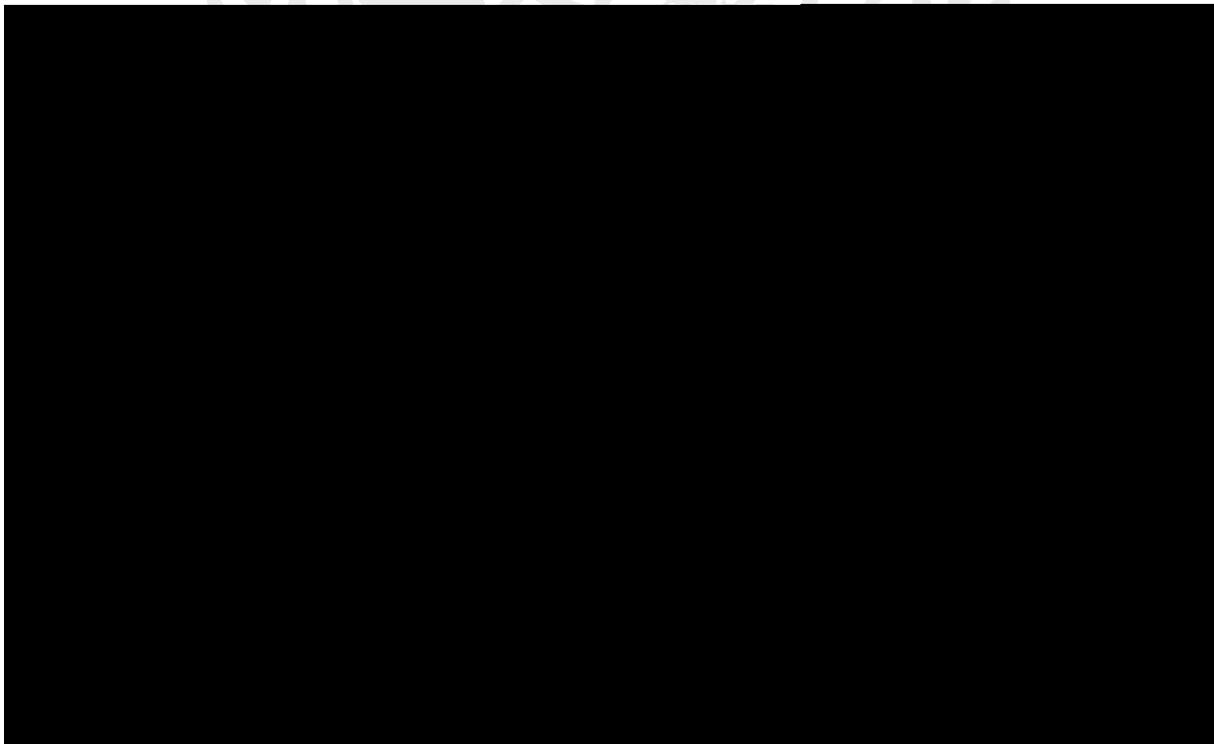
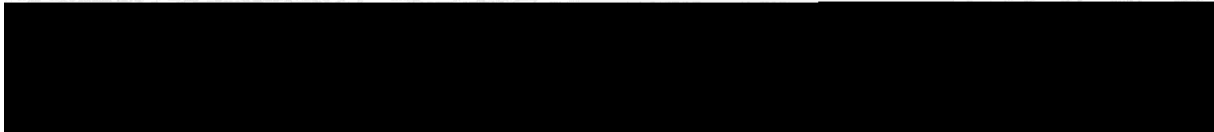




UNITED NATIONS  
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Case No. 2010-189



Counsel for Appellant: Clifford A. Arrey

Counsel for Respondent: Amy Wood

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the USG/OIOS to appoint an independent panel to conduct an investigation, to immediately rescind the decision to promote a named candidate, and to retroactively promote Mr. O'Neill to the P-5 level.

6. By letter dated 21 July 2006, the USG/OIOS advised Mr. O'Neill's counsel that she had reviewed his contentions regarding the selection process, but found them to be without merit. She also expressed concern as to the "speculations and allegations" made in the Confidential Letter relating to the selections and appointments in OIOS.

7. By letter dated 24 July 2006, Mr. O'Neill submitted to the Secretary-General a request for administrative review of the decision not to select him for the post of Field Section Chief. In the request, he referred to the Confidential Letter of 26 June 2006 that his counsel had addressed to the USG/OIOS and the latter's response of 21 July 2006.

8. On 25 September 2006, Mr. O'Neill submitted a Statement of Appeal to the JAB in New York, challenging the OIOS' promotion process, especially for the P-5 post of Field Section Chief, and alleging denial of opportunity for him to fairly compete in the

by the USG/OIOS to release the Confidential Letter to OIOS staff members, calling it an act of “aggravation, outrage, spite, malice, trickery and deceit” and seeking monetary damages for that “reprehensible conduct”.

