



Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

APPLETON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Alan Gutman, ALS/OHRM, Secretariat

Introduction

1. The Applicant applied twice for the position of Director of Investigations, Office of Internal Oversight Services (“OIOS”) (“the Post”) at the D-2 level. The Post was first advertised in a vacancy announcement in 2008 and again in 2009. A selection panel set up by OIOS recommended him as the only qualified candidate for the Post in each instance. Neither of these recommendations was approved by the Special Review Group (“SRG”) and, as a result, no appointment was made to the Post. A third vacancy announcement was issued, for which the Applicant did not apply. The Applicant submits that he should have been selected for the Post.

Scope of the case

2. The case was initially assigned to Judge Kaman on 30 July 2010. Following her departure from the Dispute Tribunal, it was reassigned to the undersigned judge on 15 November 2011.

3. In 2010, the Respondent challenged the receivability of the case on the grounds that there had been no reviewable administrative decision in either selection process and that the Applicant had applied for the second announced vacancy after he had ceased being deployed as a United Nations staff member.

4. Judge Kaman addressed those issues in the findings of Order No. 289 (NY/2010) dated 29 October 2010. She concluded that “the Applicant validly challenges an administrative decision within the meaning of art 2.1(a) of its Statute, being the decision not to select him for [the Post]”.

5. The Respondent has raised the same receivability issues again before the present Judge. The Tribunal notes that since Order No. 288 (NY/2010) dealt with the jurisdiction of the Tribunal, it is appealable to the United Nations Appeals Tribunal (*Tadonki* 2010-UNAT-005). As those matters have been decided, the present Tribunal will not revisit them.

6. In a jointly signed statement dated 7 February 2011, prepared pursuant to Order No. 305 (NY/2010) dated 16 November 2010, the parties agreed that the central issue in the present case is whether the Applicant's candidacy for the Post was given full and fair consideration. In Order No. 296 (2011) dated 14 December 2011, the Tribunal recorded that the parties had further agreed that the issue for determination of the Tribunal was:

Whether the decision of the Secretary-General not to accept the submission of the [then] Under-Secretary-General of the OIOS [Ms. Ms. Inga-Britt Ahlenius, ("USG/OIOS")] in February 2010 to approve the appointment of the Applicant to [the Post] was lawful.

7. In order to reach a decision on the main issues, the Tribunal has identified the following questions to be determined:

a. Whether the selection process for each of the vacancy announcements was properly conducted at the programme manager level by OIOS (the USG/OIOS);

b. Whether the SRG correctly exercised its authority when it decided not to endorse any of the USG/OIOS's recommendations of the selection of the Applicant;

c. Whether the Secretary-General acted appropriately when not making a selection decision and whether the Applicant was properly notified about the non-selection decision; and

d. If found that the Applicant's rights were breached, whether the Applicant suffered any compensable harm.

Facts

8. The factual chronology that follows is based on those facts agreed upon by the parties in their joint submission of 7 February 2011. The Tribunal also reviewed the documentary evidence adduced by the parties and the oral evidence provided at a

substantive hearing on 21 and 22 March 2012 by the USG/OIOS; Mr. Vijay Nambiar, then Chef de Cabinet, the Executive Office of the Secretary-General (“Chef de Cabinet”); Ms. Catherine Pollard, Assistant Secretary-General of the Office of Human Resources Management (“ASG/OHRM”); and Ms. Barbara Mulvaney, a candidate for the Post during the second selection process. The Applicant was also heard.

9. On 7 September 1994, the Secretary-General issued ST/SGB/273 (Establishment of the OIOS). On 18 January 1995, ST/AI/401 (Personnel arrangements for the OIOS) was issued to outline the administrative arrangements and the authority of the USG/OIOS in personnel matters.

10. The Applicant joined the Organization on 3 October 2006, as the Deputy Director of the Procurement Task Force (“PTF”) in OIOS at the D-1 level on a fixed-term appointment with service limited to PTF. He was appointed as Director of the PTF/OIOS on 6 April 2007.

11. On 17 December 2007, the Post, which is the subject of this case, was advertised under vacancy announcement number “07-ADM-OIOS-416258-R-NEW YORK (G)” in Galaxy (an online United Nations jobsite) in accordance with sec. 4 of the now abolished ST/AI/2006/3 (Staff selection system). The vacancy was also advertised externally in international publications, *The Economist* and *Le Monde*. The vacancy announcement elicited 73 candidates, including the Applicant. Five of the candidates were female.

12. On 3 April 2008, the Secretary-General sent a memorandum to all Heads of Departments and Offices on achieving gender balance in the United Nations Secretariat. He requested that for appointments at the D-2 level and above, his office should generally be provided with a list of at least three qualified candidates, including at least one female candidate.

13. An interview panel was established by the USG/OIOS to identify candidates for recommendation for the Post. The panel comprised the USG/OIOS as the Chair and three other members. The panel reviewed the candidates based on the evaluation criteria set out in the vacancy announcement and invited four candidates, including the Applicant, to participate in a competency-based interview in October 2008. It found that only the Applicant met “all the qualifications and all the competencies required for the [Post]”.

14. By memorandum dated 18 November 2008, the USG/OIOS submitted the interview panel’s recommendation to the SRG in which she noted that none of the female applicants had met the criteria required for the post.

15. The Secretary of the SRG, namely the ASG/OHRM, responded to the USG/OIOS on 26 November 2008 as follows, copied to the USG for Management, Ms. Angela Kane:

Subject: D-2 Director, Investigations Division.

Dear [USG/OIOS],

The [SRG] reviewed your submission regarding the above vacancy this morning. The SRG noted that there was no indication of wide circulation of the vacancy including advertisement in professional external magazines. The SRG further noted that the four candidates interviewed were of the same nationality. The submission of one recommended candidate and no female candidates is not in line with the Secretary-General’s policy.

Consequently, the SRG did not endorse the recommendation and requests re-advertisement of the [P]ost. In view of the specialised nature of the functions, the SRG recommends wide advertisement when re-circulating the [P]ost, in order to attract a wider pool of candidates including suitably qualified female candidates.

