



**Before:** Teresa Bravo  
**Registry:** Geneva  
**Registrar:** René M. Vargas M.

LOEBER

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Anca Apetria, Schwab, Flaherty & Associés

**Counsel for Respondent:**

Alexandre Tavadian, UNHCR

Elizabeth Brown, UNHCR

## **Introduction**

1. By application filed on 15 August 2016, the Applicant contests the decision not to select him for the post of Head, Supply Management and Logistics Service (“SMLS”), Division of Security and Supply (“DESS”), Office of the United Nations High Commissioner for Refugees (“UNHCR”).
2. The application was registered under Case No. UNDT/GVA/2016/078, and served on the Respondent who filed his reply on 15 September 2016.

## **Facts**

3. The Applicant was selected for the post of Chief of Section (Procurement of Goods), PMCS, effective 2 March 2014, under a two-year fixed-term appointment (“FTA”) due to expire on 1 March 2016.
4. Between May and June 2014, the Head, PMCS, started implementing a change in the reporting lines within the team and strengthening the management responsibilities of the Senior Supply Officer, a P-4 staff member working under the Applicant’s supervision.
5. The Applicant didn’t agree with these changes and tensions arose in the team.
6. In September 2014, the *Fritz Institute* was commissioned to undertake a re-evaluation of the supply chain at UNHCR, as a follow-up to a similar study undertaken in 2008 and in light of increasing demands on the Organization resulting from multiple emergencies as well as from an increase in the number of displaced persons.
7. On 8 December 2014, the Applicant filed a complaint for harassment by the Head, PMCS, with the Inspector General’s Office (“IGO”), UNHCR, copied to the Ethics Office, UNHCR. He subsequently asked the IGO to put the complaint on hold, since he thought the matters would be resolved through managerial

actions. At the hearing on the merits, he admitted that he never asked the IGO to take the matter up again, and that it had been overcome by events.

8. A meeting took place in Budapest, in December 2014, between the Director, DESS, the Head, PMCS, and the Applicant, during which some of the concerns raised by the Applicant relating to the management decisions by the Head, PMCS, as well as the concerns raised by the Head, PMCS, with respect to the impact of the Applicant's management style on staff were discussed. The Director, DESS, encouraged the two managers to improve their communication. It was also decided that any reorganization of the team should await the recommendations of the Fritz report.

9. The report of the *Fritz Institute* was presented in March 2015. It stressed the dramatic change that the Organization had undergone since the 2008 report, noting, for instance, that income and expenditure in response to a wide range of ongoing and protected emergencies had almost doubled.

10. On 26 March 2015, the Head, PMCS, (the Applicant's direct supervisor) performed the Applicant's annual e-pad and considered his performance as "successfully meet[ing] expectations".

11. On 4 June 2015, a meeting was held, *inter alia*, between the High Commissioner, UNHCR, the Assistant High Commissioner for Operations, UNHCR, the Head, DESS, the Head, PCMS, and the Head, Supply Management and Logistics Service ("SMLS"), UNHCR. In an email dated 11 June 2015, entitled "Note on HC's meeting on the Supply Chain, 4 June 2015", addressed to the members of the meeting and others, it is stated, *inter alia*, that:

DESS also requested to strengthen its staff in Budapest, for an additional cost of 800,000 USD. 20% of all audit recommendations in UNHCR were on procurement and procurement therefore needed to be transformed into a more robust service ([Headquarters ("HQ")] section and Field section). The HC noted that this would be acceptable for 2016 as these concerns are valid and this function needs strengthening.

12. The Head, DESS, sent a memorandum dated 16 June 2015 to the High Commissioner, entitled “Follow up to the Fritz Institute Review of the Supply Chain”. In that memo, the Director, DESS, noted four “priority actions and decision making points for consideration by the High Commissioner”. One of them concerned “the transformation of procurement into a more robust service by reconfiguring the service into a HQ section and a Field section”. To that memorandum, the Head, DESS, annexed further explanations on the proposed restructuring, including an organigram on the proposed DESS new structure. The High Commissioner signed the memorandum off on 25 June 2015.

13. The Head, PMCS, the Applicant’s supervisor, informed the latter during a meeting on 18 June 2015 of the intention to propose to the Budget Committee the restructuring of two services within DESS: PMCS and SMLS. This implied the proposal to discontinue the Applicant’s position and that of Chief of Section (Procurement of Services), and the creation of two P-5 level posts of Chief of Section (Procurement Field Support, on the one hand, and Procurement HQ, on the other hand); this was confirmed to the Applicant in writing by letter dated 22 June 2015.

14. In a memorandum dated also 18 June 2015 and entitled *Follow up to the Fritz Institute Review of the Supply Chain*, the Director, DESS, submitted the structuring proposal to the Secretary of the Budget Committee. It was received by the Budget Committee on 19 June 2015. During a meeting with staff of both services held on 19 June 2015, the Heads of PMCS and SMLS presented the restructuring proposal, and responded to questions raised by staff, including the Applicant.

15. In an email of 29 June 2015 to the Deputy High Commissioner and others, the Applicant expressed his concerns and criticism about the submission to the Budget Committee with respect to the new/modified posts at SMLS/PMCS. He noted, particularly, that the new posts proposed as Section Chief HQ Procurement and Field Procurement were not grounded in the *Fritz report*, which was however used “to implement subliminal changes desired by PMCS leadership”.

16. At its 10 July 2015 session, the Budget Committee approved the proposed PMCS restructuring, including the discontinuation of the position encumbered by the Applicant, effective 1 March 2016. The Applicant was informed of that decision by the Head, PMCS, in a letter dated 24 July 2015, which the Applicant signed on 27 July 2015.

17. On 28 August 2015, the Applicant filed a request for management evaluation with the Deputy High Commissioner of the decision to abolish his post; in his request, he also asked to be provided with a copy of the Budget Committee Decision of 10 July 2015. The Applicant received no response with respect to such request.

18. The Applicant's request for management evaluation contained *inter alia* rather strong statements with respect to the Head, PMCS. For instance, the Applicant referred to him as a liar, and that he had displayed "serious breach of ethics and deficiencies in professional conduct", and "harassment". He also mentioned having commented on "a range of very serious procurement shortcomings" at Headquarters, "in breach of basic public procurement principles".

19. On 27 August 2015, the vacancy announcement for the D-1 post of Head, SMLS, was published with an application deadline of 17 September 2015. The Applicant applied for the position.

20. In the UNHCR September 2015 compendium, two P-5 posts were published in the newly called Procurement Service ("PS"), which was composed of two sections: the Procurement HQ Section and the Procurement Field Support Section. One of the P-5 posts published in September 2015 was that of Chief of Section (Procurement Field Support), whereas the other was that of Chief of Section (Procurement HQ). The Applicant did not apply to either of these positions.

21. On 11 November 2015, the D-1 post of Head, SMLS, was re-opened for applications with a new deadline for application set for 17 November 2015.

22. By email of 2 December 2015 from a Senior Resource Management Associate, Resource Management Unit, Office of the Director, DESS, the Applicant was invited for an interview for the post of Head, SMLS, on 9 December 2015.

23. By follow up email of 3 December 2015, the Applicant was informed of the composition of the Interview Panel (“the Panel”), which consisted of:

- a. The Director, DESS (the Applicant’s second reporting officer, and the Hiring Manager for the position);
- b. The Head, Procurement Service (the Applicant’s first reporting officer);
- c. The Head, SMLS; and
- d. Mr. L., Office of the Director, Division of Human Resources Management (“DHRM”).

24. By email of 4 December 2015, the Applicant expressed his disagreement with the first three Panel members, and requested that a new Panel be constituted. He stressed that the three Panel members were directly involved in the decision to “terminate” the post of Chief, Procurement of Goods, PMCS, which he was still encumbering at the time of the interview. He also referred to his request for management evaluation filed on 28 August 2015.

25. The Applicant summarized his concerns as follows:

- a. With respect to the Head, PMCS, he stated that he “informed about the planned termination on 18 June 2015 and signed the termination letter of 24 July 2015. Due to the serious occurrences set out in the 28 August 2015 Management Evaluation request, [he] maintain[ed] that the termination undersigned by [the Head, PMCS] [was] unrightful;

b. Concerning the Head, SMLS, he stated that he “supported the termination. In the convocation of 18 June 2015, in which [he] was informed about the planned termination, [he] objected to it and asked [the Head, SMLS] whether the termination was also supported by DESS/SMLS. As Head of SMLS, he confirmed this to [the Applicant]”;

c. Finally, with respect to the Director, DESS, the Applicant noted that she “held a final information meeting on 22 July 2015 with [him], in the presence of a representative from Human Resources, on the termination of [his] position. In the meeting it was clear that [the Director, DESS] supported or directed the termination of [his] position. During this meeting, [he] expressed [his] continued disagreement with the termination of the post he encumbered, which resulted in the above mentioned request for management evaluation submitted in August 2015. It appears also that since the July 2015 meeting, [the Director, DESS] ha[d] generally avoided contact with [the Applicant], though being [his] Second level supervisor, be it on a personal level, by telephone or email. Further, on the occasion of an event in Geneva in the afternoon of 3 September 2015, [the Director, DESS] met [the Applicant’s] greeting with apparent disdain. Under these circumstances, conducting an objective interview appears impossible”;

26. He expressed his view that based on the above, and the issues he had raised in his request for management evaluation, the three Panel members had a direct conflict of interest in the D-1 post recruitment process.

27. The Senior Resource Management Associate, Resource Management Unit, Office of the Director, DESS, responded to the Applicant, in the following terms:

I take note of your comments. On the procedural side, we ensured the presence of DHRM in the senior level interviews and of [Mr. L.] D1, Director's Office, DHRM in this particular case. The direct manager of the post, [Director, DESS], has to be in accordance to the procedures. The presence of technical senior managers as [the Head, SMLS] and [the Head, PS] was also needed. You might wish perhaps to liaise with [Mr. S.] in the Legal Affairs Section for advice or eventually suggest LAS participation in the interviews.

28. By another email of the same day, the Senior Resource Management Associate, informed the Applicant that his email of 4 December 2015 had been shared with the Panel members.

29. By email of 9 December 2015, the Applicant informed the Administration that since he understood that the Panel had remained unchanged, and in light of the reasons given by him in the email of 4 December 2015—reiterated on 8 December 2015—he confirmed that he would not participate in the interview. The Applicant stressed, however, that he upheld his application for the position.

30. The Panel proceeded with the interviews with the other candidates, as they were advised by the DHRM that there were no grounds for a recusal and that they should remain as panel members.

31. On the DHRM shortlisting matrix, it is stated under the “manager’s view” that although the Applicant was highly qualified and experienced in procurement, the available information did not indicate any full time field assignments working in the management and logistical aspects of supply delivery; hence, he was not considered to be a suitable candidate. The matrix further notes the following:

As there were only 4 internal candidates, all four were invited to an interview to give each an opportunity to expand on his/her experience beyond what was available in the fact sheets and motivation letters. [The Applicant] declined the interview due to the composition of the panel, indicating that he considered three members of the four[-]member panel to have a conflict of interest in relation to his application.

32. The selected candidate was a female candidate.

33. The Applicant was separated from the Organization on 2 March 2016.

34. After his separation from the Organization, the Applicant indicated the Head, PMCS, as a referee for, at least, two other positions for which he applied at MINUSTAH and UNRWA. The Head, PMCS, had also positively recommended the Applicant to Ms. G., who was looking for a procurement officer to fill a post at the Food and Agriculture Organization of the United Nations (“FAO”), while he was still in the employment of the UNHCR.



35. On 4 March 2016, the Applicant was informed about his non-selection for the contested post. He requested management evaluation of his non-selection on 24 April 2016, but did not receive a response to his request. He subsequently filed the present application.

### **Procedural history**

36. The Applicant filed three applications with the Geneva Registry of the Dispute Tribunal, which were registered under Cases No. UNDT/GVA/2015/182, UNDT/GVA/2016/039 and UNDT/GVA/2016/078. All three cases were assigned to Judge Goolam Meeran, who, after consultation with the parties, decided to consolidate them into a combined proceeding.

37. A hearing on the merits was held from 21 March 2017 to 23 March 2017. Following a request for recusal of Judge Meeran, filed by the Applicant on 27 March 2017, the President of the Tribunal ordered by Order No. 77 (GVA/2017) of 30 March 2017 that Judge Meeran be recused from the three cases. As a result of that order, the cases were reassigned to the undersigned Judge.

38. After holding a case management discussion on 6 June 2017, the undersigned Judge convoked the parties to a hearing, held from 10 to 14 July 2017, and during which the Tribunal heard several witnesses. The Respondent filed his closing submissions on 19 July 2017, and the Applicant on 28 July 2017.

### **Parties' submissions**

39. The Applicant's principal contentions are:

- a. The decision-making process for the D-1 position lacked fairness and integrity since three panel members were directly implicated in the "unlawful termination" of his position as Chief of Section, Procurement of Goods, PMCS;

b. The Head, PMCS, acted arbitrarily and in bad faith as he tried to progressively erode the Applicant's functions and change reporting lines, leading to a formal harassment complaint submitted to the OIG;

c. The Director, DESS, also revealed continuous support to the discontinuation of the Applicant's post and progressively ceased interactions with him;

d. Also, the Head, SMLS, supported the restructuring and the discontinuation of the Applicant's post after the Applicant had drawn management's attention to bad procurement management at SMLS;

e. The assessment of candidates for the newly advertised D-1 position was done in violation of the Revised Policy and Procedure on Assignments (UNHCR/HCP/2015/2/Rev.1);

f. The Organization also failed to provide the reasons why his request for an alternative panel was not granted, and why the original Panel composition was maintained;

g. The Applicant requests that the recruitment process be declared null, and that the procedure be repeated with a new panel as well as with a subsequent interview; and

h. He demands material compensations for the non-selection amounting to a total of USD24,953.94, compensation for the loss of pension in the amount of USD2,100, plus interest, as well as moral damages.

40. The Respondent's principal contentions are:

a. The Applicant provides no evidence in support of his assertion that the Panel members were biased against him;

b. He voluntarily decided not to undergo the interview for the D-1 position and, as a consequence, the Organization couldn't consider him for the job;

- c. The selected candidate was a female and was entitled to the same consideration as internal applicants pursuant to paragraph 20 of *the Revised Policy and Procedures for Assignments and the Policy on Achieving Gender equity in UNHCR Staffing*; and
- d. The Application should be rejected.

### **Consideration**

41. The Tribunal first recalls that in selection and appointment matters, the Administration enjoys broad discretion and it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of a selection process (*Fröhler* 2011-UNAT-141, *Ljungdell* 2012-UNAT-265). The Tribunal's examination is limited to whether the procedure laid down in the Staff Regulations and Rules was followed, and whether the staff member was given full and fair consideration (*Abbassi* 2011-UNAT-110).

42. Further, the Appeals Tribunal has clarified that in non-selection cases, official acts are presumed to have been regularly performed. It stressed in *Rolland* 2011-UNAT-122 that:

26. There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. 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 stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

43. The Appeals Tribunal further has constantly held that "the burden of proving improper motives such as abuse of authority, discrimination, retaliation or harassment rests on the person making the allegations" (*see Nwuke* 2015-UNAT-056 and also *Jennings* 2011-UNAT-184).

44. The present selection exercise is governed by the Revised Policy and Procedures on Assignments (UNHCR/HCP/2015/2/Rev.1).

45. The Applicant's main argument is that he was denied full and fair consideration since three out of the four Panel members were biased against him; not replacing them after his request for recusal, made it impossible for him to attend the interview.

46. The Tribunal therefore has to assess whether upon receipt of the Applicant's request for recusal of three of the four Panel members in the context of the recruitment procedure for the D-1 position, any or all of them should have recused themselves and/or whether the Organization should have replaced any or all of them.

47. The Respondent confirmed, and the Tribunal notes with concern, that no rules or guidelines exist within UNHCR to deal with the handling of potential conflicts of interests for the purpose of selection exercises like the present one. However, the *Policy and Procedures for the Promotion of International Professional Staff members* provides, at its para. 4.6, for promotion (but not recruitment or selection processes), the following:

Where a case under review by either Panel raises a conflict of interest for a Panel member, Secretary, LAS Representative or Ex Officio that person shall excuse himself or herself during consideration of the case. Possible scenarios for a conflict of interest include, but are not limited to, a Panel Member's own promotion or that of his or her spouse, partner or current supervisee.

48. The Tribunal notes that, while this provision and instruction does not apply to the subject-matter of the case at hand (recruitment/selection), its rationale with respect to an obligation by an interview panel member to recuse him- or herself in case of conflict of interest certainly applies to all selection exercises. Indeed, the Respondent conceded that where a member of an assessment panel is conflicted, s/he cannot take part in the selection process.

49. Staff Regulation 1.2(m) defines a conflict of interests as follows:

A conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's

status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

50. Moreover, the Tribunal recalls that the Appeals Tribunal has determined the standard test to assess bias and conflict of interest in selection/interview panels in *Finniss* 2014-UNAT-397, in which it held that 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”.

51. Also, the International Labour Organization Administrative Tribunal referred in its Judgement No. 179, *Varnet vs. Unesco* to the following:

[i]t is a general rule of law that a person called 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.

52. This means that it is irrelevant for the outcome of the present case, that the Head, PMCS, and the Director, DESS, confirmed in their evidence to the Tribunal, during the hearing on the merits, that they did not feel any bias or resentment against the Applicant. Indeed, a subjective feeling is irrelevant and the question of impartiality or bias has to be analysed from the point of view of a fair-minded objective observer. It is also irrelevant whether the Applicant had a subjective feeling that one or more of the Panel members were biased against him. What is determining is solely whether, on the basis of the available evidence at the time and from the perspective of a fair-minded objective observer, a reasonable perception of bias of one or more of the Panel members against the Applicant existed. That assessment is without prejudice to the question whether the Applicant would, ultimately, have been recommended and selected for the position.

*The Head, PMCS*

53. The Tribunal has to assess on the basis of the available evidence whether an objective observer would have concluded that the Head, PMCS, as the Applicant's direct line manager, had an actual or perceived conflict of interest and bias against the Applicant.

54. The Tribunal reiterates that the Applicant's subjective fear of bias by the Head, PMCS, cannot, in itself, be sufficient to support a finding that a conflict of interest, requiring the recusal of his supervisor from the Panel, existed. At the same time, the Head, PMCS's subjective feeling that he was not biased against the Applicant is not, in and of itself, sufficient to find that he could remain on the interview Panel and did not have to recuse himself.

55. What is determining are the facts that occurred prior to the convocation of the Applicant to the interview in December 2015.

56. It is not contested that between May and June 2014, the Head, PMCS, tried to implement a change in the reporting lines between the Applicant and his team and to strengthen the management responsibilities of the Senior Supply Officer (P-4), PMCS, who was working under the Applicant's supervision. The Applicant did not agree with these changes in reporting lines and the Director, DESS, decided not to implement these new reporting lines pending the outcome of the Fritz report. However, the Applicant also disagreed with the assignment of some of the tasks falling in his portfolio to the Senior Supply Officer, which he felt undermined his position. Finally, he stressed that the Head, PMCS, did not appoint him as Officer-in-Charge ("OIC") in the same proportion as his counterpart (the Chief, Procurement of Services), and that the Head, PMCS, did present cases falling in the Applicant's portfolio to the Headquarters Committee on contracts ("CoC").

57. In his evidence to the Tribunal, the Head, PMCS, explained that he was not aware of the alleged disproportion in the appointment of OICs, and that he tried to balance the OIC designation between the two Chiefs of Section. Further, he explained that he presented to the CoC cases that the Applicant refused to present

on the grounds that he had not reviewed them after they had been under review by the Senior Supply Officer.

58. However, at the hearing, the Head, PMCS, admitted that he had professional disagreements with the Applicant, but also clarified that the change in the reporting lines was suggested to improve the workflow and motivation of the team, in particular of the Senior Supply Officer, who had been acting as OIC prior to the Applicant's arrival, had shown a very good work performance and, as a P-4, was able to assume some managerial functions.

59. In his evidence, the Head, PMCS, also explained that the Applicant had some "communication problems" with his team, as reflected in the mid-point review of the Applicant's ePad, and that he, as a manager, tried to solve those issues while, at the same time, ensuring that the productivity of the team was improved or upheld. He also underlined that despite those professional disagreements, he never felt biased against the Applicant and recognised his competence, dedication and professionalism. Consequently, on 26 March 2015, he performed the Applicant's annual e-pad and evaluated his performance as "successfully meet[ing] expectations".

60. The Tribunal finds that the above matters constitute mere professional disagreements, and maybe performance issues, which in and of themselves cannot lead to a reasonable conclusion of actual or perceived bias on behalf of the Head, PMCS, against the Applicant.

#### The Applicant's complaint for harassment

61. The Tribunal notes that on 8 December 2014, the Applicant filed a harassment complaint against the Head, PMCS, with the IGO, copied to the Ethics Office. Upon the Tribunal's inquiry at the hearing, the Applicant confirmed that soon thereafter, he asked the IGO to put the complaint on hold because he thought that the matters would be resolved through managerial actions. He also admitted that he did not, at any point in time, request the IGO to take the matter up again, and that the complaint was subsequently "overtaken by events", namely the restructuring and the discontinuation of his post. The Head, PMCS, confirmed on

his part, that he was not informed of the Applicant's complaint against him by the IGO, which is bound by confidentiality, or by anyone else.

62. The Tribunal thus finds that in light of the confidentiality of the complaint, it cannot be taken into account to assess whether a fair-minded observer would have found that the appearance of a potential conflict of interest existed.

The Applicant's request for management evaluation of August 2015

63. The Tribunal also noted that the Head, PMCS, confirmed in his evidence that at the time of the interview, he was aware of the Applicant's request for management evaluation of August 2015. The Tribunal recalls that the terms of that management evaluation request in relation to the Head, PMCS, were rather strong. Indeed, the Applicant referred, *inter alia*, to the Head, PMCS, as a liar, and that he had displayed "serious breach of ethics and deficiencies in professional conduct", and "harassment". He also mentioned having commented on "a range of very serious procurement shortcomings" at Headquarters, "in breach of basic public procurement principles".

64. On the basis of these strong issues raised in the request for management evaluation alone, the impartiality of the Head, PMCS, in assessing the Applicant was open to question on reasonable grounds. The Tribunal considers that this, together with the above work related disagreements between the Applicant and the Head, PMCS, are grounds that, under the *Finniss* test, called for the Head, PMCS, to recuse himself. Under the same test, it would have been sound management by DHRM to replace the Head, PMCS, by another Panel member. Also, the Director, DESS, who was aware of the above tensions that culminated in the Applicant's request for management evaluation, should have encouraged the replacement of the Head, PMCS, by another Panel member, in her discussion with the Head, PMCS, and DHRM.

65. In this respect, the Tribunal notes that at the hearing, both the Director, DESS, and the Head, PMCS, confirmed that while it would have been impossible or extremely difficult to replace the three Panel members for which the Applicant



had requested recusal, it would have been possible—albeit not ideal—to only replace the Head, PMCS.

66. However, and without prejudice to its findings that it would have been sound management to replace the Head, PMCS, the Tribunal is of the view that the present case has to be distinguished from *El-Kholy* UNDT/2016/101.

67. Unlike *El-Kholy*, in the case at hand, the Applicant refused to undergo the interview. Under the circumstances of the present case, the Tribunal considers that to assess whether the Applicant was given full and fair consideration, it would have been essential for him to undertake the interview. Indeed, this is a key element for the appreciation of the present case, since the Applicant's refusal to undertake the interview makes it impossible for the Tribunal to assess what the outcome of the interview would have been had he actually undertaken it. In other words, in the absence of an interview and an interview record, it is impossible to examine whether the presence of the Head, PMCS, on the Panel, prejudiced the Applicant. Any such assessment done otherwise would be purely speculative. In fact, by not undergoing the interview, the Applicant precluded the Tribunal from concluding whether the composition of the panel was a determining factor for his non-selection to the D-1 position.