11. Under cover of a memorandum dated 8 March 2007, the representative of the Secretary-General submitted his comments on Mr. O’Neill observations. He attached a copy of the comments dated 25 January 2007 from OIOS in response to Mr. O’Neill’s observations including his complaint about the cover letter and the decision to release the Confidential Letter. The representative of the Secretary-General quoted the OIOS’ comments on this issue that the cover letter and the Confidential Letter had been shared with the OIOS staff members

to ensure full transparency and to allow [them] to provide additional information if wished... In the USG’s view it is inappropriate that staff members be mentioned in a negative manner without having the opportunity to review the information and provide their viewpoint. The USG is also very much concerned with a culture that allows unsubstantiated accusations to be made without any accountability and without allowing a due process to take place. OIOS should also set an example of transparency by allowing the involved parties access to information which may be potentially harmful to them.

12. In a report dated 8 November 2007, the JAB dismissed Mr. O’Neill’s claim that the non-promotion decision was unlawful. But it concluded that “there was no legitimate rationale for the release of [the Confidential Letter]” and recommended that the USG/OIOS issue a written apology to Mr. O’Neill for non-observance of confidentiality in the present litigation.

13. On 25 January 2008, the Deputy Secretary-General informed Mr. O’Neill of the decision of the Secretary-General not to accept the JAB’s recommendation to issue an apology, noting nonetheless that confidentiality was an important part of the appeals process and should be respected.

14. According to the UNDT, in his application to the former Administrative Tribunal on 2 May 2008 and his subsequent submission to the Dispute Tribunal on 4 June 2010 after the case had been transferred to the UNDT, Mr. O’Neill only identified the decision to release the Confidential Letter, but not the decision not to select him for promotion to the P-5 level, as the issue for litigation. In his summation of the legal issues for the

UNDT dated 4 June 2010, Mr. O'Neill listed nine issues, of which one referred to the P-5 selection process, but not to any non-selection decision:

The Applicant believes that it is most desirable for the Judge, to judiciously address comprehensively the governing principles in implementing the relevant provisions of the Charter, relevant resolutions and decisions of the General Assembly, Staff Rules and Regulations of the Organization, relevant Administrative Instructions and Secretary-General's Bulletins, guidelines and their application to the Applicant's staff selection process to the P-5 level.

In his summation dated 2 June 2010 of the legal issues for the UNDT, the Respondent focused on the decision to release the Confidential Letter, while noting that Mr. O'Neill did not address the specific findings of the JAB with respect to his non-selection for the three posts at the P-5 level, or the decision of the Secretary-General to accept the JAB's recommendation on that issue.

15. In Judgment No. UNDT/2010/203 dated 22 November 2010, Judge Kaman dismissed Mr. O'Neill's application as not receivable. Noting that Mr. O'Neill did not identify the contested decision as being the one not to select him for promotion in either his application to the former Administrative Tribunal or his submission to the UNDT, Judge Kaman determined that

[t]hus, [Mr. O'Neill] ostensibly abandoned before the Administrative Tribunal the original grounds for his appeal before the JAB (the non-selection claim) and instead changed the basis of his appeal before the Administrative Tribunal to that of the Confidential Letter--an issue that had never been the subject of administrative review and that had not been formally preserved for appeal.

Consequently, Judge Kaman held that Mr. O'

16. On 7 January 2011, Mr. O'Neill appealed the UNDT Judgment to the Appeals Tribunal. The Secretary-General filed an answer on 4 March 2011.

### Submissions

#### Mr. O'Neill's Appeal

17. Mr. O'Neill maintains that he did not abandon his appeal against his non-selection to a number of P-5 posts to which he had applied. For the purpose of judicial economy, he retained his original appeal to the JAB by attaching it as an annex to his application to the former Administrative Tribunal and the UNDT.

18. Mr. O'Neill submits that the UNDT Judge erred in law by considering the cover letter as an administrative decision requiring review by the Secretary-General, and not as documentary evidence, which was so found and accepted by the JAB. It was a fact that he had never received any written notification that his counsel's Confidential Letter had been released. Consequently, it cannot be considered as an "administrative decision".

19. Mr. O'Neill believes that the UNDT erred in fact and law by deeming the treatment of the cover letter as a matter raised *sua sponte* by the JAB, when it was raised by him as part of his JAB appeal. He stresses that the JAB handled the decision to release the Confidential Letter "properly".

20. Mr. O'Neill avers that the UNDT's conclusions that he identified the release of the Confidential Letter as the only administrative decision under appeal, but that the cover letter did not appear to have undergone the required adminidler- Of5b-5.2t.5 cf5b-5.2t1720.



**THE UNITED NATIONS APPEALS TRIBUNAL**



**Judgment**

32. This Court affirms the impugned Judgment and dismisses the appeal in its entirety.

Original and authoritative version: English

Done this 21<sup>st</sup> day of October 2011 in New York, United States.

*(Signed)*

Judge Simón, Presiding

*(Signed)*

Judge Garewal

*(Signed)*

Judge Courtial

Entered in the Register on this 2<sup>nd</sup> day of December 2011 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar