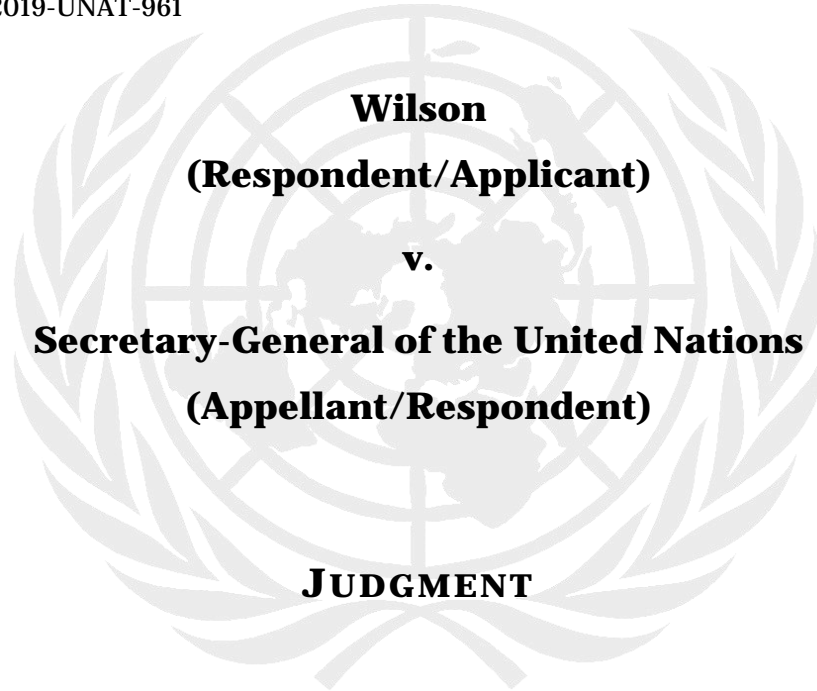




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-961



**Wilson
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge John Raymond Murphy Judge Jean-François Neven
Case No.:	2019-1260
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Mr. Wilson: Daniel Trup, OSLA

Counsel for Secretary-General: Wambui Mwangi

JUDGE MARTHA HALFELD, PRESIDING.

1. This case arose from a selection exercise for a vacant position at the D-1 level within the United Nations Joint Staff Pension Fund (UNJSPF) in 2016, in which Mr. Anthony Wilson was not selected. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that the selection process was flawed, and Mr. Wilson did not receive full and fair consideration chiefly because the involvement of the Deputy Chief Executive Officer (Deputy CEO), UNJSPF, in the second selection exercise constituted an actual or perceived conflict of interest. But the UNDT declined to rescind the contested decision or award Mr. Wilson any monetary compensation. We vacate the UNDT Judgment.

Facts and Procedure

2. The following facts were agreed before the Dispute Tribunal:¹

... In 2008, [the Applicant] was promoted to the D-1 level as Chief, Financial Information Operations Service, Division of Management, Office of Programme Planning, Budgets and Accounts (OPPBA).

... By virtue of his above selection, and subsequently via [Job Opening (JO)] 23941 in 2012 and JO 25327 in 2013, the Applicant is rostered at the D1 level.

... On 14 April 2016, the Applicant received notice of JO 57744, Chief, Information Management Systems Service, D-1, UNJSPF. The Applicant applied the same day and received confirmation that he would be identified as a rostered candidate.

... On 3 June 2016, eight days before the end of the advertisement period, the Applicant received notice via Inspira [the United Nations online jobsite] that a rostered candidate had been selected for the JO.

... On 6 June 2016, the Applicant learned that [Mr. DCD, name redacted], a P5 in the ICT Audit Section of Office of Internal Oversight Services (OIOS) had been selected.

... On 7 June 2016, the Applicant requested management evaluation of the decision not to select him.

... On 15 June 2016, the Applicant filed an application [with the Dispute Tribunal] for suspension of action of the contested decision pending management evaluation. On 20 June 2016, [the Dispute Tribunal] issued Order No. 147 (NY/2016), granting the suspension of action pending management evaluation.

¹ *Wilson v. Secretary-General of the United Nations*, Judgment No. UNDT/2019/041, para. 3.

... On 30 August 2016, [the Management Evaluation Unit (MEU)] issued its evaluation letter, which rescinded the contested decision, and stated that [the Under-Secretary-General for the Department of Management (USG/DM) had decided that] selection exercise should be recommenced, with additional requirements:

- UNJSPF should establish a panel, comprising a majority of individuals outside of the UNJSPF and with no prior involvement in this recruitment, to assist the hiring manager in the recruitment.
- The panel should assess whether the rostered candidates meet the requirements and competencies of the job opening. Such assessment should include a review by the panel of the candidates' applications and competency-based interviews, as well as any other evaluation mechanisms which the panel considers appropriate.
- The panel should prepare a documented record of its assessment of the rostered candidates.
- The hiring manager should submit the documented record of the panel and his/her own reasoned recommendation for selection to the UNJSPF Chief Executive Officer ["CEO/UNJSPF"] for his decision.

... On 22 September 2016, the panel members evaluated the personal history profiles of the roster candidates, and confirmed that all of them met the requirements of the position.

... On 23 September 2016, the rostered candidates were invited for interviews to take place on 28 September 2016 via Skype, and on 27 September the names of the panel members were disclosed:

- [Mr. PD, name redacted, Deputy Chief Executive Officer (Deputy CEO)]
UNJSPF – Hiring Manager (D2)
- [Ms. OP, name redacted], Deputy Chief [Enterprise Resource Planning]
Umoja – UN Secretariat (D2)
- [Mr. CH], Director Chief Technology Officer – UNDP (D1)
- [Ms. NC], Chief Unit [Headquarters] Staffing Section [the Office of
Human Resources Management (OHRM)] – UN Secretariat (P5),
ex officio

... The panel members, with the exception of the hiring manager, were external to the UNJSPF. In addition, none of the external panel members had any prior involvement in the selection exercise.

... The Applicant's interview was scheduled for 9:00 am on 28 September 2016. Immediately thereafter, the Applicant wrote to [Ms. NC], copying the MEU, stating that he had received an anonymous email to his [United Nations] email account, which alleged irregularities in the selection process. The interview was canceled.

... The Applicant also wrote to the panel stating that on 28 September 2016, prior to the scheduled time of the 9:00 am interview, another anonymous email was sent to the Applicant's [United Nations] email account, which purported to share sample questions from the upcoming interview.

... On September 28 and 29, the Applicant received emails regarding the re-scheduling of his interview.

... On 30 September 2016, the Applicant wrote to both [Ms. CDLR, name redacted] and [Ms. NC] regarding his concern with the email circular cited in the anonymous email.

... On 3 October 2016, [Ms. NC] replied to the Applicant.

... On 1 October 2016, the Applicant was informed of his new interview date for 7 October 2016.

... On 7 October 2016, panel interviewed the roster candidates, including the Applicant. The competencies assessed were Professionalism, Planning and Organizing, Client Orientation, Leadership, and Managing Performance.

... In its evaluation, the assessment panel found that the Applicant did not fully demonstrate all the required competencies. The panel concluded that, though the Applicant fully demonstrated the competencies of professionalism and client orientation, he did not demonstrate the competencies of planning and organizing, and leadership. As such, the assessment panel did not recommend the Applicant for selection.

... The panel concluded that two of the roster candidates fully demonstrated the competencies of the position. It unanimously recommended one roster candidate for the position.

... On 7 December 2016, the Applicant noted in Inspira that the status of JO 57744 had changed to "Selected from roster." The Applicant later came to know that the same candidate as before, [Mr. DCD] was the selected candidate.

... On 8 and 11 December 2016, the Applicant requested management evaluation of the second selection decision.

... On 9 December 2016, the Applicant filed an application [with the Dispute Tribunal] for suspension of action of the contested decision pending management evaluation.

... On 16 December 2016, [the Dispute Tribunal] issued Order No. 276 (NY/2016), which granted the suspension of action pending management evaluation.

... On 12 January 2017, the MEU issued its evaluation of the second selection decision, in which the decision was upheld.

3. On 7 April 2017, Mr. Wilson filed an application with the Dispute Tribunal against the decision not to select him for JO 57744. He requested rescission of the contested decision and an award of six months' salary for violation of his rights and loss of opportunity in career advancement.

4. In its Judgment now under appeal, the Dispute Tribunal granted Mr. Wilson's application in part, but declined to award him any monetary compensation.

5. The UNDT determined that there was a lack of regulatory guidance for a selection exercise limited to rostered candidates, but if the Administration decided to establish an assessment panel to conduct a competency-based selection exercise, it must follow the general rules and directives set forth in the related regulatory framework including Administrative Instruction ST/AI/2010/3 titled "Staff selection system". "This must be particularly so where an election is made to follow such process, ... and where the initial selection exercise appeared marred with irregularity so as to be set aside by the Administration."²

6. Upon review of the history of the selection exercise for JO 57744, the Dispute Tribunal took issue with several factors, of which the most serious was the involvement of the Deputy CEO of UNJSPF in the second selection exercise as both a voting and therefore deciding member of the assessment panel and the hiring manager. In the view of the Dispute Tribunal, such an involvement "constituted an actual[,] if not [] a perceived conflict of interest; or at the very least gave the appearance thereof", giving rise to "a reasonable apprehension of partiality or bias".³

7. The Dispute Tribunal also found problematic several circumstantial factors, which, while they individually might not render the selection process flawed, taken as a conspectus of circumstances, could be perceived as indicators that the selection process was procedurally deficient and not conducted with the required level of impartiality. Those factors included the lack of timely confirmation that the assessment panel members were compliant with the training requirements; the non-existence of the interview notes taken by the assessment panel members; the uncertainty surrounding the availability of Mr. Wilson's e-PAS reports to the assessment panel, and the anonymous e-mails "cloud[ing] the appearance of a fair process".⁴

² *Ibid.*, para. 43.

³ *Ibid.*, para. 61.

⁴ *Ibid.*, para. 80.

8. While it found that the selection exercise was flawed in several respects and Mr. Wilson did not receive full and fair consideration during the selection exercise for JO 57744, the Dispute Tribunal declined to award him compensation because he had provided no evidence of either pecuniary or non-pecuniary harm. For the same reason, the Dispute Tribunal declined to rescind the contested decision because no basis existed for awarding Mr. Wilson any in-lieu compensation.

9. The Secretary-General appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal) on 17 May 2019, and Mr. Wilson filed his answer on 29 May 2019.

Submissions

The Secretary-General's Appeal

10. The Secretary-General submits that the Dispute Tribunal erred by concluding that the selection process was flawed solely on the basis of the participation of the Deputy CEO as the hiring manager in both the first and second selection exercises. The fact that the Deputy CEO found Mr. Wilson unsuitable for the position in the first selection exercise that was rescinded is not evidence of a conflict of interest. It was entirely logical that the Deputy CEO would be tasked with the role of a hiring manager for JO 75544 that would directly report to him. The letter by the USG/DM to Mr. Wilson clearly envisioned the participation of the Deputy CEO throughout the selection exercise. There was no allegation of an acrimonious relationship between the Deputy CEO and Mr. Wilson or bias or discrimination on the part of the Deputy CEO against Mr. Wilson. The UNDT based its conclusion of an actual or perceived conflict of interest on an unsubstantiated assumption. The UNDT did not refer to any fact, other than the Deputy CEO's participation as the hiring manager for both selection exercises, to demonstrate that any personal interest of the Deputy CEO could have interfered with, or could be perceived as having interfered with, the performance of his official duties in the second selection exercise.

11. The Dispute Tribunal erred by failing to refer to any clear and convincing evidence showing that Mr. Wilson was denied a fair chance in the selection process, or that a basis existed for the reasonable apprehension of bias or partiality. Mr. Wilson was provided with the composition of the assessment panel before his interview, but he did not express any concern about conflict of interest on the part of the Deputy CEO before his interview. He only raised the

issue of conflict of interest months later. Likewise, he did not raise any allegation of bias against the other members of the assessment panel; he only offered the unsubstantiated anonymous e-mails as his proof of irregularity without clearly articulating his claim.

12. The Dispute Tribunal erred by concluding that the selection exercise was flawed and that Mr. Wilson did not receive full and fair consideration due to other circumstantial factors including the failure to confirm training compliance in writing for the assessment panel members, the failure to produce individual scoring sheets or notes by the assessment panel members, and the leaking of original interview questions as revealed by the anonymous e-mails. The facts of the case do not lead to a conclusion of a flawed selection process, and circumstantial factors fail to support any conclusion of bias or conflict of interest.

13. The Secretary-General requests that the United Nations Appeals Tribunal (Appeals Tribunal) grant his appeal and vacate the impugned Judgment.

Mr. Wilson's Answer

14. Mr. Wilson states that he takes no position on the appeal filed by Secretary-General, “[i]n light of the recent agreement reached between the parties and the desire to seek an end to the current litigation”.

Considerations

15. The issue for consideration and determination in this appeal is whether the UNDT erred on a matter of law or fact in its conclusion that Mr. Wilson was not afforded full and fair consideration in the second selection exercise. According to the UNDT, this was the consequence of the reasonable impression of partiality or bias caused by the Deputy CEO's participation in the assessment panel, both as a hiring manager and a voting member, as well as certain other circumstantial factors.

16. In his appeal, the Secretary-General contends that no issue of conflict of interest arose from the fact that the Deputy CEO had found Mr. Wilson unsuitable for the position in the first selection exercise that had been rescinded. The Secretary General highlights that the only fact cited by the UNDT to support its conclusion was the Deputy CEO's participation in both the first and second selection exercises that gave rise to a reasonable perception that his impartiality had been compromised by his preconceived opinion about the candidates.

According to the Secretary-General, this was not enough for the conclusion that his personal interest had interfered with, or was perceived to have interfered with, the performance of his official duties or with the integrity, independence and impartiality required of him in the second selection exercise.

17. Further, the Secretary General argues that *Finniss*⁵ is distinguishable from the present case, as in the former, there was an acrimonious relationship between the candidate and the panel member, which led to the perception of the possibility of bias in the panel, while, in the latter, there was no such allegation of animosity between Mr. Wilson and the Deputy CEO, as acknowledged by the UNDT.⁶

18. We agree with the Secretary-General on this issue. As governed by Staff Regulation 1.2(m) “Basic rights and obligations of staff”:⁷

[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.

19. Article 22 of the Appeals Tribunal’s Rules of Procedure defines conflict of interest as including any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her, and any other circumstances that would make it appear to a reasonable and impartial observer that the judge’s participation in the adjudication of the matter would be inappropriate. The UNDT Rules of Procedure contain the same language on this matter. Although relating to judges, these provisions can be useful to enlighten our interpretation of the term “conflict of interest” within the Organization.

20. The core question for consideration and determination is hence whether there was any *actual, possible or perceived* conflict of interest in the Deputy CEO’s participation in the assessment panel during the second selection exercise. For us to determine that, certain facts

⁵ *Finniss v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-397.

⁶ Impugned Judgment, para. 54.

⁷ Secretary-General’s Bulletin ST/SGB/2012/1 effective 1 January 2012.

must be recalled. When the first selection decision was rescinded by the Administration, the USG/DM issued specific instructions for the second selection exercise. This would involve the establishment of “a panel, comprising a majority of individuals outside of the UNJSPF and with no prior involvement in this recruitment, to assist the hiring manager in the recruitment”.⁸ There is no challenge to the fact that the Administration complied with this specific instruction, particularly with regard to the composition of the assessment panel.⁹

21. In the case at hand, the assessment panel did not consider Mr. Wilson as meeting all the required competencies and unanimously recommended another candidate for selection. This recommendation was submitted to the CEO as head of office, who ultimately took the decision to select the other candidate. Even granted that any further participation by the Deputy CEO in the second selection exercise could have been avoided in light of his involvement in the first selection exercise that had been cancelled, it is not reasonable to assume that his involvement in the first selection exercise automatically meant that he was conflicted and therefore should be excluded from any selection exercise.

22. The present case is distinguishable from *Finniss*,¹⁰ since there was no allegation of bias, discrimination or any other kind of deteriorated or privileged relationship between the involved candidates and the Deputy CEO. Therefore, no threat to his impartiality in the evaluation of Mr. Wilson’s candidacy could be assumed. On the contrary, the Deputy CEO’s participation in the selection exercise was expected and reasonable, as the selected candidate would be reporting directly to him and the CEO. This might be the reason for the UNDT’s opinion that the Deputy CEO could simply have acted as the hiring manager.¹¹ We agree with the UNDT in this finding. However, we must disagree with the UNDT when it held that the Deputy CEO should not have acted as a voting member of the assessment panel. Either there was a conflict of interest, actual, possible or perceived, or there was none. In conclusion: to exclude the Deputy CEO’s involvement in the selection exercise, there must be reasonable grounds and/or evidence of extraneous or improper motives. Mr. Wilson did not raise

⁸ Impugned Judgment, para. 35(a).

⁹ *Ibid.*, para. 36. Ordinarily, ST/AI/2010/3, in paras. 9.4 and 9.5 would not have required a panel in these cases, as rostered candidates may be selected by the head of a department/office/mission, or recommended for selection by the hiring manager to the head of department/office/mission, without referral to a central review body.

¹⁰ *Finniss v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-397.

¹¹ Impugned Judgment, para. 54.

anything thereof, except for the unsubstantiated and inconsequential rumors, as acknowledged by the UNDT, brought by the anonymous emails he had allegedly received.¹²

23. In addition to the two members of the assessment panel being external to UNJSPF, a staff member from OHRM sat on the assessment panel *ex officio*, and a UNJSPF staff member assisted the assessment panel with notetaking and report drafting.¹³ Then, the assessment panel made its recommendation to the CEO, who took the ultimate decision. This process shows a built-in safeguard mechanism to keep any individual bias and preformulated opinion from influencing the selection exercise, of which the Deputy CEO was a part.

24. The other issues considered by the UNDT as possible indicators of deficiency in the selection exercise were i) purported tardy presentation of the panel members' training certification in competency-based interviews; and ii) non-existence of the individual interview notes taken by the assessment panel members. As they were found to be "circumstantial factors" by the UNDT, they were not capable of invalidating, by themselves, the selection process.¹⁴

25. In light of the above, the UNDT erred in law when it concluded that the circumstances of the case amounted to a conflict of interest on the part of the Deputy CEO and that, coupled with the circumstantial factors, Mr. Wilson had not been afforded full and fair consideration during the second selection exercise for JO 57744.

¹² *Ibid.*, paras. 60 and 78-80.

¹³ *Ibid.*, paras. 59 and 70.

¹⁴ *Ibid.*, paras. 64 and 71.

Judgment

26. The appeal is upheld and Judgment No. UNDT/2019/041 is hereby vacated.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Neven

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar