
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/019

Judgment No.: UNDT/2012/200

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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.

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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

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.

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

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 at1

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.”

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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

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.

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.⁶ A staff member has no right to promotion based on his prior performance.

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

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

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

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

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 select

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

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 correct¹⁴ 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

¹⁴ 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.

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.¹⁵ At that point there was no legal impediment to the Applicant receiving the difference in salary that was due to him.

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

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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