68. Moreover, quite distinctly from *El-Kholy*, there is supporting evidence in this case that the Head, PMCS, gave positive references about the Applicant's experience and professionalism, even after his separation from UNHCR. Indeed, the Applicant admitted at the hearing and the Head, PMCS, confirmed that after the Applicant's separation from service, he provided positive recommendations to the Applicant for two posts, one at MINUSTAH and one at UNRWA. The Tribunal notes that the Applicant actually got the post at MINUSTAH, and cannot but assume that the reference provided by the Head, PMCS, to MINUSTAH had a positive impact on his selection.

69. Furthermore, the evidence at the hearing confirmed that the Head, PMCS, had also recommended the Applicant for a P-5 Procurement position at the FAO in Rome, while he was still in the employment of UNHCR. It transpired at the hearing that it was the Applicant himself who had mentioned the Head, PMCS, as

a referee when applying for this position. As such, the Tribunal notes that despite their different professional views with respect to the management and particularly the restructuring of PMCS, such disagreement does not seem to have affected the Applicant's prospects of developing a career in the United Nations, supported by the Head, PMCS's positive recommendations.

70. Moreover, the Head, PMCS, also stressed that the Applicant was suitable for the newly created P-5 posts, and, had he applied for any of them, he would have had good chances for being selected. The fact that the Head, PMCS, provided these positive recommendations, and was asked by the Applicant to serve as his referee, clearly contradicts the Applicant's claim of bias.

71. It follows from the foregoing that the evidence provided at the hearing does not allow the Tribunal to conclude that the Head, PMCS, was actually biased against the Applicant and that, as a Panel member for the D-1 post, he negatively interfered with his interview for the D-1 position and jeopardized the Applicant's candidature to that post. On the contrary, the Head, PMCS, went beyond his way to give the Applicant positive recommendations, even after his separation from UNHCR, and thus helped him to continue his career with the United Nations. The Tribunal also notes that the Applicant, following clarifications obtained during the hearing, admitted that the Head, PMCS, had not lied about his consultation with DHRM and apologized for having made an allegation of dishonesty.

#### Disagreement on the restructuring exercise

72. With respect to any disagreement between the Applicant and the Head, PMCS, and also the Director, DESS, and the Head, SMLS, regarding the restructuring exercise, the Tribunal recalls that the Administration disposes of broad discretion regarding the reorganization of its services, the implementation of the best managing practices and the use of best management tools. Provided that these decisions are not arbitrary, taken on capricious grounds and comply with certain basic standards and norms of fairness and justice, they fall within the exclusive prerogative of the Administration, even if staff members do not agree with them.

73. As this Tribunal found in judgment *Loeber* UNDT/2017/073, the restructuring exercise of PMCS was genuine. The restructuring decision was taken by the High Commissioner, UNHCR, and can, in no way, serve to make any findings by the Tribunal as to the perceived or actual conflict of interest of the Head, PMCS, vis-à-vis the Applicant.

*The Director, DESS*

74. The Tribunal also has to evaluate whether the facts that occurred prior to December 2015 could reasonably have led a fair-minded objective observer to conclude that the Director, DESS, was biased against the Applicant.

75. The Director, DESS, gave evidence at the hearing that she had given consideration to the Applicant's request for recusal, but since she did not feel any bias, and DHRM confirmed that there was no issue with her remaining on the Panel, she decided not to take any action.

76. The Tribunal recalls that the Director, DESS, was based in Geneva and, thus, did never directly work with the Applicant, whose duty station was in Budapest, under the direct supervision of the Head, PMCS, who, in turn, reported to the Director, DESS. As the Applicant's second reporting officer, the Director, DESS, thus only had an indirect involvement in the day-to-day work of the Applicant.

77. However, at the hearing, the Director, DESS, confirmed that she was aware of the "issues" and tensions that had arisen between the Applicant and the Head, PMCS. Nonetheless, she emphasised that she expected the Head, PMCS, to address those issues directly with the Applicant, and that she did not want to undermine his authority. She further underlined that, after the meeting held in December 2014 in Budapest with the Applicant and the Head, PMCS, she had decided "to put on hold" the change in the reporting lines pending the presentation of the Fritz Report. She did so in her role as line manager of the Head, PMCS, and as SRO of the Applicant, and to ensure the smooth functioning of the service.

78. Nevertheless, the Director, DESS, also stressed that, from a managerial point of view, she supported the restructuring process in the context of the Fritz Report, as reflected in the memorandum of 16 June 2015, to the High Commissioner, UNHCR.

79. The Tribunal is further convinced that the Applicant's reference to the Director, DESS, having greeted him "with disdain", and her lack of responsiveness to some of the emails he sent are not sufficient either to meet the test of bias under *Finniss*.

80. For the reasons outlined above, it is the Tribunal's view that the facts concerning the involvement of the Director, DESS, in the restructuring process do not allow any reasonable conclusion to establish the existence of an actual or perceived bias on her part against the Applicant. The Tribunal concludes that in light of the circumstances, the fact that the Director, DESS, as hiring manager for the D-1 position, decided to remain on the Panel, was reasonable.

*The Head, SMLS*

81. Finally, the Tribunal finds that as far as the Head, SMLS, is concerned, no evidence whatsoever was produced either in the case file, or at the hearing, to allow it to conclude that a fair-minded observer would have concluded that there was a real possibility that he was biased against the Applicant. The mere reference by the Applicant to the Head, SMLS, having, in the Applicant's view, made wrong decisions in the management of the SMLS warehouse, and having supported the restructuring exercise, does not suffice to reasonably create even a possibility of bias.

*DESS response to the Applicant's request for recusal*

82. The Tribunal notes that while it did not change any of the Panel members in response to the Applicant's request for recusal of three out of the four Panel members, the Senior Resource Management Associate, Resource Management Unit, DESS, reassured the Applicant that from the procedural side, they had ensured the presence of a D-1 from the Director's Office, DHRM, in the

interview. She further explained why the direct manager of the post (Director, DESS), as well as the two technical senior managers had to remain on the Panel. Finally, she informed the Applicant of the possibility to liaise with the Legal Affairs Section (“LAS”), UNHCR, and to consider asking for the attendance of one of their lawyers at the interviews.

83. The Tribunal is satisfied with the reasons that the Administration gave to the Applicant for its decision not to replace three Panel members. Further, it finds that suggesting to the Applicant to contact LAS was reasonable, and provided the Applicant with a procedural safeguard in case he wished to contest the selection process after undergoing the interview. The Applicant did not pursue that suggestion, but willingly decided not to go to the interview.

*“Oral hearing” with the Deputy High Commissioner*

84. Another argument raised by the Applicant concerns the lack of response to his request for an “oral hearing” with the Deputy High Commissioner, UNHCR. Although, in the Tribunal’s view, it would have been a good management practise to give the Applicant the opportunity to meet with the Deputy High Commissioner, whether to grant or not such a meeting falls under the discretionary powers of the Organization and cannot be sanctioned by the Tribunal.

*Selected candidate*

85. Finally, the Respondent clarified that although the selected candidate was not a UNHCR staff member, she was eligible to apply for internally advertised vacancies pursuant to para. 20 of the Revised Policy and Procedures of Assignments. Furthermore, as a female candidate, she had priority in accordance with the Policy on achieving Gender Equity in UNHCR Staffing. The Applicant’s arguments with respect to the selected candidate must therefore fail.

*Is the Applicant entitled to a remedy?*

86. For the reasons outlined above, and notwithstanding its conclusion that it would have been sound management to replace the Head, PMCS, in the Panel, the

Tribunal finds that the presumption of regularity of the decision not to select the Applicant prevails. The fact the Applicant refused to go to the interview did not allow the Tribunal to assess the impact of the Panel composition on the outcome of the selection process.

87. In light of all the circumstances, the Tribunal is satisfied that the Applicant's candidature received full and fair consideration. It follows that the Tribunal cannot grant the Applicant any remedy, either in the form of rescission and/or of compensation for material and moral damages, under art. 10.5 of its Statute.

### **Conclusion**

88. In view of the foregoing, the Tribunal DECIDES:

The application is rejected in its entirety.

*(Signed)*

Judge Teresa Bravo

Dated this 12<sup>th</sup> day of September 2017

Entered in the Register on this 12<sup>th</sup> day of September 2017

*(Signed)*

René M. Vargas M., Registrar, Geneva