Finniss and the PCO for the New York selection exercise, Mr. Postica;
- b. Mr. Postica's assertion that his relationship with Mr. Finniss was not personalized is wholly contrary to the evidence;

- c. Mr. Postica's attempts to present himself as the reasonable, honest-broker within ID/OIOS are undermined by the evidence and by his own testimony;
- d. Mr. Postica drove the evaluation process of the New York Post to the Applicant's detriment;
- e. Mr. Finniss as a matter of record, had the most relevant experience for the post – both within the Organization and prior to that as an experienced fraud investigator;
- f. The scoring and the commentary entered on *Galaxy* are inherently contradictory;
- g. The guidelines accompanying ST/AI/2006/3 provided that the documented record should compare the candidates against the evaluation criteria, not against one another.
- h. The defects in the evaluation process had a direct causal link to the Applicant's eventual non-selection;
- i. The USG/OIOS in making her selection decision, knew full well that the interview panel, were not well-disposed to the Applicant's candidacy and;
- j. The clear and only inference capable of being sustained is that the USG/OIOS saw the scores or had access to them and considered, all relevant information including scores in making her selection decision.

### **Respondent's submissions**

71. The Respondent submitted that:

- a. The Applicant's case was not about whether the Applicant was fully and fairly considered for the New York Senior Investigator post. Rather about

the defamation of Mr. Postica, who was but a PCO and not the final decision-maker;

b. The interview panel was not biased against the Applicant;

c. The Applicant has failed to prove that the members of the interview panel who evaluated his candidacy for the New York Post were biased against him which ultimately led to the USG/OIOS to select a candidate other than him;

d. The Applicant has failed to establish that he was not accorded full and fair consideration during the selection process;

e. The Respondent has demonstrated more than a minimal standard (*Rolland* UNDT/2010/095) that the Applicant's candidature was treated in fair and reasonable manner;

f. It is not enough that a candidate for a position has performed well in the past and is held in high regard by the Organization. The candidate must prevail in a competitive selection exercise as per provisions of former staff regulation 4.3;

g. The PCO, Mr. Postica, was instructed by the Director of Investigations Division to review the Applicant's reports. The Applicant has not proven that there was personal animus between him and Mr. Postica which had an impact on his interview evaluation;

h. The Secretary-General has broad discretion in selection decisions.<sup>6</sup> A staff member has no right to promotion based on his prior performance.

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<sup>6</sup> UN Administrative Tribunal Judgment No. 1477, UN Administrative Tribunal Judgment No. 594, *Del Rosario-Santos* (1993), UN Administrative Tribunal Judgment No. 312, *Roberts* (1983)

Therefore the Tribunal should not substitute its own Judgment for that of the Secretary-General;<sup>7</sup>

i. In the case of *Rolland*, UNDT/2010/095, the Tribunal rejected the argument that the Administration had erred in failing to select the applicant for a promotion, finding that the evaluation criteria for assessment of the applicant's candidacy had been properly applied;

j. He conceded that he had failed to accord the Applicant priority as per ST/AI/2006/3 and that while this may have been mistaken, there was no *mala fides* in the interview panel's action and;

k. In the event the USG/OIOS reviewed the evaluations of the recommended candidates prior to making the selection decision it is likely that she would have had access to the evaluation records without any score.

## **Considerations**

**Was the selection process for the New York Post vitiated by bias, prejudice, or discrimination born of personal animus?**

### **Interview and Evaluation Process**

72. The evidence in this case was principally directed towards the allegation of bias by the PCO of the New York Post interview panel, which was tasked with evaluating candidates and recommending them to the decision maker who was to make the selection decision for the New York Post.

73. The guidelines in paragraph 9 of ST/AI/2006/3 provide that the evaluation of the candidates is to be against the pre-approved evaluation criteria. From this

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<sup>7</sup> UN Administrative Tribunal Judgment No. 828, *Shamapande*.

stipulation and as a matter of fair process, there is no room for extraneous considerations such as bias, prejudice and discrimination.

74. These three words all have discrete legal meanings. Bias, in the legal sense, may be actual or apparent but either way it is assessed objectively. Actual and conscious bias which is proven as a matter of fact automatically disqualifies the decision maker.

75. The test for apparent bias is :

Whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.<sup>8</sup>

76. The Tribunal notes that an interview panel in a selection exercise is not a tribunal and has no final powers of decision making. It takes one step in a process but it is an important step. It is the only opportunity candidates have to provide information and create an impression apart from their Personal History Profile (PHP) records. The interview panel has the power to recommend and to provide a reasoned<sup>9</sup> analysis of the suitability of candidates for the post relied on by the ultimate decision maker. To avoid the tainting of the final decision it is incumbent on the interview panel to be and to be seen to be impartial, objective and free from bias.

77. Given the documented history between Mr. Finniss and Mr. Postica, the Tribunal has no hesitation in finding that there was a very real possibility that Mr. Postica in his role as PCO would be perceived to be biased against Mr. Finniss, either unconsciously or consciously. The emails referred to in the findings of fact demonstrate personal animosity between them before the selection process for the New York Post. Although Mr. Postica adamantly denied that he conducted himself in anything but a professional, objective manner as PCO of the interview panel, in his oral evidence he said that he has an enduring anger against Mr. Finniss.

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<sup>8</sup> Magill v. Porter [2002] 2 AC 357 House of Lords

<sup>9</sup> ST/AI/2006/3, part II Recording Evaluation

78. The Tribunal finds it remarkable that a person who professed such pride in his years of service as a professional prosecutor could be unaware that the well-known enmity between him and one of the candidates for the post would compromise his ability to serve as an impartial PCO on the interview panel due to the appearance of bias that would be perceived by a fair minded observer.

79. It is even more remarkable that an office such as OIOS which must be dedicated to the fair and impartial investigation of staff members, did not apply those standards of fairness and impartiality to its own process of staff selection. The vitriolic email exchanges between Mr. Postica and Mr. Finniss had been widely copied throughout the OIOS and were certainly known to the Deputy and Acting Director OIOS as well as the USG/OIOS. They should all have been aware that, however much Mr. Postica believed he was acting professionally and objectively, there was a very real possibility of the appearance of bias and for this reason he should not have been included as a member of the interview panel and certainly not as the PCO.

80. While the Applicant's case initially alleged bias against all the three panel members, in the course of the hearing he chose not to pursue these allegations against Mr. Dudley and Mr. Pillay. However it is unfortunate that neither of these senior managers recognised, as they should have, that in the circumstances Mr. Postica's inclusion as PCO was bound to be contentious when evaluating Mr. Finniss.

81. The question is whether Mr. Postica's bias had an effect on the results accorded to Mr. Finniss by the interview panel.

82. It is the Respondent's case that although Mr. Finniss was a well-qualified candidate and his contribution to the Organization had been appreciated for many years, the record reveals that he did not perform well in his interview and as a result he was not the highest rated candidate in the New York Post selection exercise.

83. From the evidence it is clear to the Tribunal that two of the scores allotted to Mr. Finniss after his evaluation by the panel were not based on the objective evidence that the interview panel had before it.

84. The first of these is the score awarded for experience. The assessment of years of relevant experience is an objectively verifiable exercise. The interview panel recorded that Mr. Finniss had over 20 years of relevant experience for the post. It recorded that Mr. Norley had “relevant investigatory experience” and “many years of experience in the Australian police”. Mr. Norley told the Tribunal that he had had 16 years as a police officer before starting work with the United Nations in 2008. In his first position he was reporting to Mr. Finniss. Yet Mr. Finniss score for experience was 27/50 while Mr. Norley’s was 35 /50.

85. The second is the score for the candidates’ educational qualifications. These are also objectively verifiable. In spite of the evidence that Mr. Norley had no relevant educational qualification for the post and Mr. Finniss had an MBA considered to meet the criterion of the Vacancy, Mr. Norley received 15 /20 while Mr. Finniss received 12/50. The interview panel also incorrectly took account of a qualification that Mr. Norley had not yet attained. It noted “Mr. Norley will obtain a Master’s Degree in Management and Leadership.”

86. These anomalies undermine the reliability of the evaluations of the interview panel. Scores for experience and education can only be assessed on the basis of objective evidence obtained from the candidates’ PHPs. Yet two of the panel members accepted that Mr. Finniss’ scores for education and experience were adjusted to reflect his performance in the interview. This serious error resulted in him being awarded unjustifiably low scores. If Mr. Finniss’ performance at interview were lacking, there was a place for stating so in the comments section. This was not done.

87. The oral evidence at the hearing from panel members indicated a degree of confusion by the panel as a whole about how to evaluate an applicant’s experience.

88. The Tribunal finds that there were anomalies in the evaluation and scores given to Mr. Finniss which, in the absence of any other explanation by the Respondent, can only be explained by the bias or personal animus against him held by Mr. Postica. There is no other rational reason why his scores for experience and education should have been lower than those of Mr. Norley.

89. Further, in spite of Mr. Finniss being suitable for the post, the panel resisted his inclusion in the list of recommended candidates when challenged by ORB. This was recognised by the USG/OIOS in an email in October 2008 in which she said that the evaluation (of Mr. Finniss) as put in print did not justify his exclusion on the list of recommended candidates. It was only after her intervention, two months after the ORB first raised its concerns, that Mr. Dudley and Mr. Postica dropped their resistance to adding Mr. Finniss name to the list of recommended candidates.

90. The Tribunal concludes 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. Mr. Finniss and others, including Mr. Norley, strongly suspected this at the time of the selection, but it was not until all of the relevant evidence was adduced at the oral hearing that their suspicions could be substantiated.

## **The Selection**

### **1. Priority Consideration (ST/AI/2006/3)**

91. Section 7 and Annex II of ST/AI/2006/3 sets out the process for consideration and selection of candidates for vacancies.

#### **Section 7**

##### **Consideration and selection**

7.1 In considering candidates for posts up to and including at the D-1 level, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage,



candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.

92. The Respondent conceded four days before the hearing that the Administration did not comply with section 7.1 of ST/AI/2006/3, because he failed to give priority to the candidacy of Mr. Finniss who was a 30-day candidate. On the basis of this and the evidence before it, the Tribunal accepts this concession as properly made.

93. In mitigation of this breach, the Respondent submitted that at the time of the selection exercise, the former policies of the Organization concerning priority consideration for internal candidates did not comply with the later rulings of the Dispute Tribunal in *Kasyanov*, UNDT/2009/022 and *Charles* UNDT/2012/020. He referred to an opinion on the point by the Office of Legal Affairs (“OLA”) which was relied on at the time by the Administration in reaching its decision.

94. This mitigation stands good only until such time as the Administration knew or must have known that there had been a breach. The Applicant’s request for Administrative review was made on 24 October 2008 and his Appeal was filed on 11 January 2009 with the JAB.

95. The *Kasyanov* UNDT/2009/022 decision on liability was rendered on 23 September 2009. Although the UNDT rendered a subsequent decision on compensation in *Kasyanov*, which the Respondent appealed, it did not challenge the UNDT’s ruling concerning the priority consideration. The Respondent is deemed to have been aware and accepted that the priority rule had been breached from the date that *Kasyanov* UNDT/2009/022 became executable.

96. The Respondent raised the receivability of the application after the case had been allocated a second substantive hearing date. Only when the Tribunal ruled that the matter was receivable did the Respondent make the concession that the priority rule had been breached. This is relevant to the question of compensation.

## 2. Was the selection decision tainted or influenced by the flawed evaluation?

97. Apart from this conceded error, the Respondent does not accept the Applicant's allegation that the selection exercise was otherwise conducted improperly. He maintains that his concession on the 30-day rule means that there is no need for the other allegations to be decided other than payment for financial compensation as a result of the Applicant's delayed promotion. The Tribunal does not agree with that submission. Allegations of bias, prejudice and discrimination are serious and if made out, potentially affect the remedies to be awarded.

98. The Tribunal accepts the Respondent's submission that the Secretary-General has broad discretion in selecting candidates but that does not make the exercise of discretion immune from review. Any discretion must be exercised in a regular manner, in accordance with the rules and policies of the Organization.<sup>10</sup> It must be free of improper motive and be based on correct facts and evidence.<sup>11</sup>

99. In a written submission<sup>12</sup> in this case, the Respondent asserted that:

The Applicant bears the burden of showing by clear and convincing evidence that the panel members were ill motivated in scoring his candidacy and that this impacted on his candidacy. The Applicant, not the Respondent, must take the steps the Applicant enumerates in his pleading, including calling the USG/OIOS. It is not for the Respondent to disprove the Applicant's allegations. It is for the Respondent to respond to evidence presented by the Applicant in support of his case. He failed to present any evidence to support his case, and, as a result, his request for the Tribunal to draw an inference that the USG/OIOS saw the scores should be rejected.

100. The Tribunal rejects this submission for the following reasons.

101. In *Rolland* 2011-UNAT-122 the Appeals' Tribunal stated:

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<sup>10</sup> See *Nogueira* UNDT/2009/088, *Larkin* UNDT/2010/108.

<sup>11</sup> See *Obdeijin* 2012-UNAT-201.

<sup>12</sup> Respondent's request for leave to reply to Applicant's additional final submissions dated 3 October 2012, page 2 para 5.

There is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. If the management is able to even minimally show that the appellant's candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the appellant who must be able to show through clear and convincing evidence that she was denied a fair chance of promotion.

102. However, in administrative cases the decision maker is the repository of much, if not all, of the evidence necessary to establish the facts about the reasons for the decision and the manner in which it was taken. The Respondent has an obligation to give reasons for a decision he has taken where requested. In such cases the burden of demonstrating both the reasons and the factual basis for them lies with the decision maker. This principle was recently stated by the Appeals Tribunal in *Obdejin* 2012-UNAT-201:

Whereas, normally, a staff member bears the burden of proof of showing that a decision was arbitrary or tainted by improper motives, the refusal to disclose the reasons for the contested decision shifts the burden of proof so that it is for the Administration to establish that its decision was neither arbitrary nor tainted by improper motives.

103. Due process or procedural fairness includes a basic requirement that parties to a case must have disclosure of information relevant to the decision that is in issue.

104. The Tribunal expressly and firmly rejects the Respondent's submission that in this case the Applicant alone bears the burden of showing by clear and convincing evidence that the panel members were ill motivated in scoring his candidacy and that this impacted on his candidacy. Such an approach would abnegate the due process rights of the Applicant. If followed, it would amount to the dereliction of the Respondent's obligation to give reasons for his administrative decision.<sup>13</sup>

105. It is unreasonable and unfair to require an Applicant to call the decision maker who is the representative of the Respondent and to produce documents which are neither in the Applicant's possession nor control. The Organization must ensure that

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<sup>13</sup> See *Obdejin* UNDT/2011/032 which was upheld on appeal, *Obdejin* 2012-UNAT-201.

staff members have reasonable and effective means to contest administrative decisions. The Respondent bears the evidential burden of making at least a minimal showing of regularity. This is particularly so where, as in this case, a decision is seriously called into question.

### **3. What is a minimal showing?**

106. Natural justice requires a decision maker to give reasons for his or her decision especially when serious questions of impropriety are raised about the character of a decision and/or where the process of decision-making is called into question.

107. Administrative decisions must be capable of being demonstrated to be legal, rational, procedurally correct<sup>14</sup> and based on well-founded facts. The Respondent will have made a minimal showing of regularity and will have met his evidentiary burden if he provides the Applicant and the Tribunal with information about the decision being challenged.

108. This information should include the findings of fact material to the decision; the evidence on which the findings of fact were based; the reasons for the decision and all of the documentation in the possession and control of the decision maker which is relevant to the review of the decision.

109. In this case, the Applicant has raised substantial questions about the regularity of the selection decision, including whether and to what degree it was influenced by the interview panel's evaluation of Mr. Finniss. In response, the Respondent asserts that the USG/OIOS did not see the scores of the recommended candidates and therefore they could not have affected her decision. Such evidence is entirely in the knowledge of the Respondent. However, apart from the email of 6 October 2008 from the USG/OIOS, which strongly suggested that she had seen and was concerned

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<sup>14</sup> See *Sanwidi* 2010-UNAT-084

at the interview panel's evaluation, he produced no evidence, documentary or otherwise to support his assertion.

110. The Tribunal finds that the Respondent has not met the minimal standard required to prove that the selection decision was made in accordance with the rules and regulations. In the absence of any evidence the presumption of regularity has been rebutted.

### **Findings**

111. The Applicant has shown that the selection process and the decision for the New York Post were materially flawed and not in compliance with the United Nations Rules and Regulations for the following reasons:

- a. Mr. Postica's role as PCO was vitiated by his bias towards the Applicant;
- b. The evaluation scores accorded to Mr. Finniss by the interview panel did not objectively reflect the facts about his education and work experience;
- c. The selection exercise was unlawful as it breached the Administrative Instruction ST/AI/2006/3 on Staff Selection System and;
- d. The Respondent did not show to a minimal standard that the selection decision was otherwise made in a regular manner.

### **Remedies**

112. Mr. Finniss gave evidence of the effects that this case has had on him. First was his disappointment at not being selected for the post since he presented as a strong and proven candidate for the position. That disappointment was compounded when he found that he had been portrayed as a weak candidate for the post and was ranked amongst the lowest candidates.

113. He said that the case caused him unnecessary work stresses. The emotional strain affected his family life as he would often return home in a very depressed mood.

114. Since this selection process the Organization has introduced a new way of counting the work experience of staff members. This now begins from the date of award of the first degree. As Mr. Finniss obtained his degree much later in his career, his numerous years of work experience are no longer relevant. If he had been selected for the vacancy at the time of his application, he would have had other opportunities to progress in his career. Now his career path is limited to OIOS.

115. He also referred to the pecuniary loss and increments that would have accrued to him every 12 months had he been selected for the position.

### **Compensation**

116. The Respondent accepts that because of the breach of section 7.1 of ST/AI/2006/3, Mr. Finniss was not selected for the P-5 post, which he would otherwise have got. The Respondent therefore agrees to pay the Applicant 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, which he received up until his promotion in January 2010.

117. The resolution of this case has to a large extent been delayed by the failure of the Respondent to acknowledge this error in the selection process until after the appeal and not until four days before the second hearing of the case. The Tribunal finds that the Respondent had presumptive knowledge that it was in breach once the *Kasyanov* UNDT/2009/022 decision became executable.<sup>15</sup> At that point there was no legal impediment to the Applicant receiving the difference in salary that was due to him.

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<sup>15</sup> After the expiry of the time for filing the appeal of UNDT Judgment: *Kasyanov* UNDT/2009/022.

118. For these reasons, pursuant to Article 11 (3) of the Statute, as part of the compensation, the Tribunal awards interest on the compensation detailed in paragraph 116 from the date *Kasyanov* UNDT/2009/022 became executable to the date of this judgment at the US Prime Rate applicable on the date of execution of *Kasyanov* UNDT/2009/022.

### **Moral Damages**

119. In *Muratore* UNDT/2011/129 (confirmed on Appeal<sup>16</sup>), the Applicant, who the Tribunal found was not selected for reasons of bias, was awarded seven months' net base salary at the rate in effect on the date of his separation.

120. In this case the Tribunal is satisfied that Mr. Finniss suffered 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 by the stress and humiliation caused by Mr. Postica's role in the selection process.

121. The Applicant is awarded USD 50,000 in moral damages.

### **Conclusion on Remedies**

122. In total, the Tribunal awards the Applicant the following compensation:

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.

b. Interest on the compensation detailed in paragraph 116 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.

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<sup>16</sup> *Muratore* 2012-UNAT-245

- 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.

### **Accountability**

123. Article 10(8) of the Statute provides that the Tribunal may not award exemplary or punitive damages but may refer appropriate cases to the Secretary-General for “possible action to enforce accountability”. While the Tribunal recognises that the origins of this case occurred over four years ago, the conduct of this selection exercise was so seriously flawed beyond the admitted procedural error that it reflects 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

124. This case is not an isolated example of staff selection irregularities in OIOS which have caused damage to staff members for no reason than that they applied for a particular vacancy for which they were qualified. Such cases may impose substantial costs on the Organization. In *Appleton* UNDT/2012/125 this Tribunal stated:

[...]It is abundantly clear to the Tribunal that the Applicant was the unwitting and blameless victim of an internal dispute between senior managers of the United Nations. His evidence and demeanor at the substantive hearing clearly demonstrated that he has been deeply distressed and frustrated by the lengthy, flawed and highly public selection processes.

125. The present case is referred to the Secretary-General pursuant to Art. 10(8) of the Statute of the Dispute Tribunal for appropriate action to be taken to enforce the



accountability of those staff members who were responsible for the biased assessment and unlawful non-selection of Mr. Finniss. These include the members of the interview panel and the ultimate decision maker. The purpose of this is to ensure that bias and other irregularities are eliminated from the selection procedures in the Organization.

*(Signed)*

Judge Coral Shaw

Dated this 19 day of December 2012

Entered in the Register on this 19 day of December 2012

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi