



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/017/
UNAT/1615
Judgment No.: UNDT/2011/099
Date: 14 June 2011
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

DE CRUZE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant has two cases before the United Nations Dispute Tribunal: UNDT/NY/2010/017/UNAT/1615 (Case 1) and UNDT/NY/2009/044/JAB/2007/020 (Case 2). Case 1, the present case, concerns the Applicant's non-selection for the P-4 position ("the Post") of Secretary of the United Nations Publications Board and Exhibits Committee within the Department of Public Information ("DPI"), and Case 2 (decided in Judgment No. UNDT/2011/100) deals with the non-renewal of the Applicant's contract following his non-selection for the Post.

2. In the present case (Case 1), a selection exercise was conducted with regard to the Post and the Applicant was recommended, along with two other (male) candidates. However, based on the advice of the Focal Point for Women ("FPW") for DPI, the Under-Secretary-General ("USG") of DPI cancelled the otherwise orderly selection exercise, despite the fact that a selection panel did not deem any of the female candidates suitable (some of these had been short-listed, had undergone a written test and were interviewed for the Post). A vacancy announcement was reissued for the Post a second time, and a female candidate ultimately was selected. The Applicant was deemed suitable for the Post in both selection exercises.

3. The main substantive issue to be addressed by the Tribunal is defined as follows: did the Respondent properly exercise his discretion and follow proper procedures during the selection exercise for the Post?

Facts

4. The Applicant entered service of the United Nations on 22 April 1997 with the Department of Peacekeeping Operations ("DPKO"), Field Administration and Logistics Division, as a P-3 Personnel Officer. He later served as Chief of Personnel, both with the United Nations Preventive Deployment Force in Macedonia and with the United Nations Mission in Kosovo ("UNMIK").

5. As of 5 July 2000, the Applicant held the P-4 position of Deputy Chief, Office of the Iraq Oil-for-Food Programme (“OIP”).

6. By its resolution 1483 (2003) adopted 2 May 2003, the Security Council determined that OIP would be ending as of 21 November 2003. As a result, on 18 August 2003, the Officer-in-Charge of the Office for Human Resources Management (“OHRM”), Mr. Denis Beissel, issued a memorandum stating (as quoted in a 3 November 2003 memorandum from the Assistant-Secretary-General (“ASG”) of OHRM, Ms. Rosemary McCreery, to “All Heads of Department and Offices”:

...

3. The Executive Director of the Programme and the Officer-in-charge of the Administrative Services of the Commission [the United Nations Monitoring, Verification and Inspection Commission (“UNMOVIC”)], have requested that priority consideration be given to the staff who apply for posts (at the General Service and Professional levels), whenever possible, for upcoming vacancies in all Departments and Offices.

4. Given the very special circumstances of this situation, it would be in the best interest of the Organization to make every effort to ensure that the placement of the OIP and UNMOVIC staff be undertaken promptly. To this end, it is proposed that recruitment of external candidates should be limited to the vacancies where no internal candidates possess requisite skills and competencies.

...

7. On 18 September 2003, the Applicant was offered a one-year fixed-term contract at the P-4 level with the Special Court for Sierra Leone (“SCSL”) as Chief of the Personnel Section. The Applicant testified at the substantive hearing before the Tribunal, which took place on 6 April 2011, that when he accepted the temporary appointment to the Post (as described below), he declined the SCSL offer.

8. In the abovementioned 3 November 2003 memorandum, the ASG/OHRM instructed “All Heads of Departments and Offices” to consider OIP staff members of the professional category at the 30-day mark for vacancies for which they would

apply. Due to his status as a former member of the OIP, the Applicant was therefore considered an internal candidate when he later applied for the Post.

9. In October 2003, the Applicant applied for the Post under a temporary vacancy announcement (UNA-31768-E-P-4-006) and was chosen for the position. On 7 October 2003, the Officer-in-Charge (“OIC”) of the Executive Office (“EO”) of DPI, Mr. Oleg Astapkov, requested the Applicant to be released from OIP to DPI, with the explanation that the temporary vacancy announcement had failed to elicit any suitable candidates from within DPI and the Applicant had “the combination of skills and administrative expertise for this position”.

10. The propriety of the Applicant’s placement on the Post under this temporary vacancy announcement is not at issue in this case.

The first selection exercise

11. On 11 June 2004, a vacancy announcement for the Post (VA 04-PUB-DPI-402315-R-New York) was advertised on the online United Nations jobsite, Galaxy.

12. The application deadline for this first selection exercise was 10 August 2004. The vacancy announcement stated in boldface type and in capital letters: “**PLEASE NOTE THAT APPLICATIONS RECEIVED AFTER THE DEADLINE WILL NOT BE ACCEPTED**”.

13. No female candidates from within DPI applied for the Post during the first selection exercise, although they were given the opportunity to do so. Ten candidates were shortlisted and interviewed for the Post (six of whom were women), and three male candidates, including the Applicant, were ultimately recommended. In contrast, the selection panel did not find that any of the female applicants met the competencies for the Post.

14. The selection panel’s evaluation of the Applicant for the Post states, in relevant part, as follows:

Competencies: Excellent communication skills, both written and oral

Education: BA in Social and Behavioural Science, with extensive experience in Social Affairs, providing him with the requirements for the position.

Experience: 20 years' experience in administrative and policy related positions for either the Australian Government or the United Nations. 8 years at the international level

...

Other Skills: Excellent communication skills. Demonstrated a high level of communication particularly at the interpersonal level from his extensive experience in personnel. ... Has demonstrated the ability to integrate technology with his work as witnessed by the setting up of a website for the UN Publications Board and developing spreadsheets to help organise the schedule of exhibit. ... His current work coordinating both the Publications Board and the Exhibits committee involves dealing with numerous projects at one time.

15. On 17 February 2005, the Director of the Outreach Division of DPI, Mr. Raymond Sommereyns, who was programme manager (“PM”) (occasionally also referred to as “programme case officer”) of the selection exercise, transmitted the list of recommended candidates to the Mr. Shashi Tharoor, USG for Communications and Public Information (i.e., DPI), who as the head of department was the ultimate decision-maker in the selection exercise.

16. The male/female ratio within DPI was approximately 50:50 during the selection exercise discussed herein. According to the Joint Appeals Board (“JAB”) Report No. 1908, paragraph 66, the gender ratios for DPI in the years 2004 and 2005 were:

... satisfactory enough ... to allow the Head of Department to give priority to other selection criteria [in this case, the priority that Mr. Denis Beissel suggested to be provided to OIP staff members in his 18 August 2003 memorandum, as recited above] without affecting his human resources plan. (According to the Reports of the Secretary-General on the Composition of the Secretariat—A/59/299 of 26 August 2004 and 2005 and A/61/237 of 15 August 2006—the gender ratios for the Department of Public Information were: a) Period 1 July

2003 to 30 June 2004: Overall: 51.1%; P-4 level: 43%; b) Period 1
July 2005 to 30 June 2006: Overall: 57.99%; P-4 level 44.26%)

17. On 10 March 2005, the PM forwarded to the FPW/DPI, Ms. Mita Hosali, a copy of the short-list of 15- and 30-day candidates, under a 22 September 2004 memorandum from the USG/DPI. In that 2004 memorandum, the USG/DPI stated that he had decided to assign “an advisory role” to the FPW/DPI in the selection of candidates to fill vacancies in DPI at the professional level and that programme managers should provide the FPW/DPI with the short-list, as well as the names of the candidates who were to be called for an interview.

18. On 21 March 2005, the FPW/DPI wrote to the PM, as follows (emphasis added):

Thanks for sharing this list with me some 10 days ago. I must apologize profusely for not getting back to you with a response. However, as I mentioned in another message, it would be most helpful if I could have

Vacancy announcement
PHP’s [personal history forms] of all candidates interviewed
Recommended list

I gather that the *USG’s memo of 22 September may not ask that you provide this information to the FPW [Focal Point for Women], but the practice has evolved and our working arrangement is such that we find it quicker to review the case and give a response with all relevant details. Invariably when some of this documentation is missing, it takes unduly long while the FPW request additional information from the PCO [programme case officer].*

I look forward to your cooperation so that I may respond to you today.

...

19. On 14 April 2005, the FPW/DPI sent an email to the OIC/EO/DPI, stating *inter alia* as follows (italics added by Tribunal, boldface in original):

Specifically, please note that I have received relevant documentation and arrived at some conclusions:

- I do not feel that there is any strong candidate who meets the evaluation criteria, *other than the individual who has been doing the job functions temporarily*;

- I feel that it is a *manipulation of the process* to allow someone who was temporarily placed against a post without any clear process of recruitment to then invoke his eligibility based on “on the job” experience;

- When there is clearly great interest in upward mobility among all staff, and many women with seniority, for P-4 and P-5 posts, and these are the two levels at which DPI has to improve its record, it is not acceptable to not even shortlist a women [sic] candidate on the recommended list;

- If one were simply looking at those who might be able to do the job, *some of the women who could be considered are* [name redacted] and [name redacted];

- I feel very strongly that there are many other highly qualified female candidates both inside and outside the Outreach Division, who would be suitable for this position and *should be given a chance to express interest*;

- I urge the Secretary-General to re-advertise the post to show his commitment to find the best person for the job, and to reassure his female staff that he is doing his utmost to take their interests into account.

20. On 25 April 2005, Mr. Louis Germain, a staff member from the EO/DPI (his title is not referenced in the case record), wrote in an email to some colleagues that, having reviewed the recommended list of applicants for the Post and having taken into consideration the concerns expressed by the FWP/DPI, the USG/DPI had decided to cancel the first selection exercise and to re-circulate the vacancy announcement for the Post.

21. According to information provided by the Respondent, the first selection exercise for the Post was cancelled at the 60-day recommended list for head of department approval, so the list was never forwarded to the Central Review Committee (“CRC”) following the first selection exercise.

22. On 5 May 2005, the Applicant wrote to the ASG/OHRM, and requested her to initiate an investigation into whether the FPW/DPI exceeded her mandate and abused her authority by intervening in selection exercises within DPI.

23. On 30 July 2005, the Applicant was informed by the Officer-in Charge of OHRM, Ms. Jan Beagle, that (emphasis added):

We have carefully reviewed the situation described in your memorandum. We have concluded that the Under-Secretary-General for Communications and Public Information took the decision to request re-circulation of the vacancy after consultations with several DPI officials, including the DPI Departmental Focal Point for Women, all of whom acted in an advisory capacity.

OHRM has authorized DPI to re-circulate the vacancy announcement for the position of Secretary, Publications Board and Exhibits Committee, P-4.

Your eligibility status will remain “30-day” for this and other vacancies at your level or one level higher for which you may wish to apply

The second selection exercise

24. On 28 September 2005, the vacancy announcement for the Post was re-advertised (VA-PUB-DPI-407591-R-NewYork). Six candidates, including the Applicant, were recommended by the PM and approved by the CRC.

25. On 31 January 2006, Mr. Astapkov, now in his capacity as Executive Officer, DPI, notified the Applicant that he was not selected for the Post and that even though the selected candidate was expected to assume the Post on 1 February 2006, it had been decided to extend the Applicant’s contract until 28 February 2006.

26. On 15 February 2006, the Applicant filed a request for administrative review of the decision not to select him for the Post (and of the decision not to renew his contract beyond 28 February 2008—the subject matter of Case 2).

27. On 27 April 2006, the Applicant filed a full statement of appeal with the JAB.

28. On 6 August 2007, the JAB panel issued its Report No. 1908 in which it unanimously, *inter alia*, recommended that (see paragraph 79):

[The Applicant] be compensated in the amount of 20 months' net base salary at the rate in effect on the date of this report, in view of the damage suffered and of the recurrent objectionable administrative practices which affected his conditions of service, including the loss of his entitlements.

29. By letter from the Deputy Secretary-General of 2 November 2007, the Respondent dismissed the recommendation of the JAB recited above, explaining that:

The Secretary-General finds that since you were one of the recommended candidates at both stages of the selection process for the post in DPI, and since you were subsequently placed on the roster of eligible candidates for similar posts, your application did, in fact, receive full and fair consideration. Moreover, he finds that it is clear from the record that the 'priority consideration' for OIP staff consisted of allowing applicants to be exceptionally considered at the 30-day mark, which you had been. The Secretary-General also finds that there is no support for the conclusion that there was a 'reasonable suspicion' of extraneous motives. He therefore does not agree with the findings of the JAB with regard to the decision not to select you for the post of Secretary, Publications Board/Exhibits Committee.

30. On 28 July 2008, the Applicant filed an application with the former United Nations Administrative Tribunal, which, on 1 July 2009, was transferred to the Dispute Tribunal.

Applicant's submissions

31. The Applicant's primary contentions may be summarised as follows:

a. While no staff member has a right to be promoted or assigned to a particular post, every staff member has a right to be afforded fair consideration for posts on an equal basis (citing *Weiler* UNDT/2010/063, *Sefraoui* UNDT/2009/085 and *Applicant* UNDT/2010/115);

b. Whilst the Applicant appreciates that positive discrimination might be required to ensure a fair gender balance, the situation within DPI at the time did not indicate any unfairness in this regard;

c. As a result of the unlawful interference from the FPW/DPI and the unlawful re-circulation of the vacancy announcement in what otherwise would appear to have been a proper selection process, the list of the three recommended candidates (including the Applicant) was never transmitted to the CRC, which resulted in the selection of a candidate who had not even applied for the Post in the first place;

d. It was improper and misplaced for the FPW/DPI to comment that she felt that there was no strong candidate to meet the evaluation criteria; this was a matter for the selection panel to determine and, to a lesser extent, for the PM;

e. It was prejudicial for the FPW/DPI to suggest that the selection process had been manipulated and this suggestion was without identifiable merit in the record and was designed to persuade the USG/DPI to re-circulate the vacancy announcement to allow more female candidates to submit applications;

f. The fact that the selection process did not produce any suitable female candidates does not at all suggest that the selection process must therefore have been improper, let alone manipulated;

g. The decision to re-circulate the vacancy announcement was a deviation from the rules, without justification, was unlawful and deprived the Applicant a one-third chance of selection;

h. The Applicant lost the chance, estimated at one-third, of being selected for the P-4 post of Programme Officer, with the ultimate consequence that the

Applicant was without work for a period of approximately eight months until he was able to secure a different position;

i. The Applicant requests compensation in the amount of one-third of the salaries he would have made during the period he was unemployed, less earnings he made during the same period, which is not applicable;

j. The Applicant also requests compensation for moral damages;

k. The Applicant requests that the Tribunal to order the Secretary-General to be held in part responsible for the Applicant's legal costs.

Respondent's submissions

32. The Respondent's primary contentions may be summarised as follows:

a. The Tribunal should not substitute its view for that of the Secretary-General in selection matters;

b. There is a presumption that official acts have been regularly performed (citing *Rolland* 2011-UNAT-122);

c. Following a minimal showing by the Administration that the candidacy of a staff member was given full and fair consideration, the burden of proof shifts to the Applicant, who must show by clear and convincing evidence that he was denied a fair chance of appointment (citing *Rolland* 2011-UNAT-122), and the Applicant has not done so in this case;

d. The Applicant, as a former OIP staff member, was given priority consideration enabling the Applicant to be selected at the 30-day mark and, without this priority, the Applicant would have had the status as an external candidate;

e. Under ST/AI/2006/3 (Staff selection system), sec. 9.2, the head of office (in this case, the USG/DPI) possessed the authority to select the candidate that s/he considered the best suited for the functions of the position, having due regard for the Organization's human resources objectives and targets, and he did so in the present case;

f. The evidence clearly demonstrates that the decision to accept the FPW/DPI's advice was not only reasonable, but it was in conformity with ST/AI/1999/9 on gender equality in selection and appointment;

g. Even if the Tribunal were to conclude that accepting the advice of the FPW/DPI denied the Applicant fair and adequate consideration, the selection exercise was carried out a second time and, thus, any breach of the Applicant's rights was remedied;

h. Since the Applicant was accorded full and fair consideration during the second selection exercise, the Applicant is not entitled to compensation for the non-selection decision.

Relevant legal instruments

33. The Tribunal notes that the Respondent makes reference to the now-abolished ST/AI/2006/3 in his closing statement, but this administrative instruction did not enter into force before 1 January 2007; the preceding ST/AI/2002/4 (Staff selection system) is therefore to be applied. The relevant provisions from ST/AI/2002/4 are the following:

Section 7

Consideration and selection

7.1 In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark

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

...

7.4 The programme manager shall evaluate new candidates and roster candidates transmitted by OHRM ... for consideration at the 15-, 30- or 60-day mark on the basis of criteria pre-approved by the central review body.

7.5 Interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required for appointment and promotion at the 30- and 60-day marks of the candidates identified by the programme manager as meeting all or most of the requirements of the post, and are encouraged for lateral moves at the 15-day mark. Whenever possible, interviews should be competency-based and conducted by an ad hoc panel.

7.6 For each vacancy, the programme manager shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and/or decision by the head of the department/office.

7.7 Programme managers shall transmit their proposal for one candidate or, preferably, a list of qualified, unranked candidates to the appropriate central review body through the head of department/office after the 15-, 30- or 60-day mark. The head of department/office shall ensure that, in making the proposal, he or she has taken into account the Organization's human resources planning objectives and targets, especially with regard to geography and gender, and provide a certification to that effect to the central review body. ...

...

Section 8

Central review bodies

The central review bodies shall review the proposal for filling a vacancy made by the department/office concerned to ensure that candidates were evaluated on the basis of the pre-approved evaluation criteria and/or that the applicable procedures were followed, in accordance with sections 5.1 to 5.6 of ST/SGB/2002/6.

Section 9

Decision

9.1 The selection decision shall be made by the head of department/office when the central review body finds that the

evaluation criteria have been properly applied and/or that the applicable procedures have been followed. ...

9.2 The head of department/office shall select the candidate he or she considers to be best suited for the functions, having taken into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and shall give the fullest regard to candidates already in the service of the Organization.

...

34. ST/AI/1999/9 (Special measures for the achievement of gender equality) contains the following relevant provisions:

1.1 The goal as set by the General Assembly is to achieve a 50/50 gender distribution by 2000 in all posts in the Professional category ...

...

1.5. As soon as a vacancy announcement is issued, OHRM or the local personnel office shall assist all departments and offices, especially those falling short of the goal set in section 1.1, in identifying qualified women candidates for the post. This should be done at least six months before the post falls vacant in cases of foreseeable vacancies, for example, retirements and post proposed for establishing in the programme budget. For that purpose, OHRM or the local personnel office shall review potential women candidates within and outside the department or office concerned, including those serving in regional commissions or on mission appointment, as well as those who meet the minimum requisite seniority under section 1.6 of the present instruction ...

...

1.8 (a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates, provided that:

- (i) Her qualifications meet the requirements for the vacant post;
- (ii) Her qualifications are substantially equal or superior to those of competing male candidates;

(b) In accordance with staff regulation 4.4, the fullest regard shall be given to the qualifications and experience of women already in service of the United Nations;

(c) In evaluating women candidates, particular emphasis shall be given to potential to perform at the higher level, although women may not have been offered such an opportunity in their prior services;

(d) When the qualifications of one or more women match the requirements for the vacant post and the department or office recommends a male candidate, the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended;

...

Consideration

The scope of the judicial review in the present case

35. As stated in *Liarski* UNDT/2010/134, the Tribunal generally will not substitute its decision for that of the Organization in the discretionary matters of appointment and promotion, but it may examine whether the selection process was carried out in an improper, irregular or otherwise flawed manner and assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable (see also *Kozlov/Romadanov* UNDT/2011/058, *Solanki* UNDT/2009/045, *Joshi* UNDT/2009/047, *Tsoneva* UNDT/2009/048, *Krioutchkov* UNDT/2010/065 and *Rolland* UNDT/2010/095).

36. 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 Respondent is able to even minimally show that the Applicant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Once a minimal showing has been made, the burden of proof would thereafter shift to the Applicant, who would need to show through clear and convincing evidence that he was denied a fair chance of promotion (see the judgment of the United Nations Appeals Tribunal in *Rolland* 2011-UNAT-122).

Did ST/AI/2002/4 authorize, even implicitly, the cancellation of the first selection exercise and the re-issuance of a new vacancy announcement for the Post following input from the FPW/DPI?

37. The first inquiry is whether ST/AI/2002/4 authorized, even implicitly, the Under-Secretary-General to cancel the first selection exercise and to reissue a new vacancy announcement for the Post following the input from the FPW/DPI.

38. Under ST/AI/2002/4, secs. 7.1 and 7.4, the PM was first to evaluate all applications according to the 15-day, the 30-day and the 60-day mark priority system. The Applicant, as a former OIP staff member, had been given 30-day mark preference and was considered an internal candidate for the Post.

39. The PM then was to shortlist candidates, who would undergo “[i]nterviews and/or other appropriate evaluation mechanisms” (see sec. 7.5), which was a mandatory requirement for positions to be filled by candidates at the 30- and 60-day marks. The interviews were to be competency-based and before an *ad hoc* interview panel (see sec. 7.5).

40. At this stage in the first selection exercise, ten candidates were selected for interviews, including the Applicant. No female candidates from within DPI had applied for the Post, although the vacancy announcement had been publicly advertised on the online United Nations jobsite, Galaxy, with a 60-day time limit for submitting applications. Accordingly, all potential female candidates *within* DPI were given a full opportunity to apply for the Post, but they simply did not do so. Of the ten candidates who were interviewed for the Post, six were women, although three male candidates only (including the Applicant) were ultimately recommended.

41. Thus, the selection panel had determined, following competency-based interviews, that none of the female applicants met the competencies for the Post. The Tribunal agrees with the Applicant that the fact that the selection process did not

produce any suitable female candidates does not suggest that the selection process was improper, let alone manipulated. In line herewith, the Respondent has not made any submission to suggest that the first selection process was, in any possible way, flawed.

42. That the Applicant was qualified for the Post follows directly from his performance evaluation in which it was, *inter alia*, emphasised that he had “[e]xcellent communication skills, both written and oral”, that he had the appropriate educational background and technological skills for the Post and that he had sat on the Post for 27 months before the selection decision was made.

43. Under ST/AI/2002/4, based on the PM’s reasoned record of the evaluation of each of the short-listed candidates (see sec. 7.6), the PM was to forward a list of recommended candidates to the appropriate central review body (in the present case, the CRC) through the head of department/office, who—when making the initial selection proposal—was to ensure that (emphasis added) “the Organization’s human resources planning objectives and targets [were met], especially with regard to geography and *gender*, and provide a certification to that effect to the central review body” (see sec. 7.7).

44. Under ST/AI/2002/4, sec. 9.2, after the CRC reviewed the proposal for filling the vacancy to make sure that candidates had been evaluated on the basis of the relevant evaluation criteria and that the applicable procedures had been followed, the head of department/office would select the candidate s/he considered to be best suited for the Post, taking into account “the Organization’s human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and *gender*, and shall give the fullest regard to candidates already in the service of the Organization” (emphasis added).

45. As already mentioned (see para. 16 above), the male/female ratio within DPI during the selection exercise for the Post was approximately 50:50 and, according to

JAB Report No. 1908, paragraph 66, the gender ratios for DPI in the years 2004 and 2005 were “satisfactory enough ... to allow the Head of Department to give priority to other selection criteria without affecting his human resources plan ...”.

46. Even though the head of department/office, when making her/his selection decision under ST/AI/2002/4, secs. 7.7 and 9.2, was to take gender issues into account, it was not relevant for the USG to do so in the present case, since the gender goal of ST/AI/1999/9 had already been achieved within DPI. Under ST/AI/1999/9, sec. 1.8, preference for female candidates was therefore rendered inapplicable.

47. Additionally, even if the selection panel had not acted improperly by taking gender considerations into account, the specific language of ST/AI/2002/4 also did not permit a head of department/office to cancel a selection process if s/he was not satisfied with the list of candidates recommended by the PM. ST/AI/2002/4 similarly did not authorize the re-issuance of a vacancy announcement simply to broaden the pool of candidates.

48. In line therewith, the Tribunal has not been directed to any administrative instruction that would have permitted OHRM, on 30 July 2005, to authorize DPI to re-circulate the vacancy announcement for the Post. Quite to the contrary: ST/AI/2002/4 and ST/AI/1999/9 did not permit OHRM to cancel the selection exercise after consulting “with several DPI officials, including the DPI Focal Point for Women” (30 July 2005 email from Ms. Beagle, OIC/OHRM).

49. The Tribunal finds that ST/AI/2002/4 did not authorize, even implicitly, the USG to cancel the first selection exercise and to reissue a new vacancy announcement for the Post following the input from the DPI Focal Point for Women.

Was the intervention in the selection exercise by the FPW/DPI and OHRM proper according to ST/AI/1999/9 and ST/AI/2002/4?

50. ST/AI/1999/9 and ST/AI/2002/4 state the parameters under which the FPW/DPI and OHRM could be legitimately involved in the selection exercises for the Post.

51. Several difficulties are noted, which render improper the participation of the FPW/DPI and OHRM in this case. Specifically:

a. Sec. 1.5 of ST/AI/1999/9 requires the involvement of a FPW or OHRM at least six months *before* a vacancy announcement is circulated in cases of foreseeable vacancies; for those departments falling short of gender goals, the purpose was to identify qualified women candidates for the Post; and nothing in the case record supports any other finding than the vacancy for the Post was foreseeable. Here, the vacancy announcement was circulated on 11 June 2004, but the FPW/DPI only became involved sometime in March 2005 and OHRM not until 30 July 2005, i.e., a long time after the vacancy announcement for the Post was issued;

b. ST/AI/1999/9 permits preference to be given to female candidates *only where* there are female candidates qualified to perform the job (sec. 1.8(a)(i)) *and where* the female candidates' qualifications are "substantially equal or superior to those of competing male candidates" (sec. 1.8(a)(ii)). Since the selection panel in this case had determined that no female candidate in the first selection exercise possessed the requisite qualifications for the Post, the preference under ST/AI/1999/9, sec. 1.8, regarding gender became inapplicable;

c. ST/AI/1999/9 and ST/AI/2002/4 do not permit the FPW to be involved in a selection process after candidates have been interviewed and recommended, as was done in this case;

d. According to her 21 March 2005 email, the FPW/DPI herself disregarded the 22 September 2004 memorandum of the USG/DPI, which did not permit the FPW/DPI to request a copy of the vacancy announcement, the PHP's of all candidates interviewed, and the recommended list, as was done in this case; the FPW/DPI, thus, contravened explicit instructions from the USG/DPI on this point;

e. While the FPW/DPI contended in her 21 March 2005 email that the "practice" of the Organization "has evolved" to give the FPW/DPI information about candidates, such practice was not permitted by any rule, regulation or administrative instruction, specifically ST/AI/2002/4, thus rendering the "practice" unlawful;

f. The FPW/DPI herself acknowledged that the Applicant was a "strong" candidate "who has been doing the job functions temporarily"; given that gender considerations no longer were to be taken into account, the Applicant's strong credentials should have been considered;

g. The FPW/DPI provided no facts that would demonstrate how the first selection exercise was "manipulated", as she stated in the 14 April 2005 email, such that it would justify her intervention in the selection process; the Tribunal agrees with the Applicant's contention that it "was prejudicial for Ms. Hosali to suggest that the selection process had been manipulated ... this suggestion was without identifiable merit in the record and was designed to persuade [the USG] to re-circulate the vacancy announcement to allow more female candidates to submit applications";

h. The FPW/DPI failed to explain why she considered certain specific female candidates mentioned in her 14 April 2005 email to the OIC/EO/DPI as being possible candidates for the Post, suggesting that the selection procedures of ST/AI/2002/4 were being circumvented entirely.

52. The Applicant correctly observes that as a result of the unlawful interference of the FPW/DPI in the first selection exercise and the unlawful re-circulation of the vacancy announcement, a candidate was eventually selected who had not even applied for the Post in the first place.

53. Furthermore, the involvement of the FPW/DPI did not become proper simply because the FPW/DPI “felt”:

a. That there were no “strong” candidates among the recommended candidates (all the while ignoring the Applicant’s excellent credentials, which she praised herself);

b. That qualified female applicants should be given a chance to apply for the position (this had been done already by posting the vacancy announcement on Galaxy for 60 days, and no female staff member from DPI had applied, while the female candidates who did apply were deemed not suitable for the Post);

c. That the selection process had been “manipulated” (without any factual proof of that statement).

54. The Respondent argues that since the selection exercise was carried out a second time, any breach of the Applicant’s rights was remedied. The Tribunal finds this argument to be without merit, for if the first selection exercise had been properly conducted the Applicant likely would have been appointed to the Post, obviating the need for a second selection exercise. Additionally, the second selection exercise began as a result of the improper cancellation of the first selection exercise, which nullifies its validity.

55. The Tribunal finds that the requirements of ST/AI/1999/9 and ST/AI/2002/4 regarding the participation of the FPW/DPI and OHRM were not properly observed in this case.

56. The Respondent has not met his burden of making a minimal showing that the Applicant's candidature was given full and fair consideration for the Post, and the presumption of regularity has not been met. Since that presumption has not been met, the burden of proof does not shift to the Applicant to show, through clear and convincing evidence, that the presumption of law stands satisfied (*Rolland* 2011-UNAT-122).

57. The Tribunal finds that the Respondent did not properly exercise his discretion and did not follow proper procedures during the selection exercises for the Post.

Compensation

58. Under the judgment of the Appeals Tribunal in *Antaki* 2010-UNAT-096, the Dispute Tribunal has the unquestioned discretion and authority to quantify and order compensation under art. 10.5 of its Statute for violation of the legal rights of a staff member, as provided under the Staff Regulations, Staff Rules, and administrative issuances.

59. Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury (*Wu* 2010-UNAT-042).

60. The very purpose of compensation is to place the staff member in the same position s/he would have been in, had the Organization complied with its contractual obligations (*Warren* 2010-UNAT-059 and *Innaelli* 2010-UNAT-093).

61. The Appeals Tribunal has specifically determined that under art. 10.5(a) of the Statute of the Dispute Tribunal, an award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damage designed to punish the Organization (*Wu* 2010-UNAT-042, explicitly reaffirming the former United Nations Administrative Tribunal Judgment No. 1047, *Helke* (2002) and

Judgment No. 1122, *Lopes Braga* (2003), both cases of compensation for procedural irregularities).

62. The Applicant in this case phrases his arguments regarding compensation in terms of “loss of chance”, namely that the decision to re-circulate the vacancy announcement following the involvement of the FPW/DPI deprived the Applicant of a one-third chance of selection.

63. Loss of chance/opportunity compensation could represent: (a) the impact on a staff member’s employment situation and career prospects (*Kasyanov* UNDT/2010/026); (b) the loss of opportunity to compete for remunerative employment (*Koh* UNDT/2010/040); (c) the loss of the right to be fairly considered in the promotion exercise (the former Administrative Tribunal Judgment No. 1341, *Hawa*); (d) the loss of the right to continue with the Organization until retirement age (*Shashaa* UNDT/2009/034); (e) the loss of the right to full and fair consideration for promotion and appointment (*Wu* UNDT/2009/084); and (f) the loss of job security of a position and conversion to a 100 series contract (*Sprauten* UNDT/2010/087). Other compensable types of loss of chance/opportunity may exist, as well (*Sprauten* UNDT/2011/094, para. 70).

64. The Tribunal considers the Applicant to have correctly identified the nature of his compensation request as coming within the category of loss of chance/opportunity, for the Applicant is seeking compensation for the failure “to be afforded consideration for [the Post] on an equal basis” (see para. 31(a) above, as well as *Sprauten* UNDT/2011/094, para. 70, and the former Administrative Tribunal Judgment No. 1341, *Hawa* (2007) (compensation for the loss of the opportunity to participate in promotion exercises over a period of seven years)). Based on the analysis in *Sprauten* UNDT/2011/094, the Tribunal hereinafter refers to the Applicant’s compensation request as one for “loss of chance/opportunity” compensation.

65. Loss of chance/opportunity compensation is of a non-pecuniary or non-economic nature to compensate for procedural violations, and does not represent compensation for lost earnings (*Sprauten* UNDT/2011/094, paras. 69, 71 and 72).

66. In this case, the Tribunal cannot say with certainty that the Applicant would have been selected for the Post (in which case the Applicant theoretically would have been entitled to all economic compensation for the contract benefits and emoluments that he lost following the wrongful denial). Reference is made to the discussion in *Sprauten* UNDT/2011/094, paras. 72 and 73. Without a determination that the Applicant would have been selected for the Post, the Applicant is not entitled to economic compensation for lost earnings, and the only issue of damages to determine is loss of chance/opportunity damages.

67. Where a staff member has suffered a loss of chance/opportunity, then compensation may be measured under the “percentage” method approved by the Appeals Tribunal in *Hastings* UNAT-2010-106 or may be determined according to the trial judge based on the facts of the individual case (*Lutta* 2010-UNAT-112), without being bound by the percentage method articulated in *Hastings*.

68. The Tribunal chooses to award loss of chance/opportunity compensation under *Lutta* 2010-UNAT-112, which evaluates the facts of the individual case. Some of the significant factors here are: (a) the fact that the Applicant had served on the Post for 27 months; (b) the fact that he received an excellent evaluation by the relevant selection panel; and (c) the fact that the Applicant twice was on the final list of recommended candidates. The Tribunal thus finds that the Applicant stood a very high likelihood of being selected for the Post. This very high likelihood is one factor that the Tribunal takes into account in determining loss of chance/opportunity compensation. As a result of this very high likelihood, and even though the Tribunal cannot say with certainty that the Applicant would have been selected for the Post, the Tribunal finds that the Applicant stood a higher chance than one-third (i.e., there were two other final candidates—the *Hastings* method) of being selected for the Post.

69. Following the principles articulated above, under art. 10.5 of the Statute of the Dispute Tribunal, the Tribunal will award the Applicant eight months' net base pay in effect at the time of the selection process mentioned herein (i.e., in January 2006), as non-pecuniary compensation for the substantial and unwarranted irregularities in the selection process for the Post.

70. The Applicant additionally requests compensation for moral injury, but given the award of loss of chance/opportunity compensation in this case, the Tribunal declines to make an award for moral injury.

Conclusion

71. The Tribunal finds that ST/AI/2002/4 did not authorize, even implicitly, the USG/DPI to cancel the first selection exercise and to reissue a new vacancy announcement for the Post following the input from the FPW/DPI.

72. The Tribunal finds that the intervention in the selection exercise by the FPW/DPI and OHRM was not proper according to ST/AI/1999/9 and ST/AI/2002/4.

73. The Tribunal finds that the requirements of ST/AI/1999/9 and ST/AI/2002/4 regarding the participation of the FPW/DPI and OHRM were not properly observed in this case.

74. The Tribunal finds that the Respondent did not properly exercise his discretion and follow proper procedures during the selection exercises for the Post.

75. The Tribunal awards the Applicant the sum of eight months' net base pay in effect in January 2006, as non-pecuniary compensation for the substantial and unwarranted irregularities in the selection process for the Post.

76. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed in paragraph 75 above is to be paid within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate

applicable as at that date shall apply. 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.

(Signed)

Judge Marilyn J. Kaman

Dated this 14th day of June 2011

Entered in the Register on this 14th day of June 2011

(Signed)

Santiago Villalpando, Registrar, New York