



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

EL-KHOLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Esther Shamash, UNDP

Introduction

1. By application filed on 1 May 2015, the Applicant contests the decision to deny her full and fair consideration for the D-2 position of Special Representative of the Administrator, Programme of Assistance to the Palestinian People (“PAPP”), United Nations Development Programme (“UNDP”), and, specifically, the decision to conduct an assessment interview with a panel that included a senior official whose conduct of a restructuring exercise was the subject of several critical emails, in which the Applicant called into question his motives and treatment towards her.

2. The Respondent filed his reply on 2 June 2015, asserting that the Applicant had been accorded full and fair consideration and that the interview panel was properly constituted, in that there were no grounds to justify the recusal of the senior official concerned.

3. Following case management discussions and orders, a hearing was held from 11 to 13 July 2016. The Tribunal heard evidence from: the Applicant; Mr. Magdy Martinez-Soliman, Assistant Administrator and Director, Bureau for Policy and Programme Support; Mr. Patrick Keuleers, Director/Chief of Profession, Governance and Peacebuilding Bureau for Policy and Programme Support, UNDP; Mr. Alberic Kacou, former Chief of Staff and Director of the Executive Office (“EO”); Ms. Liz Huckerby, Chief, Integrated Talent Management and former Officer-in-Charge, Office of Human Resources (“OHR”), Mr. Michael Liley, former Director, OHR and Ms. Shazma Nathwani, Human Resources Specialist, OHR.

Background

4. The Applicant joined UNDP in 1998, as Policy Advisor (P-4) in the Regional Bureau for Arab States, at UNDP Headquarters in New York. After several assignments in different duty stations, she was promoted to the P-5 level on 1 July 2002, and to the D-1 level on 1 July 2005. She was granted a permanent appointment on 30 June 2009.

5. With effect from 10 March 2012, the Applicant took up the position of Director, OGC (D-1), Democratic Governance Group (“DGG”), Bureau for Development Policy (“BDP”), UNDP, in Oslo, Norway.

6. The OGC was funded through the UNDP’s Governance Thematic Trust Fund (“DGTTF”). In November 2012, the Norwegian Government indicated that it planned to reduce core funding to UNDP, including funding to DGTTF, by USD3.5 million.

7. In July 2013, Mr. Martinez-Soliman, who was at the time Deputy Director, BDP, UNDP, visited Norway to discuss the future of the OGC with the Norwegian Government. The Applicant was not involved in these and subsequent discussions on OGC with the host government. She was not pleased at being excluded from these discussions which directly affected her position and that of her team.

8. By email of 22 August 2013, Mr. Martinez-Soliman informed the Applicant that structural changes within OGC were needed due to the “risk of a continued dearth of funding” for 2014, and that those changes would also affect the position of the Director, OGC.

9. In response to the Tribunal’s Order No. 57 (GVA/2016), requesting the Applicant to provide further particulars and documents that were being relied upon in support of the contention that Mr. Martinez-Soliman might have had a motive to be biased against her, the Applicant referred to an email she sent on 14 January 2014 to Mr. Martinez-Soliman, expressing concern at the way in which he had communicated with her stating:

I want to signal my deep concerns at the tone of this email as well as several others you sent over the past months ... I do not believe that this is an appropriate manner of communication among colleagues. I would like to discuss my concerns with you with some urgency.

10. The Tribunal was not provided with a copy of that email, but its existence was not challenged.

11. In January and February 2014 the Applicant had discussions with Mr. Patrick Keuleers, her direct supervisor, who was at that time the Director, a.i., Democratic Governance Group and is now the Director/Chief of Profession, Governance and Peacebuilding Bureau for Policy and Programme Support, UNDP. She expressed her disagreement with the process by which the structural changes within the OGC were handled and, in particular, about her exclusion from the negotiations with the Norwegian government. The Applicant alleges that during one of these meetings, Mr. Keuleers said to her that she could not prove anything, since both he and Mr. Martinez-Soliman were lawyers. At the hearing, Mr. Keuleers denied making such a comment and explained that in general terms he may have advised staff about the importance of having proof to support any assertions or allegations they may make.

12. In January 2014, the Applicant met Mr. Jens Wandel, the Assistant Administrator and Director, Bureau of Management (“BOM”), UNDP New York. The Applicant stated that she explicitly raised concerns about inappropriate communication from Mr. Martinez-Soliman and complained in general about the way she was being treated. The Respondent did not challenge this allegation.

13. By letter dated 20 February 2014, Ms. Liz Huckerby, then Officer-in-Charge (“OIC”), Office of Human Resources (“OHR”), UNDP, informed the Applicant that her post of Director, OGC, would be abolished with effect from 31 March 2014, and provided her with information to help her find a new assignment following the abolition of her post.

14. By email dated 26 February 2014 to Mr. Liley, then Director, OHR, copied to Mr. Martinez-Soliman, the Applicant raised her concerns about her abrupt relocation from Oslo. The email included the following (emphasis added):

I regret having to conclude on this note but for the past seven months there appears to have been a clear pattern by BDP management of keeping me as the OGC Director systematically out of the loop of discussions, taking place at HQ and in Oslo, about OGC’s future. ... Occasionally my enquiries in this regard were even met with dismissive replies.

...

The fact that I never received an explanation as to why I was not eligible for leading OGC through a process of transition or be at least an active contributor in discussions for which I am, in my present position, eminently qualified, raises, from my perspective, serious questions about the motivation behind my exclusion from this process which appears to be unduly hasty, leading to undue pressure on me.

I am even being told that I cannot be accommodated, as is common, in such situations, to stay in my post during the standard three month search period. In effect, I was informed in writing only last week that in a month and ten days I will be 'unassigned'. The considerations behind this rushed process, and subsequent pressure put on me to go along with it remain unclear to me to this day and as such do not appear to meet reasonable standards of transparency. I am deeply uncomfortable with how this has been handled. I have been trying in good faith to find a way forward that would be in the best interests of the organization as well as reasonably accommodating me as a competent and long serving staff member.

15. Mr. Keuleers and Mr. Liley agreed in their evidence before the Tribunal that the Applicant had told them that she was unhappy about the restructuring and with the way it was carried out, but expressed the view that it was no more than the objections that are to be expected from staff members who are at risk of losing their jobs. However, it is clear from the email of 26 February 2014 and from other emails and discussions, that the Applicant was casting serious doubts about the motivations behind particular decisions, especially as these affected her position and her future prospects. She was also impugning the integrity of the process by raising concerns about the lack of transparency and the motives behind the treatment accorded to her, which went beyond the expression of concern to be expected from staff members who are subjected to a restructuring of the workplace.

16. The Applicant's protest did not result in a reversal of the decision to abolish her post. She left her post on 31 March 2014, and an Officer-in-Charge was assigned to OGC. As of 3 April 2014, the Applicant took up a one-year temporary assignment with the United Nations Volunteers, financed by BDP.

17. By email of 10 April 2014, the Applicant wrote to Ms. Helen Clark, the UNDP Administrator summarizing her positive achievements as Director, OGC. The email was copied to Mr. Martinez-Soliman, to Mr. Wandel, the Assistant Administrator, to Mr. Keuleers, the Applicant's direct supervisor and to Mr. Liley, the Director, OHR, to whom the Applicant had sent the email of 26 February 2014. In her concluding paragraph, she expressed her deep concerns about the manner in which the restructuring was carried out and the way in which she was treated, in the following terms (emphasis added):

At the same time, I would also like to register my concerns, which I have already expressed to BDP management and OHR several months ago, regarding the process through which OGC has been handled in the past eight months. My concerns relate to what appears to be arbitrary decision making processes and the systematic exclusion of the OGC Director, and OGC's management team for that matter, from internal and external discussions and consultations regarding the OGC, and its future directions. I will be writing separately in this regards, but for now as I exit the Oslo Governance Center, I wanted to bring to your attention these results by the OGC team and their recognition by the government of Norway as the building blocks for its renewed financial and political commitment to the Center.

18. It is not clear from the documents on file and the oral evidence what response, if any, she received from the UNDP Administrator, or anyone acting on her behalf. In any event, the Tribunal has not been provided with any evidence that the Applicant had written separately, as indicated in the final paragraph of her letter. Had she done so directly to the UNDP Administrator, as indicated, it would have been legitimate for the Tribunal to enquire into the action taken, given that the UNDP Administrator was the Hiring Manager in this case. In the absence of such evidence, together with the fact that the UNDP Administrator had delegated to others the conduct of the selection exercise, the Tribunal decided that it was not necessary, absent a request from the parties, to call Ms. Clark as a witness.

19. On 12 May 2014, the Applicant wrote to Mr. Wandel, the Assistant Administrator and Director, BOM, UNDP, copying the Director, Office of Audit and Investigations ("OAI"), UNDP, and the Director, OHR, requesting "a formal review of the manner in which the OGC and its staff were treated over the past

months, as well as the process, treatment and rationale underlying the decision by BDP Management to abruptly abolish [her] post as Director, transfer [her] out of Oslo, and replace [her] with an OIC". She noted in that communication that (emphasis added):

Principles of transparency and accountability appear to have been compromised throughout this process. I was treated in an inappropriate manner by BDP management both personally and professionally that is not in line with due process.

20. On 8 June 2014, the Applicant filed with the OAI a complaint of harassment and abuse of authority. By letter dated 8 July 2014 from Mr. Bernard O'Donnell, the Deputy Director (Investigations), OAI, the Applicant was informed that OAI had determined that the case did not amount to abuse of authority or harassment that would constitute misconduct, that an investigation was not warranted, and that the case had been closed. The Tribunal did not enquire into, nor were any explanations proffered as to why the case was closed without any investigation.

21. By email of 14 August 2014 to OAI, the Applicant expressed her concern at the decision to dismiss what she regarded as "a credible claim made in good faith and backed up by [twelve] pages of specific information and emails, as well as her indication of the willingness of staff, who witnessed first-hand the manner in which she was treated to come forward and testify in the course of an investigation". She also stated that "the absence of any inquiry whatsoever into her concerns is reflective of a reluctance to address possible abuse of authority by senior managers". While stating that this would leave her with no choice but to appeal this decision, the Applicant did not pursue the matter formally.

22. On 16 July 2014, the Applicant sent a request for management evaluation of the decision to reinstate the post of Director, OGC (D-1), and to reinstate recruitment for it to Mr. Wandel. He responded to the Applicant on 27 August 2014, stressing that no recruitment process for a new post of Director, OGC, had been initiated and that any request with regard to the abolition of the post of Director, OGC, was time-barred. He made no comment on the substance of her allegations against senior managers.

Facts relating to the selection process of the PAPP post

23. The vacancy announcement for the post of Special Representative of the Administrator, Programme of Assistance to the Palestinian People (PAPP, UNDP, was advertised internally with an application deadline of 20 November 2014.

24. On 30 October 2014, the list of the interview panel members comprised:

a. Ms. Sima Bahous, the Assistant Secretary-General (“ASG”), Assistant Administrator and Director of the Regional Bureau for Arab States (“RBAS”), UNDP;

b. Mr. Magdy Martinez-Soliman, ASG, Assistant Administrator and Director, Bureau for Policy and Programme Support (“BPPS”), who was the former Deputy-Director, BDP;

c. Ms. Liz Huckerby, the then Acting Director of OHR, and

d. Ms. Heather Simpson, Special Advisor to the Administrator, EO, UNDP.

25. On 1 November 2014, the composition of the panel was approved by the Chief of Staff, on behalf of the Administrator. However, the Special Advisor to the Administrator, EO, was not available on the dates set for the interviews. On 26 November 2014 she was replaced by a D-1 UNDP staff member, Ms. Sharon Kingsley, representing the EO.

26. On 12 November 2014, the Applicant applied for the D-2 post of Special Representative for the PAPP and the shortlist of candidates, which included the Applicant, was finalised on 21 November 2014.

27. On 24 November 2014, the Applicant was informed that she would be interviewed on 28 November 2014. The candidates were not informed of the composition of the interview panel. The interview took place over the telephone on 2 December 2014. At the beginning of the interview, the Applicant learned, for the first time, the names of the interview panel members. The Applicant said in evidence that she was shocked to learn that Mr. Martinez-Soliman, with whom

she had a less than cordial relationship, whom she held responsible for abolishing her post and against whom she had levelled serious criticisms about the manner in which the restructuring of OSG was carried out, was sitting on the panel to decide if she should be recommended for appointment. At the time she did not express an objection to his presence on the panel and proceeded with the interview.

28. The panel recommended two of the five shortlisted candidates, but not the Applicant, for further assessment. The Applicant was informed, by letter dated 9 December 2014, that she had not been selected for the post of D-2 Special Representative, PAPP.

29. She requested management evaluation of this decision on 30 January 2015, and on 11 March 2015 she received a response upholding the decision.

30. By letter dated 12 February 2015, the Applicant was informed that since she remained without regular placement following the closure of the structural change job fairs, during which she had not competed for a position, her appointment would be terminated on 30 June 2015.

Parties' submissions

31. The Applicant's principal contentions are:

- a. She was not given full and fair consideration in that the participation of Mr. Martinez-Soliman tainted the selection process;
- b. The relationship between her and Mr. Martinez-Soliman, who was a senior member of the interview panel, was strained. She had, prior to the interviews, expressed her concerns directly to him and to other senior managers, particularly with reference to his attitude towards her and the manner in which the structural review was carried out resulting in loss of employment. Furthermore, she had filed a formal complaint of harassment and abuse of authority against him;

c. There was not a level playing field in that, in contrast to other candidates, her performance at the interview was adversely affected because of the presence of Mr. Martinez-Soliman;

d. The Executive Office should not have retained Mr. Martinez-Soliman as a member of the Panel once it became clear that the Applicant had applied for the post and was one of the short-listed candidates. Alternatively, Mr. Martinez-Soliman should have recused himself when he found out that the Applicant was going to be interviewed;

e. The fact that the Applicant was between assignments as a result of the abolition of the post she had previously encumbered, was known at the time the decision to put Mr. Martinez-Soliman on the panel was taken and when she was short-listed. The Administration, as well as Mr. Martinez-Soliman, was clearly aware of the potential conflict of interest;

f. The Appeals Tribunal has found that the test for apparent bias is whether a fair-minded observer would conclude, having considered the facts, that there was a real possibility that the interview panel was biased (*Finniss* 2014-UNAT-397, referring to ILOAT Judgment *Varnet v. UNESCO* No. 179);

g. Although she did not contest Mr. Martinez-Soliman's presence on the panel during the interview, because she wanted to be professional in her conduct, she did so before she received notification that she was not selected;

h. She was placed at a disadvantage compared to the other candidates in that she lost composure and confidence at the interview. But for his presence she would have performed better and would have stood a good chance of being recommended for the position, and

i. She seeks accountability of the managers who were responsible for the violation of her rights; compensation for the material and moral damages she suffered due to the violation of her rights, and the consequential loss of

opportunity, taking into consideration that this irregularity resulted directly in the termination of her permanent appointment as an unassigned staff member.

32. The Respondent's principal contentions are:

a. The Tribunal is limited to examine whether the Applicant's candidature was given full and fair consideration, whether the decision was taken without any bias against her, whether proper procedures were followed and whether all relevant material was taken into account;

b. The Applicant had no right to, and the Administration had no obligation to provide her with a list of the members of the interview panel prior to the interview, nor a right to have potential objections to its composition be heard (*Asariotis* 2015-UNAT-496);

c. Further, even if the Applicant had objected to the presence of Mr. Martinez-Soliman on the panel, the Administration would not have been under any obligation or would have had no justification to change the panel's composition, since there was no conflict of interest on the part of this panel member. In fact, since OAI found that the complaint of 8 June 2014 did not warrant an investigation, Mr. Martinez-Soliman was never informed about it, in accordance with the relevant policy. Accordingly, he was unaware of the Applicant's complaint against him;

d. The decision to put Mr. Martinez-Soliman on the interview panel for a key position of the Organization was reasonable and justified, and was taken before the shortlist of candidates was made. He was only one of four senior officials who comprised the panel;

e. The Applicant did not submit that Mr. Martinez-Soliman was biased in his appraisal of her performance at the interview, but simply refers to a "prior strained relationship" between them; "[m]ere personal knowledge of a candidate does not [...] give rise of itself to a serious question of favouritism or conflict of interest" (*Safraoui* UNDT/2009/095);

f. Further, the OAI, on the basis of a proper consideration of the Applicant's complaint, determined that it did not warrant an investigation, and she was informed accordingly on 8 July 2014. She chose not to challenge that decision, and as a consequence, it is undisputed that Mr. Martinez-Soliman did not abuse his authority, nor did he harass the Applicant. In the circumstances, there was no ground to believe that he was biased against the Applicant;

g. Mr. Martinez-Soliman had no personal antipathy towards the Applicant and was unaware that she had submitted a complaint against him. Accordingly, there was no actual, potential or apparent conflict of interest;

h. The Applicant's subjective fear of bias and discomfort is insufficient to support a finding of a conflict of interest;

i. The selection process was highly competitive. The report of the interview panel shows that the Applicant was fairly and objectively assessed, and that consensus was reached on the outcome of her interview. The panel found that the Applicant lacked experience in dealing with large teams and it did not recommend her for this key UNDP position;

j. The Applicant could have objected to the presence of Mr. Martinez-Soliman at the start of the interview. Instead, she waited until the results of the interview to complain about the composition of the panel;

k. Since she did not claim that she was not fairly assessed by the panel, the Applicant cannot claim that she was not given full and fair consideration; and

l. The application should be rejected in its entirety.

Consideration

33. The Tribunal recalls the jurisprudence of the Appeals Tribunal in appointment and promotion matters. It is not the function of the Dispute Tribunal to take on the substantive role with which the interview panel was charged, and a

selection should be upheld when candidates have received full and fair consideration, when discrimination and bias are absent, and proper procedures have been followed (*Rolland* 2011-UNAT-122; *Charles* 2013-UNAT-286; *Aliko* 2015-UNAT-540).

34. While the Applicant submits that she was not given full and fair consideration, she does not claim that she ought to have been selected for the contested post.

35. The Tribunal notes that in assessing whether the Applicant was given full and fair consideration, the main issue for it to consider is whether the constitution of the interview panel was proper, and particularly whether the presence of Mr. Martinez-Soliman on the panel constituted a procedural flaw sufficient to conclude that she did not receive full and fair consideration, irrespective of whether she would have been appointed. This is not a case of actual conflict of interest but an apparent conflict of interest.

36. The Tribunal recalls that this case is governed by article 101, para.3, of the Charter, and Chapter IV of the Staff Rules and Regulations, as well as internal rules of UNDP. According to para. 4 of the UNDP Recruitment and Selection framework, the latter does not apply to recruitment for D-2 posts and senior representatives in the field, such as Resident Representatives and Resident Coordinators, which are the exclusive prerogative of the Administrator, guided by the UNDP Executive Group. The selection for D-2 posts and senior representatives in the field is guided by internal guidelines, entitled “Standard Operating Procedures for vacancies/submission to Executive Office” (“Standard Operating Procedures”), which are a table of one and a half pages listing responsibilities for the establishment of the short listing panel, the clearance of interview panellists by the Executive Office, and the selection by the Administrator on the basis of the interview report.

37. The Tribunal finds that even decisions that fall within the exclusive prerogative of the Administrator cannot be taken on arbitrary and capricious grounds. They must conform to certain basic standards and norms of fairness and justice. Where a particular post is subject to an open and competitive process, it

must conform to the principles underpinning the selection process within the United Nations. In this case, the Respondent properly did not argue that the principle of a perceived conflict of interest did not apply but submitted that it was not breached in this case.

38. The Tribunal notes in this regard that the UNDP Recruitment and Selection framework provides in para. 86, the following:

If a panel member is requested to interview a candidate that they have directly supervised, it is at the discretion of the panel member to determine whether or not he or she should excuse him or herself from the panel should it constitute an actual or perceived conflict of interest.

39. While the rationale of that provision is applicable, the Tribunal notes with some concern that no further and clear guidelines exist to deal with the recognition and handling of potential conflicts of interests for the purpose of selection exercises.

40. The Tribunal notes, however, that the Appeals Tribunal provided guidance in *Finniss* 2014-UNAT-297, where it ruled that in applying the test for apparent bias of selection/interview panels, the Tribunal shall examine “whether [a] fair-minded observer, having considered the facts, would conclude that there was a real possibility that the interview panel was biased”. In that judgment, the Appeals Tribunal referred to the persuasive holding by the International Labour Organization Administrative Tribunal in its Judgment No. 179, *Varnet v. UNESCO*, which stated:

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.

41. Thus, the relevant standard applicable to the facts in this case is the existence of a reasonable perception of bias from the perspective of a fair-minded observer. The Applicant’s subjective fear of bias cannot in itself be sufficient to support a finding that a conflict of interest exists.

Issue one: On the basis of the available evidence, should OHR and/or the Executive Office have removed Mr. Martinez-Soliman from the interview panel?

42. With the above standard in mind, the Tribunal finds it appropriate to first examine whether OHR or the Executive Office should have removed Mr. Martinez-Soliman from the interview panel, on the basis of a perceived conflict of interest, once it was decided that the Applicant was one of the candidates to be interviewed.

43. The Tribunal notes that in his evidence, Mr. Kacou, the former Chief of Staff and Director of the Executive Office, stated that when he approved the composition of the interview panel, which included Mr. Martinez-Soliman, on 1 November 2014, he did not and could not have known that the Applicant would be a candidate for the post. Mr. Kacou further stated that even on 26 November 2014, after the Applicant had been shortlisted for an interview and a panel member had been replaced, he had no knowledge of any facts that could create the appearance of a potential conflict of interest vis-à-vis the Applicant. Accordingly, he testified that he had no reason to change the panel's composition and to remove Mr. Martinez-Soliman from it.

44. The Tribunal is satisfied that Mr. Kacou, who acted within his delegated authority on behalf of the Administrator, UNDP, had no knowledge of the various communications and requests for management review filed by the Applicant, in which she had raised concerns about the management by Mr. Martinez-Soliman of the change process at OGC. The Tribunal noted that Mr. Kacou was not copied on any of the relevant communications sent by the Applicant regarding her concerns. On that basis, the Tribunal finds it reasonable to conclude that Mr. Kacou had no grounds to question Mr. Martinez-Soliman's participation on the panel, on the grounds of a perceived, or actual, conflict of interest.

45. The Tribunal also considered whether the UNDP Administrator, in her capacity as Administrator and Hiring Manager for the contested post, had a duty to raise the matter of a potential conflict of interest of Mr. Martinez-Soliman, which would have prevented him from sitting on the panel.

46. The UNDP Administrator approved the short-list of candidates, which included the Applicant, and as Administrator and Hiring Manager for that strategic post had to be aware of the composition of the panel which was approved on her behalf. The Tribunal carefully reviewed the terms of the Applicant's email of 10 April 2014 to the UNDP Administrator, which referred to "arbitrary decision making processes and the systematic exclusion of the OGC Director" from the restructuring, and noted with concern that none of the witnesses, and particularly those who were copied on that email, seemed to know if any follow-up was taken.

47. It is the Tribunal's view that the email called for some kind of follow-up and a review of the matters raised by the Applicant. However, it did not find it necessary to hear the UNDP Administrator on this matter for the purpose of the present proceedings, since it found that the terms of that email, apart from the final paragraph could reasonably be read as a positive resumé of the Applicant's achievements with a criticism in the final paragraph which referred to arbitrary decision making about which the Applicant was to write separately. The Applicant did not do so. The Tribunal finds that this email in itself could not, without more, trigger in the mind of the UNDP Administrator the appearance of a conflict of interest or of bias on the part of Mr. Martinez-Soliman, which would have required the UNDP Administrator to remove him from the interview panel once the Applicant had been short-listed.

48. Similarly, the Tribunal also finds that Ms. Liz Huckerby, another panel member, had no knowledge, at the time, of the various communications, including that to the UNDP Administrator, and requests for management review filed by the Applicant in which she had raised serious concerns about the change process and made allegations about the manner in which she was treated. Although the Applicant stated she had copied her request for management evaluation of 16 July 2014 to Ms. Liz Huckerby, her email address was misspelled. Ms. Huckerby stated at the hearing that she never received that communication. She was equally not aware of the complaint of 8 June 2014. However, in her evidence to the Tribunal, she confirmed that a reasonable perception of bias would have been sufficient to exclude Mr. Martinez-Soliman, and had she been aware of the terms

of the complaint of 8 June 2014, despite the fact that it was closed without an investigation, it would have been sensible to have removed him from the panel to avoid any perception of bias.

49. Applying the standards set by the Appeals Tribunal in *Finniss*, the Tribunal is satisfied that OHR and the Executive Office did not have sufficient knowledge at the time to consider removing Mr. Martinez-Soliman from the interview panel on the basis of a perception of bias.

Issue two: On the basis of the available evidence, was it unreasonable for Mr. Martinez-Soliman not to recuse himself from the interview panel once he became aware that the Applicant was one of the short-listed candidates?

50. Counsel for the Respondent is correct in pointing out, in her final closing submissions, that there was no proof or finding of actual bias or abuse of authority on the part of Mr. Martinez-Soliman and that, the OAI did not consider that there were grounds to carry out an investigation. The Tribunal agrees that this contention is well founded and that Mr. Martinez-Soliman was not told that a complaint against him had been made to OAI. However, whilst there was no reason for recusal on the grounds of actual or proven bias, and for the reasons outlined below, Counsel for the Respondent is mistaken in submitting that there was no reasonable basis upon which Mr. Martinez-Soliman should have recused himself under the test in *Finniss*.

51. The Tribunal has carefully reviewed the documentary evidence and the evidence provided by the witnesses, including Mr. Martinez-Soliman. While it does not question that at the time of the interview, Mr. Martinez-Soliman was unaware of the Applicant's complaint of June 2014 to the OAI, it finds that on the basis of the available evidence, Mr. Martinez-Soliman had a sufficient basis to be reasonably aware of the fact that the Applicant took strong issue with his communication style, his handling of the OGC restructuring, and his overall dealing with her and in particular that she impugned his integrity by calling into question his motivation in directing the restructuring exercise which resulted in her post being abolished.

52. Mr. Martinez-Soliman had regular discussions with the Applicant and was copied on her email of 26 February 2014 to Mr. Liley, then Director, OHR, as well as on the communication she sent to the UNDP Administrator on 10 April 2014. In these communications, the Applicant explicitly referred to her concerns about the motivation of BDP management in excluding her from the change process at the OGC, and on her removal from the post of Director. In light of the various discussions he had had with the Applicant with respect to the OGC redesign, and their disagreements in this matter, which he admitted, Mr. Martinez-Soliman could not brush aside the references to concerns about BDP management's motivation and arbitrary decision making processes of which he was an integral and senior participant. In that regard, the Tribunal notes that Mr. Liley, in his evidence to the Tribunal, said without any hesitation or ambiguity that when the Applicant referred to "BDP management", it was clear that she could only have meant Mr. Martinez-Soliman which, according to him, "was the same thing". In his evidence to the Tribunal, Mr. Martinez-Soliman himself admitted that towards the end of the Applicant's tenure at the OGC, their relationship had not improved and that they went through some difficulties and had disagreements on the handling of the OGC change process. He said, however, that he felt that the Applicant had blown some issues out of all proportion.

53. While it may have been mainly disagreements about managerial issues, the fact of the matter remains that the Applicant labelled these issues in communications to senior management as arbitrary, and questioned the motivation behind it. Moreover, Mr. Martinez-Soliman was copied on some of these communications and had himself had numerous discussions with the Applicant in this respect. All of the foregoing created a situation in which a fair-minded observer would have concluded that there was a real possibility that the presence of Mr. Martinez-Soliman on the interview panel would lead to a reasonable perception of bias. In the exercise of his discretion, it was unreasonable for Mr. Martinez-Soliman as a senior manager not to at the very least have raised the matter of a perceived conflict of interest with the panel and ultimately not to recuse himself from sitting on it. His failure to do so constitutes a procedural flaw in the selection exercise. The Tribunal finds that the participation of

Mr. Martinez-Soliman on the interview panel constituted a denial of full and fair consideration given the background and content described herein.

Issue three: Does the fact that Ms. Sharon Kingsley as a D-1 staff member sat on the panel constitute a procedural flaw?

54. The Applicant further submits that the presence of a panel member at the D-1 level, that is, one level under the grade of the post under review, constitutes a procedural flaw.

55. According to para. 86 of the Recruitment Framework, “with the exception of the HR representative, panel members should be graded equal to or higher than the post under consideration”. The Tribunal notes, however, that in light of the fact that recruitment to D-2 positions is governed by the Standard Operating Procedures and not by the framework, the Administration was not legally required to have a panel exclusively with members at the D-2 or above level. The presence of a D-1 staff member does not constitute a procedural flaw in the selection exercise.

Issue four: Did Mr. Martinez-Soliman’s presence on the interview panel have an impact on the contested decision?

56. The Tribunal carefully reviewed the interview notes and is concerned that Mr. Martinez-Soliman did raise with the panel members issues about the Applicant’s performance at the OGC. The record, namely the handwritten interview notes from the note-taker, shows that after the panel members, including Mr. Martinez-Soliman, had expressed their view that the Applicant’s performance at the interview with respect to her managerial competencies was not up to the standard required. Mr. Martinez-Soliman mentioned that the Applicant did not have “a smooth ride [at the OGC] in Oslo”. Mr. Martinez-Soliman confirmed in evidence that this statement did not arise from the interview performance, nor was it an issue in the documents before the panel. Furthermore, it was uncontested that the Applicant’s formal performance evaluations during her long career with the Organization, including during her tenure as Director, OGC, were consistently positive.

57. Mr. Martinez-Soliman was questioned closely by Counsel for the Applicant and by the Tribunal to clarify the exact point in time or stage of the decision making process at which this comment was made. He clarified that it was “at the end of the deliberations”, meaning that it was after the decision not to recommend the Applicant for a second round of interviews was made. However, he was unable to explain the relevance of the comment when asked what was the point of making such an adverse comment if, as he claimed, it was made “at the end of the deliberations”. The handwritten notes show that the comment was made at the stage when it was clear from the recorded comments of the panel members that, in their opinion, the Applicant’s answers lacked sufficient depth. It is clear that the panel continued its discussion after Mr. Martinez-Soliman’s comment, as evidenced by three pages of handwritten notes. The Tribunal finds that Mr. Martinez-Soliman’s recollection that his comment was made “at the end of the deliberations” is inconsistent with the facts. However, it is consistent with his recollection that by that stage, the Applicant and others had been “eliminated”.

58. It would appear that Mr. Martinez-Soliman’s statement did not have an actual impact on the final decision not to recommend the Applicant, since it simply reinforced a conclusion drawn earlier by the panel members on the basis of her performance at the interview. Nevertheless, it was unwise and inappropriate to have made any such comment, bearing in mind United Nations policy that panel members must not introduce their personal knowledge of a candidate during a selection process.

59. The Applicant further submits that Mr. Martinez-Soliman’s presence on the interview panel had an impact on her non-recommendation, to the extent that she was distressed and as a consequence did not perform as well as she otherwise might have at the interview. It would be highly speculative and therefore unsafe to go as far as the Applicant contends. However, the evidence before the Tribunal is consistent with the Applicant’s description of the adverse effect on her interview performance. To that extent it is legitimate to infer that there was some measure of detriment to the Applicant, in her interview performance, although the extent of it would be difficult to quantify. However, there is no indication that the other panel members, who had no knowledge of the relationship between

Mr. Martinez-Soliman and the Applicant, were influenced by him or were judging the Applicant's performance by other than objective criteria, and assessing her in accordance with her interview performance.

60. The Tribunal finds that having regard to the applicable legal principles in *Finniss*, and in light of the allegations made by the Applicant against him as well as the criticisms she had expressed regarding Mr. Martinez-Soliman's motivation, the latter, as a senior manager, ought to have been reasonably aware that a fair-minded observer would have concluded that there was a real possibility of bias at the interview. He had erred in thinking that there were no grounds for him to recuse himself. However, the Tribunal is unable to conclude, on the evidence, that but for the presence of Mr. Martinez-Soliman, the Applicant would have progressed to the second phase of the interview process.

Issue five: Is the Applicant entitled to a remedy?

61. The Appeals Tribunal held in *Vangelova* 2011-UNAT-172 that:

An irregularity in promotion procedures will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.

62. In light of the Tribunal's conclusions that Mr. Martinez-Soliman's participation as a panel member did not have an adverse impact on the Applicant's chances for promotion, it cannot order that she be granted a remedy, either in the form of rescission and/or of compensation for material damages under art. 10.5 of its Statute.

63. The foregoing notwithstanding, the Tribunal notes that the Applicant also claimed compensation for moral damages. Pursuant to art. 10.5(b) of its Statute, the Tribunal may award compensation for moral injury if such damage is substantiated by evidence. The Appeals Tribunal has held that "[a]n entitlement to moral damages may ... arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably

attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award” (*Asariotis* 2013-UNAT-309).

64. The Applicant gave evidence of the stress caused to her when she was informed that Mr. Martinez-Soliman was sitting on the interview panel. She stated she was in a state of shock. The Tribunal is concerned that the Applicant’s distress was increased in light of her situation as an unassigned staff member serving on a temporary assignment, who was in need of placement. Her permanent appointment was terminated as a result of the abolition of her post of Director, OGC. It is thus obvious that what was at stake for the Applicant in the present selection exercise was her future career with the Organization. The distress caused to the Applicant by the participation of a panel member who ought reasonably to have recused himself was not insignificant given the issues at stake. However, its impact on the actual assessment of performance cannot be quantified with any degree of certainty and the Tribunal is not prepared to engage in the speculative exercise that Counsel for the Applicant has invited the Tribunal to engage in. However, the Tribunal finds that the Applicant suffered a degree of anxiety and distress which was not insignificant.

65. The Tribunal’s finding, based on the documents and oral testimony, is that she did suffer distress for which she is entitled to compensation. The Tribunal awards USD1.000 compensation for moral damages.

Accountability

66. Art. 10.8 of the Statute of the Dispute Tribunal states that it may “refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability”. The Tribunal finds that this is not a suitable case for referral for accountability under art. 10.8 of its Statute, and decides to reject the Applicant’s request in this respect.

Conclusion

67. The selection exercise was procedurally flawed and the Applicant is entitled to USD1.000 as compensation for moral damages.

68. The award of compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable.

69. All other pleas are rejected.

(Signed)

Judge Goolam Meeran

Dated this 21st day of July 2016

Entered in the Register on this 21st day of July 2016

(Signed)

René M. Vargas M., Registrar, Geneva