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**Judgme**

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**Before**

**Case N**

**Date:**

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**Counsi**

**Counse**

**JUDGE SOPHIA ADINYIRA, PRESIDING.**

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

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

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

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

... At that time, ALU was responsible for checking investigation reports submitted from investigators at the three duty stations. In May 2006 Mr. Postica was asked by the then Deputy Director OIOS to advise ALU to submit all requests through him so that he could coordinate them. In an email dated 11 May 2006 she advised the three Operations Managers that Mr. Postica's new function was to contact the assigned investigator to follow up on any issues the investigator may have regarding the sharing of the requested documents. In the same email she expressed her concerns to the Operations Managers about the quality d.01-1(h.1(tedn0002g TD-\*000re)5(w157711nvd032(t-1210)

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **The vacancy and selection process for the New York Post**

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

##### **Competencies**

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

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

... On this issue the Tribunal is not in a position to judge whether the questions were appropriately weighted for a P-5 post but notes that as all of the candidates who were interviewed were subjected to the same questions there could be no disadvantage

requirement of this position.” In so doing, it took account of a qualification that



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

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

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

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

Dear Both,

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

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

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

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

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

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

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... These Applications were transferred to the United Nations Dispute Tribunal (“the Tribunal”) on 1 July 2009 in acco

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

4. The UNDT awarded compensation as follows:<sup>2</sup>

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

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

c. USD 50,000 as moral damages.

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

5. The UNDT also decided to refer the case to the Secretary-General, pursuant to Article 10(8) of its Statute “for appropriate action to be taken to enforce the accountability of those staff members [the members of the interview

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

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

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

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

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

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

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

**Mr. Finniss' Answer**

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

14.

**Considerations**

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

*Appeal against finding of bias*

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

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

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

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

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

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

24. The open history of animosity and ill-feeling



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*Referral*

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

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

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

39. We affirm the referral.

**Judgment**

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

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<sup>8</sup> Impugned Judgment, para. 123.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Adinyira, Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Chapman

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

*(Signed)*

Weicheng Lin, Registrar