16. The USG/OIOS replied on 26 November 2008 to the ASG/OHRM and the USG/DM clarifying the selection process, including that the Post had been advertised in *The Economist* and *Le Monde*. She asked the SRG to reconsider the case. The USG/OIOS explained that, “due to the fact that OIOS does not have sufficient staff at the D-2 level to constitute an appropriate OIOS Review Board, I have

followed the precedent set by my predecessor in submitting D-2 level personnel decision to the SRG for approval”.

17. By email dated 1 December 2008, the ASG/OHRM, in her capacity as Secretary of the SRG, responded to the USG/OIOS that she would circulate the additional information to the members of SRG for them to determine whether they wished to reconsider their position. On the same day, the USG/OIOS responded by email and reiterated her views.

18. The ASG/OHRM, as Secretary of the SRG, informed the USG/OIOS on 2 December 2008 that the consensus among the members of the SRG was that the reasons previously articulated for requesting a re-advertisement of the subject post remained valid and that the SRG recommended re-advertisement of the Post.

19. On 2 December 2008, the USG/OIOS addressed a Note to the Secretary-General copied to the Chef de Cabinet, submitting the Applicant as her selection and requesting his agreement for this appointment.

20. On 31 December 2008, the Applicant’s appointment with the United Nations expired and he separated from the Organization.

21. On 1 January 2009, the Secretary-General promulgated ST/SGB/2009/2 ([SRG]).

22. On 9 January 2009, the Wall Street Journal issued an article, “[United Nations] allows its Antifraud Task force to dissolve”, in which the Applicant was referred to by name and a spokeswoman for the Secretary-General was quoted as stating that, “According to U.N. rules, there has to be some geographical choice, and women have to be part of the process”.

23. On 23 February 2009, the Report of the Independent Audit Advisory Committee (“IAAC”) issued its report to the General Assembly as document

A/63/737 (Vacant posts in the OIOS), urging immediate action to have vacant posts filled in a streamlined and expedited manner.

24. By email dated 27 February 2009, the USG/OIOS requested re-advertisement of the post for thirty days.

25. The vacancy was re-advertised on 2 March 2009, under vacancy announcement number “09-OIOS-420802-R-New York (G)” in Galaxy in accordance with sec. 4 of ST/AI/2006/3. The vacancy announcement stated that candidates who had previously applied would not need to re-apply. The announcement elicited a total of 68 eligible applicants, including the Applicant. Four applicants, including two females, were identified for an interview.

26. On 3 March 2009, the General Assembly adopted A/RES/63/265 (Report of OIOS on its activities) expressing concern over the number of vacancies in OIOS and requesting the Secretary-General to fill them as a matter of priority.

27. An interview panel was established by the USG/OIOS, comprising of herself as Chair and three other members, two of whom had been on the first interview panel. The panel invited four candidates to participate in a competency-based interview. Together with the four candidates from the previous selection exercise, a total of eight candidates were interviewed for the Post.

28. In a Note addressed directly to the Secretary-General dated 19 June 2009, the USG/OIOS provided a detailed record of evaluation of the eight candidates, and requested his approval of the Applicant as the only candidate recommended for the Post.

29. On 29 June 2009, the Chef de Cabinet forwarded the Note, including the record of evaluation of the candidates, to the SRG and requested them to “undertake an urgent review of this case before the Secretary-General takes his decision”.

30. By email dated 15 July 2009, the ASG/OHRM, as Secretary of the SRG, communicated the SRG's concerns to the USG/OIOS that, again, only one recommended candidate had been submitted for the Secretary-General's consideration and approval. The SRG requested that four candidates prescreened by OHRM be interviewed and that three names, including at least one female, be provided.

31. The USG/OIOS provided her response to the SRG's concerns in a note addressed to the Secretary-General dated 5 August 2009. This note included an evaluation of the additional candidates that the SRG had requested be interviewed by the panel. The USG/OIOS stated that OIOS had carried out its own evaluation of the additional candidates referred to above, and set out the reasons why they were not invited to participate in the interview. The USG/OIOS also reiterated her request that the Secretary-General approve the appointment of the Applicant to the Post. The Chef de Cabinet forwarded this document to the SRG.

32. The ASG/OHRM provided her comments on the USG/OIOS's note of 5 August 2009 to the Chef de Cabinet on 9 September 2009. She stated, *inter alia*, that, based on OIOS's review of the additional candidates, three had been improperly disqualified on the basis of their educational background and relevant work experience. She further noted that the educational qualifications and direct work experience of the only internal candidate, who had been performing the functions of the Post since August 2008, were not properly evaluated by OIOS. She therefore recommended that the internal candidate be given the fullest consideration in accordance with staff regulation 4.4.

33. By a note addressed to the Chef de Cabinet dated 25 September 2009, the USG/OIOS provided a response to the ASG/OHRM's comments. The USG/OIOS disagreed with the assessment of the additional candidates because, in her opinion, they did not meet the requirements for the Post which is why they were not short-listed for an interview. With respect to the internal candidate, the USG/OIOS noted that he was interviewed and "given full consideration during the process".

The USG/OIOS also addressed a note to the Secretary-General dated 25 September 2009, reiterating her request for his approval to appoint the Applicant as her recommended candidate.

34. On 18 February 2010, the SRG informed the Secretary-General that, in view of the fact that the USG/OIOS continued to recommend only one candidate, it was not in a position to make a recommendation on the case, noting that the SRG's request for a recommendation of three candidates had been unsuccessful.

35. By letter dated 18 March 2010, the Applicant asked to be informed of the outcome of the selection process. By letter dated 13 April 2010, OHRM informed the Applicant that the selection process remained ongoing, and that he would be informed once a decision had been made.

36. On 29 March 2010, the Applicant submitted a request for management evaluation of the decision not to endorse his nomination for the post.

37. On 14 July 2010, the USG/OIOS' appointment ended, and, on the same day, she submitted an end of assignment report to the Secretary-General.

38. On 20 July 2010, the Washington Post issued an article entitled "Departing U.N. official calls Ban's leadership 'deplorable' in 50-pages memo". In connection with the Applicant not being selected for the Post, it quoted the Chef de Cabinet as stating that, "the Secretary-General fully recognizes the operational independence of OIOS" but that "does not excuse [the USG/OIOS] from applying the standard rules of recruitment". In his oral evidence, the Chef de Cabinet agreed that he had made several press statements regarding the USG/OIOS' end of assignment report, although he did not recall their exact context.

39. On 23 July 2010, the Chef de Cabinet issued a statement to staff addressing the issues in the report of the USG/OIOS.

40. On 14 September 2010, a new USG of the OIOS was appointed.

41. On 3 November 2010, a new vacancy announcement was issued for the Post, which requested all candidates who had previously applied to submit a new application for the Post.

42. On 5 November 2010, OHRM informed the Applicant that the previous vacancy announcement for the Post was cancelled and re-advertised in Inspira (the most recent United Nations online jobsite). The Applicant was also informed that “interested and qualified candidates should re-apply” for the new vacancy announcement. The Applicant did not re-apply before the closing date of the new vacancy announcement.

Applicant’s submissions

43. The Applicant’s principal contentions may be summarized as follows:

a. The Applicant was the only recommended candidate in two independent selection exercises, which the USG/OIOS had conducted according to established procedures and in good faith. OHRM had approved the selection criteria, and the USG/OIOS was not required to undertake a global search for alternative female candidates as the SRG had demanded;

b. The SRG exceeded its authority by rejecting or vetoing the USG/OIOS’s appointment and acted in bad faith when blocking an appointment. The Applicant was discriminated against because of his gender and nationality. ST/SGB/2009/2 only has the legal character of a non-binding policy promulgated by the current Secretary-General and applying it violated the basic principles of the *ex post facto* doctrine. The Secretary-General’s 3 April 2008 memorandum on gender only represented a “request”;

c. The Secretary-General should have selected the Applicant based on the USG/OIOS’s recommendation. The decision not to do so was deliberately delayed until the USG/OIOS had departed from the Organization and the Applicant was not timely informed of the non-selection;

d. The Administration, particularly the Chef de Cabinet, acted in bad faith when public statements were made and which were reported in the press about the Applicant while the selection process was still ongoing. These statements damaged the Applicant's reputation;

e. The power of appointment of all staff in OIOS lies not with the Secretary-General but with the USG/OIOS. In her oral evidence, the USG/OIOS, referred to the operational independence of the OIOS, as set out in General Assembly resolution 48/218 B and ST/SGB/273, and argued that she was, in reality, the ultimate decision-maker as the Secretary-General had delegated his authority to appoint OIOS staff at the D-2 level to her;

f. As to compensation, the Applicant was without employment for the full year of 2009 until 19 May 2010. He was told by OIOS to continue to wait, discouraged from moving on, informed by OIOS that they were confident the impasse would be resolved, and informed by the Administration that the process was on-going. OIOS put all its hopes in the IAAC, and told the Applicant so. As a result, the Applicant suffered severe financial hardship, damage and loss. He was forced to liquidate his United Nations pension contribution in order to live. In 2010, the Applicant was appointed the Senior Legal Adviser and the Interim Director of Investigations at the Global Fund to Fight AIDS, Tuberculosis and Malaria ("the Global Fund"); a position which is close but not equal to the stature of the Post and with a comparable salary;

g. The Applicant suffered both personal and professional dislocation, was forced to relocate to Geneva, a location with which he had no connection, separated from family, friends, and colleagues. He was forced for a time to pay for two residences, one in Geneva, and a lease in New York. His consultancy earnings during this 17-month period were minimal, and he was forced to use all his savings to meet financial obligations incurred as a result of his previous employment with the United Nations. The Applicant was

denied the opportunity for a United Nations career, an opportunity that will likely never materialize again as positions as head of investigations are few and far between at the United Nations. The Respondent's actions have resulted in humiliation, stress and uncertainty.

Respondent's submissions

44. The Respondent presented his contentions in his reply as well as in his closing statement in the form of comments to the specific paragraphs of the Applicant's relevant written submissions (the application and the Applicant's closing statement). The Respondent failed to introduce them as independent arguments, which resulted in additional work for the Tribunal. The Tribunal has had to dissect them from this context to make a proper summary.

45. The Respondent's principal contentions may be summarized as follows:

- a. The Applicant only has a right to full and fair consideration, but not to have an appointment approved;
- b. All officials of the Respondent acted in good faith during the recruitment process for the Post. The Applicant presented no evidence of abuse of authority, bias, or prejudice before the Tribunal;
- c. The Applicant did not receive a firm commitment that the Secretary-General would appoint him to the Post. Hope and reliance on hope are not recognized legal doctrines. The applicable standard is firm commitment (*Abdalla* 2011-UNAT-138);
- d. The Applicant was interviewed in accordance with established procedures. The subsequent review by the SRG of the entirety of the process did not reduce or diminish the consideration he received during the interview stage;

e. The SRG acted within its authority and did not make a recommendation on individual candidates. The SRG found that the recommendation was inconsistent with the policy on achieving gender balance in the United Nations Secretariat and that other candidates had not been fairly considered. Eligible and qualified female candidates applied, and were presented for review by the interview panel;

f. The Organization's gender policies are firmly grounded in mandates from the General Assembly, as well as the jurisprudence of the former United Nations Administrative Tribunal. The policies with respect to review of all D-2 posts by the SRG are fully incorporated into staff rule 4.15. The policies of the Organization require that managers should normally recommend three candidates, one of which is female. Specific and reasonable measures that managers can take to meet this requirement include, in addition to widespread advertising, targeted measures such as accessing professional networks and associations, and managerial measures such as reviewing a vacancy announcement to see whether it can be redrafted to appeal to eligible and qualified candidates;

g. The USG/OIOS did not establish to the satisfaction of the SRG that there were no other suitable candidates for the Post who could be recommended. The management of an investigations division is not one of those rare specialties with few suitable candidates. Senior lawyers with investigation and management experience can be found throughout the jurisdictions of the Member States, and can also be found at the international level. Those ranks include senior female lawyers with investigation and management experience. The USG/OIOS was not required to search the globe to find three candidates to recommend, including one female. The USG/OIOS was provided with a list of qualified and eligible candidates, including an internal candidate who was serving as Officer-in-Charge of the Investigations Division, and female candidates, such as a judge of the

International Criminal Tribunal for the former Yugoslavia, and a senior prosecutor from the International Criminal Tribunal for Rwanda;

h. The hierarchy of internal legislation does not preclude the application of policies on geographical and gender balance. ST/SGB/2009/2 is not merely a recommendation from the Secretary-General and forms part of the legal framework of the Organization. There is no basis for the Applicant's claim that the criminal law doctrine related to *ex postea* laws applies to the administrative legal framework of the Organization. It is the role of OHRM to provide programme managers with a list of candidates who appear to meet the requirements of a vacancy announcement. Secondly, OHRM reviewed the candidates and suggested them to the USG/OIOS in order to assist the USG/OIOS in meeting the requirements for the recruitment at the D-2 level. Thirdly, consideration of other candidates does not deprive, or in any way reduce, the consideration given to the Applicant;

i. Decisions on eligibility for recruitment are reserved for OHRM, and not the department head. In Section II, paragraph 2 of its resolution 53/221, the General Assembly decided OHRM, not the USG/OIOS, "shall remain the central authority for the monitoring and approval of the recruitment and placement of staff and for interpretation of the regulations and rules of the Organization and their enforcement". If a programme manager or head of department has a question or an issue with respect to the eligibility of a candidate, the proper course is for him or her to submit the issue to OHRM for a final ruling;

j. The IAAC had no role in the recruitment process. Nor do the statements of the IAAC serve to exempt a recruitment process from applicable procedures. The concerns of the IAAC and the General Assembly were heeded by the newly appointed USG/OIOS;

k. The third stage of the recruitment exercise established that the recruitment process was ongoing, and the statement that it was ongoing was true and accurate. It established that recruitment policies and procedures are not detrimental to the operational independence of OIOS. It established that a USG/OIOS can, through reasonable measures, identify and recommend more than one suitable candidate, including one female candidate;

l. The Applicant's current salary exceeds both the salary of an Assistant Secretary-General and that of a staff member serving at the D-2 level. The Applicant neither testified to, nor put any evidence before the Tribunal that he was forced to liquidate his pension in order to live;

m. The Applicant has not been denied a career with the United Nations. The Applicant voluntarily withdrew from the recruitment process. The Applicant could have been selected had he not withdrawn. The Applicant is free to apply for any advertised vacancy within the Organization. The Applicant was regularly updated on the status of the recruitment process by the USG/OIOS, and these updates included descriptions of her exchanges between the SRG, and with the office of the Secretary-General;

n. There is no legal or factual basis to award the Applicant moral damages;

o. There is no general bar to the Organization responding to media queries. The Organization is entitled to defend itself, respond to criticism, and express its opinion;

p. The Applicant's relocation to Geneva is unrelated to the contested decision, and cannot be compensated for as there is no connection between his claimed damages and the contested decision. The Applicant's decision to maintain two residencies, one Geneva, and one in New York, are for his own personal benefit, and unrelated to the contested decision;

- q. No duty to the Applicant was breached, and the Applicant's arguments with respect to mitigation of damages are meaningless.

Applicable law

Charter of the United Nations

46. Article 101.1 of the Charter states that United Nations staff shall be appointed by the Secretary-General under regulations established by the General Assembly. Pursuant to Article 101.3 the paramount consideration in the employment of the staff shall be the necessity of securing the highest standards of efficiency, competence, and integrity. It also stipulates that due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible, but makes no mention of gender concerns.

General Assembly resolution 48/218 B (Review of the efficiency of the administrative and financial functioning of the United Nations)

47. By its resolution 48/218 B, art. 4, the General Assembly established OIOS which is to be headed by a USG. Article 5(a) specifically emphasises that OIOS shall exercise "operational independence" under the Secretary-General in the conduct of its duties.

ST/SGB/273 (Establishment of OIOS)

48. The establishment of OIOS was implemented by ST/SGB/273 according to the mandate of General Assembly resolution 48/218 B. Article 2 reiterates that OIOS shall exercise operational independence under the authority of the Secretary-General in the conduct of its duties. Under Chapter VII (Budget and personnel), the Secretary-General is required to take into account the need for ensuring the operational independence of OIOS (sec. 30). The USG of the OIOS shall, in accordance with the Staff Regulations and Rules, develop an appropriate office organisational structure (sec. 31). In keeping with the need for operational independence, the USG of the

OIOS shall exercise a degree of latitude and control over the personnel and resources of the Office consistent with the Staff Regulations and Rules (sec. 34). Article 35 states that with respect to the OIOS staff, the USG of the OIOS shall have the powers of appointment, promotion and termination similar to those delegated by the Secretary-General to the heads of programmes, funds or subsidiary organs, enjoying special status in these matters.

ST/AI/401 (Personnel arrangements for OIOS)

49. The scope of the responsibilities of the Secretary-General and the USG of the OIOS in personnel matters is defined in ST/AI/401, as amended by ST/AI/2003/4. It refers to the need for operational independence and repeats the wording of art. 35 of ST/SGB/273 concerning the USG of the OIOS's power of appointment. Under this Administrative Instruction, the Staff Regulations and Rules and administrative instructions promulgated by the Secretary-General apply to staff members serving with the OIOS. The Secretary-General is responsible for establishing an OIOS Appointment and Promotion Panel to advise the USG/OIOS on appointments up to and including the D-2 level. The functions and procedures of this Panel are generally to be comparable to those of other similar bodies in the United Nations. It concludes with sec. 9, which states that, in accordance with the relevant staff rules, the USG of the OIOS will have authority to appoint all staff members whose appointment is limited to service with OIOS up to the D-2 level.

Other relevant administrative issuances regarding the selection processes

50. At the date of the events in this case, between February 2008 and March 2010, the relevant instruments regulating the two selection processes were ST/AI/2006/3 and ST/SGB/2002/6 (Central review bodies).

ST/AI/2006/3

51. The provisions of ST/AI/2006/3 generally governed appointments up to the D-2 level; with the exception that the functions normally discharged by a central review body should be discharged by the SRG, and the selection decision should be made by the Secretary-General (sec. 3.1).

52. ST/AI/2006/3 described in detail how a selection process was to be undertaken. Following the preparation and review of the evaluation criteria, the issuance of the vacancy announcement and the evaluation of candidates, the programme manager was required to prepare a reasoned and documented record of the recommended candidate(s) against the applicable evaluation criteria to allow the central review bodies to assess the process (sec. 7.6). Section 7.7 provided that the programme manager should preferably transmit a list of qualified candidates, and not just one. The head of department/office was then to ensure that the Organization's human resources planning objective and targets, especially with regard to geography and gender, had been complied with and to provide a certification to that effect to the relevant central review body.

ST/SGB/2002/6

53. The central review bodies, as defined in ST/SGB/2002/6, were to consider whether (sec. 5.3):

a. The proposal made by the department/office was reasoned and objectively justifiable based on the pre-approved evaluation criteria and was accompanied by a certification that, in making the proposal, the head of department/office has taken into account the Organization's human resources planning objectives, especially with regard to geography and gender balance; and

b. The record indicated the existence of a mistake of fact, a mistake of law or procedure, prejudice or improper motive that could have prevented a

full and fair consideration of the requisite qualifications and experience of the candidates.

Administrative issuances on gender balance

ST/AI/1999/9 (Special measures for achieving gender equality)

54. The general provisions to give women preferential treatment for appointments are found in ST/AI/1999/9. OHRM shall assist all departments and offices in identifying qualified women candidates for the post, which should be done at least six months before the post becomes vacant in cases of foreseeable vacancies. For that purpose, OHRM shall review potential women candidates within and outside the department or office concerned (sec. 1.5). As for the selection, vacancies shall be filled by a woman if her qualifications: (a) meet the requirements for the vacant post and (b) are substantially equal or superior to those of competing male candidates (sec. 1.8).

The Secretary-General's memorandum on achieving gender balance

55. In April 2008, the Secretary-General sent a memorandum to the Heads of Departments and Offices concerning achieving gender balance in the United Nations Secretariat. The Secretary-General stressed the high priority he attached to achieving gender balance and the need to rectify the situation where, at some levels, women's ratios had regressed. He further required that:

To enable me to exercise my discretion on senior level appointments in a positive manner, I request that you provide my office with a list of at least three qualified candidates that includes qualified women for posts at the D-2 level and above. In those exceptional cases in which you are unable to include at least one qualified woman in the slate, please submit a written explanation highlighting the efforts made to do so.

Consideration

The judicial review by the Tribunal in non-selection cases

56. The United Nations Appeals Tribunal in *Abbassi* 2011-UNAT-110 held that when reviewing selection processes, the Dispute Tribunal is to examine whether: (a) the proper procedures were followed, and (b) the staff member was given fair and adequate consideration. The Appeals Tribunal noted that the Secretary-General has a broad discretion in making decisions regarding appointments and, in reviewing such decisions, the Tribunal should not substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

57. The Tribunal rejects the Respondent's contention that the test in *Rolland* 2011-UNAT-122 should be applied in the present case as the cases concern two very different situations. In *Rolland*, the applicant was not selected for the relevant vacancies as she was neither found suitable for the post nor was she rostered. In the present case, the Applicant challenges the Respondent's failure to select him as the only recommended candidate. In addition, the presumption of regularity referred to in *Rolland* cannot be applied in this case which concerns two competing procedures, the one advocated for by the USG/OIOS and that adopted by the SRG.

The propriety of the selection process for each of the vacancy announcements as conducted at the programme manager level by the OIOS (USG/OISO)

The first selection process

58. In essence, the Respondent contends that the SRG was correct when it remanded the selection process back to the USG/OIOS, with a request that the vacancy announcement be more widely circulated. The reason given at the time was that there had been only one recommended candidate and no female candidates. The Respondent also appears to suggest that the USG/OIOS should have amended the

vacancy announcement, including the evaluation criteria. Otherwise, the parties agree that the selection process at the programme manager level was conducted properly.

59. It is not clear from the facts, or the parties' submissions, how the evaluation criteria for the first vacancy announcement were actually prepared and approved. Although the Applicant submits that OHRM did approve them, there was no evidence that they had been approved by a central review body as required by ST/SGB/2002/6 (sec. 5.1) and ST/AI/2006/3 (sec. 4.4).

60. A comparison of the 2007 vacancy announcement for the Post with one from 2004, which was also adduced in evidence, shows that the work experience requirements were substantially amended. The 2004 vacancy required twenty years of professional experience in white-collar crime, of which five should have been at the international level, whereas the 2007 vacancy announcement, for which the Applicant applied, only required 15 years of such experience, but added the further requirement of at least 10 years of prosecutorial experience with a national authority. This is an important deviation, and appears to have been tailor made to fit a candidate with the Applicant's professional background as he had 19 years of relevant professional experience of which 13 years was as a United States federal prosecutor.

61. However, neither the SRG nor OHRM criticised the 2007 evaluation criteria at the time of the two selection processes, nor did either of them suggest their amendment to widen the pool of candidates after the first selection process.

62. It was the responsibility of the programme manager to make the recommendation(s) for selection on the basis of the evaluation criteria as they were set at the time. This was done and it is inappropriate for the Respondent to criticise those criteria now.

63. The next question is whether the USG/OIOS acted correctly in accordance with the staff rules and policy when, as the programme manager for the selection process, she made only one recommendation, that of the Applicant, for selection.

64. There is no absolute requirement in ST/AI/2006/3 about the number or type of candidates to be recommended, only that a list of qualified candidates is preferable (sec. 7.7)

65. In the Secretary-General's April 2008 memorandum on gender balance, he recognized that there would be exceptional cases in which a review panel would be unable to include at least one qualified woman in the slate. The Secretary-General required that an exceptional case be justified by "a written explanation highlighting the efforts made to do so."

66. Therefore, although the Secretary-General clearly intended that the statements of policy in this memorandum should be taken seriously and that managers should be proactive in addressing the gender gap in senior appointment to the Secretariat staff, he did not impose an absolute requirement that the numbers of candidates and gender and geographical diversity criteria must be met on all occasions. The policy explicitly allows for exceptions. Where the preferred criteria cannot be met, the interview panel must satisfy the Secretary-General that those factors have been considered.

67. In each of the recommendations to the SRG, dated 18 November 2008 and 19 June 2009, the USG/OIOS stated that gender and geographical representation had been considered either "particularly" or "carefully". She gave a full report on these matters and explained why, in particular, no female candidates were recommended. The Tribunal finds that these explanations were in compliance with section 7.7 of ST/AI/2006/3 and in conformity with the Secretary-General's policy.

68. The Tribunal also notes that the mandatory rules in ST/AI/1999/9 concerning preferential treatment of women in selection processes only applies if the female candidate in question is found suitable for the job and her qualifications are substantially equal or superior to that of the male competitors. However, the interview panel did not find that any female candidates met either of these conditions.

69. The Tribunal finds that the statements by the SRG and the Chef de Cabinet that the selection process was not conducted “in line with the Secretary General’s policy” and that “basic procedures were disregarded” are not correct. The Secretary-General’s policy was not absolute. It allowed for a procedure in exceptional cases and the interview panel adhered to this procedure when it made its first recommendation. It is significant that the Officer-in-Charge for OHRM was on the interview panel, which unanimously reached its recommendation about the suitability of only one candidate.

70. Furthermore, pursuant to ST/AI/1999/9, the principal responsibility for identifying qualified female candidates falls on ORHM and not on the programme manager. Any criticism in this regard should therefore have been directed at OHRM and not the USG/OIOS.

71. In conclusion, firstly, the Tribunal finds that by advertising the vacancy announcement on Galaxy as well as in The Economist and Le Monde, the vacancy was given adequate wide international notification in order to attract candidates of both genders from a broad geographical spread. The SRG’s finding of the opposite was therefore factually wrong. Secondly, the recommendation of one candidate, namely the Applicant, was done with reference to the vacancy requirements and evaluation criteria. The recommendation was made in accordance with the relevant administrative instruction and the exceptions allowed for in the gender policy promulgated by the Secretary-General.

The second selection process

72. In the second vacancy round, the USG/OIOS did not forward her recommendation to the SRG, but sent it directly to the Secretary-General for his approval. The Chef de Cabinet then requested the SRG to review the recommendation before the Secretary-General would take any decision.

73. To ensure fairness and avoid favoritism, a central part of the selection system set out in ST/AI/2006/3 is that the selection process is to be approved by a central review body before a final selection decision is made (see sec. 8). In the absence of other review boards, the Tribunal finds that the Chef de Cabinet acted correctly when he requested the SRG to review the recommendation of the USG/OIOS.

74. In its email of 15 July 2009, the SRG first took issue with an interview panel member who had initially been approved by OHRM. In her Note to the Chef de Cabinet dated 9 September 2009, the ASG/OHRM stated that OHRM had only approved of this interview panel member under the condition that a senior OHRM official would be present at the interviews. The Tribunal notes that when the SRG finally decided on the recommendation on 18 February 2010, it refrained from reiterating this criticism. The Respondent did not explain how this alleged irregularity affected the decision making process. The Tribunal will not review that matter any further.

75. Next, the SRG proposed that the USG/OIOS should interview four additional applicants for the purpose of having at least three candidates on the list of recommended applicants for the Secretary-General to choose from. Having complied with this request, the USG/OIOS advised the SRG that none of these candidates was suitable. For the same reasons given in relation to the first selection process, the Tribunal finds that the USG/OIOS acted within her authority as programme manager when she did so. It was entirely within her purview to evaluate whether a candidate met the requirements and was suitable for a post.

76. In conclusion, the Tribunal finds that the programme manager undertook the second selection process correctly. The candidates were evaluated against the accepted vacancy requirements. The fact that only one candidate was recommended was explained. There is no evidence that the USG/OIOS' review of the additional four candidates suggested by the SRG was unreasonable or that they were not evaluated according to the vacancy requirements. There was no evidence that the recommendation was tainted by improper motives.

The SRG's recommendation not to endorse the USG/OIOS' recommendations of the Applicant

The involvement of the SRG in the selection processes

77. The SRG became involved in the selection process, initially at the request of the USG/OIOS. This was appropriate where it was not possible for OIOS to establish an Appointment and Promotion Panel (“OIOS Panel”), required by ST/AI/401, sec. 6, because there were no OIOS staff at D-2 level at the time.

78. In those particular circumstances, the functions of the SRG should therefore reflect those of the OIOS Panel, which pursuant to ST/AI/401 was “generally comparable to those of other United Nations appointment and Promotions bodies”, meaning the central review bodies. As the role of the SRG in the present case was to substitute for the OIOS Panel, it should have been governed by the provisions for central review bodies, namely ST/SGB/2002/6, rather than ST/SGB/2005/4 and ST/SGB/2009/2 that are specifically applicable to the SRG. The importance of this distinction is that the mandate of the SRG under ST/SGB/2002/6 could be interpreted as being broader as this Administrative Instruction, unlike the others, specifically refers to the Organization’s human resources planning objectives regarding gender balance in addition to the other duties of the central review body.

The role of the SRG in the first selection process

79. The Applicant contends that he was discriminated against on the basis of his gender and nationality. The SRG made no observation regarding his being a United States citizen, but found that the United Nations rules on gender balance had not been complied with when rejecting the USG/OIOS’ recommendation of the Applicant as the sole candidate for the Post. Acting as a central review body under ST/SGB/2002/6, it was within the mandate of the SRG to review whether the gender policies had been appropriately applied.

80. Such a review is not discriminatory. It is a requirement of the SRG pursuant to the Secretary-General's policies, particularly ST/SGB/2002/6. These policies do not mandate the selection of female candidates unless they meet the requirements for the vacant post and are substantially equal or superior to those of competing male candidates.

81. However, the Tribunal finds that the SRG acted unlawfully in its review of the recommendation of the Applicant by the USG/OIOS when it determined that the vacancy announcement had not been widely enough advertised, since it had actually been advertised on Galaxy as well as in Le Monde and the Economist. Second, it acted on the incorrect basis that the requirement to recommend three candidates, including a female candidate was mandatory and failed to consider the proper explanation of the USG/OIOS, which justified a departure from the usual practice. The decision to remand the case to the programme manager was incorrect.

82. Neither of the stated reasons justified the SRG's decision not to continue with the proper consideration of the recommendation. As a result of these errors the SRG failed to give proper consideration to the recommendation of the USG/OIOS and deprived the Applicant's candidacy of the proper consideration to which it was entitled.

83. The subsequent administrative decision to cancel the first vacancy announcement and to readvertise the vacancy was therefore unlawful.

The role of the SRG in the second selection process

84. While it was the task of the programme manager to assess the candidates and recommend candidates for the Secretary-General's selection, the role of the SRG was to ensure that the programme manager had followed proper procedure and appropriately applied the evaluation criteria.

85. Following the inconclusive first selection process, the SRG requested the USG/OIOS to assess four additional candidates put forward by OHRM. However,

after the USG/OIOS had evaluated these four candidates and found that none of them fitted the evaluation criteria, the SRG still did not find itself in a position to approve the USG/OIOS's recommendation of the Applicant as the only suitable candidate.

86. The reasons given by the SRG for rejecting the second recommendation were the same allegations of procedural mistakes by the programme manager it gave about the first vacancy, in particular that only one candidate had been recommended and that there was no female candidate. The evidence strongly suggests that the SRG rejected the second recommendation because it wanted at least one of the candidates suggested by OHRM to be on the list of recommended candidates before it would consider the recommendations.

87. Through the evidence of the ASG/OHRM, the Respondent maintained that the SRG was not interested in the merits of the Applicant's candidacy. She said that the SRG has no mandate to evaluate the qualifications of candidates. However, the evidence demonstrates that the SRG went to some lengths to compare the Applicant's credentials with those of other candidates. The Respondent went so far as to call an unsuccessful candidate for the vacancy as a witness at the oral hearing in an attempt to demonstrate that she would have met the evaluation criteria and should have been included on the recommended list. This suggests that the SRG had, in fact become involved in assessing the merits of the candidates' skills and competencies, a role reserved for the programme manager.

88. It appears to the Tribunal that in its responses the SRG was intent on finding reasons for the Secretary-General to avoid making a decision on the programme manager's recommendation. To this end, the SRG insisted on the rigid adherence to the gender policy that actually allowed for some flexibility, while at the same time advocating that the selection panel should have taken a more flexible approach to the application of the evaluation criteria.

89. In conclusion, the Tribunal finds that the SRG exceeded its authority by inappropriately interfering in the USG/OIOS's assessment of the four additional

candidates and, in the absence of any proven procedural irregularities in the selection process, finds that its decision not to endorse the recommendation of the Applicant as the only candidate for the Post was unlawful.

The Secretary-General not making and notifying the Applicant about the selection decision

The decision not to select the Applicant

90. It is the Respondent's case that the authority to make staff appointments in OIOS at the D-2 level and above rests with the Secretary-General. The disagreement between the Administration and the USG/OIOS about this point is central to this case. The impasse about where the authority lay contributed significantly to the lack of a selection decision, which ultimately led to the cancellation of the two vacancy announcements.

91. The authority to make staff appointments is governed in the first place by the United Nations Charter, the highest authority of the United Nations legal hierarchy. It vests the responsibility for staff appointments with the Secretary-General.

92. However, General Assembly resolution 48/218B that founded OIOS, acknowledged the need for delegation of "operational independence" to OIOS and its head, the USG of OIOS.

93. The establishment of OIOS was implemented by ST/SGB/273, an instrument higher in the hierarchy of instruments than, for example, administrative instructions or policies. Under this Bulletin, the Secretary-General reiterated the "operational independence" of OIOS and noted that the USG of OIOS shall have the power of appointment in OIOS similar to that delegated by the Secretary-General to the heads of programmes, funds or subsidiary organs enjoying special status in this matter.

94. ST/AI/401 further specifies the powers of the USG of OIOS in personnel matters and the extent to which the Secretary-General retains authority in this regard. The Secretary-General's authority includes promulgating and interpreting Staff Regulations and Rules and having the final decisions in appeals, disciplinary cases and compensation. ST/AI/401 expressly stipulates that appointments up to the D-2 level are the responsibility of the USG of the OIOS.

95. As the areas of authority relating to OIOS retained by the Secretary-General were specifically defined by ST/AI/401, it follows that all other personnel responsibilities not so retained, including both the selection and the final appointment of staff up to the D-2 level, were deliberately and specifically transferred by ST/SGB/273 from the Secretary-General to the USG of OIOS.

96. The Tribunal does not accept the submission of the Respondent that, in relation to D-2 appointments in OIOS, staff regulation 4.1 limits the USG/OIOS' authority to organise the recruitment process and make a recommendation before the Secretary-General makes the final selection and appointment. That interpretation would deprive the relevant parts of General Assembly resolution 48/218 B and the related ST/SGB/273 and ST/AI/401 of meaning and effect.

97. However, in accordance with sec. 3.3 of ST/AI/2006/3, if a head of department/office, who otherwise has authority to appoint staff limited to the entity, submits the selection recommendation to a central review body outside his or her department, the selection decision must be referred to the Secretary-General.

98. In the present case, when the USG/OIOS referred the first recommendation to a central review body (in this case, the SRG) she acquiesced to the procedure in ST/AI/2006/3. By referring the second recommendation directly to the Secretary-General, she effectively surrendered the authority conferred by ST/SGB/273 on her as the USG of OIOS to make such an appointment.

99. The Tribunal finds that the referral of the selection recommendations to the SRG, pursuant to ST/AI/2006/3, meant that the Secretary-General, and not the USG/OIOS, became the ultimate decision-maker and was responsible for making the appointment for the Post.

100. Pursuant to ST/AI/2006/3, the head of department/office, or in this case the Secretary-General, is not compelled to make a selection decision based on the list of recommended candidates. The only relevant requirement is that the head of department/office is to give due regard to the recommendation of the central review body. In the absence of an endorsement of the recommendation of the programme manager by the SRG, the Tribunal finds that the Secretary-General did not act unlawfully when he did not select the Applicant recommended by the USG/OIOS.

Notification of the Applicant concerning his application

101. The Applicant submits that the Administration failed to notify him about him not being selected for the Post. Under ST/AI/2006/3, the programme manager is to notify a candidate if s/he was interviewed for the relevant post, but not selected or placed on a roster. ST/AI/2006/3 is silent about any obligation to notify candidates in circumstances where no selection has been made.

102. Apart from the Applicant's oral evidence to the Tribunal that the USG/OIOS provided him with "cursory sound bites" throughout the selection processes about the status of his candidature, including what was happening at the SRG stage, there was no evidence that the Applicant had been formally notified that the first vacancy announcement had been cancelled until he was invited to reapply for the second vacancy. The SRG advised the Secretary-General in February 2010 that it was not in a position to make a recommendation but, in April 2010, the Applicant was told that the selection process was ongoing and he would be informed about this. That did not occur until 5 November 2010 after the second vacancy announcement had been cancelled.

103. The Appeals Tribunal in *Bertucci* 2011-UNAT-121 confirmed that when exercising his discretion the Respondent, in addition to complying with the applicable law, has a duty to act in good faith to all staff members (see para 37):

The former Administrative Tribunal, other tribunals competent to rule in cases involving international civil servants and this Tribunal itself in *Asaad*, Judgment No. 2010-UNAT-21, have consistently maintained that, whatever the scope of the discretionary power invested in the Secretary-General of the United Nations concerning the appointment of staff members, including staff members at the highest level, who will be closely involved in implementing the policies of the Organization, his discretionary power is not unfettered. The Secretary-General must act in good faith and comply with the applicable law. His decisions must not be taken on erroneous, inconsistent or fallacious grounds. If a decision is contested, it is for the Tribunal exercising its control to reconcile the judicial authority vested in it in the interests of justice of the United Nations with the discretionary power vested in the Secretary-General.

104. In *James* UNDT/2009/025, this Tribunal specified that good faith includes “acting rationally, fairly, honestly and in accordance with the obligations of due process”.

105. In the circumstances of the present case, the Tribunal finds that the Respondent was in breach of his obligation to act in good faith when the Applicant was not notified of his not being selected to the Post after the first selection process. In particular, the Respondent did not act honestly or fairly when the Applicant was advised that the selection process was ongoing at a time when it had already decided not to make a recommendation. The failure to notify the Applicant, as the single recommended candidate, for approximately nine months even when it was apparent that no selection was to be made was unfair and not in good faith.

Summary of findings on the Respondent’s liability

106. The findings of the Tribunal outlined in the above can be summarized as follows:

a. Both selection processes were conducted by OIOS in accordance with the relevant procedural requirements at the programme manager level. The suitability of all candidates was appropriately assessed against the evaluation criteria. The recommendation of only one suitable candidate, namely the Applicant, and the absence of suitable women candidates for the Post were adequately explained. While the submission of the second recommendation directly to the Secretary-General by the USG/OIOS was a procedural error, this was rectified by the Chef de Cabinet and had no influence on the process;

b. The SRG's handling of the selection process was unlawful. In respect of the first selection process, the SRG found that the vacancy for the Post should be re-circulated on the incorrect basis that it had not been widely advertised and, in the face of reasonable explanations from the USG/OIOS, it continued to insist upon having three recommended candidates, including a female, without regard to the exceptions in the Secretary-General's policy on gender. In respect of the second selection process, the SRG similarly and unlawfully refused to endorse the recommendation of the USG/OIOS of the Applicant as the only candidate for the Post;

c. The Secretary-General did not violate the Applicant's rights when he did not select him, but the failure of the programme manager, namely the USG/OIOS, to notify him about the outcome of the process was a breach of the Applicant's right to be treated in good faith.

The compensable harm suffered by the Applicant from the violations of his rights

Principles governing the award of compensation

107. Under art. 10.5(b) of its Statute, the Dispute Tribunal may award compensation for the Administration's breaches of an applicant's rights under her/his employment contract. The objective of such compensation is to place the staff

member in the position he or she would have been in had the breach not occurred (see the Appeals Tribunal in *Mmata* 2010-UNAT-092 and *Iannelli* 2010-UNAT-093).

108. In *Antaki* 2010-UNAT-095, the Appeal Tribunal outlined the types of damages that may be compensated as “actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury”. Such damages are only compensable if it has been established that harm actually occurred (*James* 2010-UNAT-009, *Sina* 2010-UNAT-094 and *Antaki*). Under art. 10.7 of the Statute of the Dispute Tribunal, exemplary or punitive damage may not be awarded, and the Appeals Tribunal has ruled that the award for damages may not, in fact, amount to such damages (*Wu* 2010-UNAT-042).

109. The Applicant has a duty to mitigate his loss of income. He must demonstrate that he tried to seek alternative suitable work to avoid unemployment and, if he cannot, the Tribunal shall assess how this should impact his compensation award (*Tolstopyatov* UNDT/2011/012 and *Mmata* 2010-UNAT-092).

Pecuniary damages—the Applicant’s actual losses

110. As no candidate has an automatic right to selection under ST/AI/2006/3 it is impossible to decide with certainty whether the Secretary-General would have selected the Applicant if the process had been conducted properly. To assess the compensable harm to a candidate who has not been selected for a post, it is necessary to calculate the probability of the candidate being selected but for the breaches by determining his loss of chance of being selected. (see *Hastings* 2011-UNAT-109 and *Lutta* 2011-UNAT-117).

111. Had the selection exercise been done without the errors of the SRG that led to the decision to cancel the vacancy announcements, the Tribunal finds that the chances of the Applicant being selected for the Post were very high. He met all the qualifications and experience criteria. He had excellent performance reviews and had twice demonstrated to the interview panel that he was the only suitable candidate

after wide advertising and the exclusion of female candidates based on their lack of suitability.

112. In all likelihood, once selected his employment would have started on approximately 1 January 2009 and he would have been entitled to a salary at the D-2 level from that date.

113. Normally a staff member in this situation would be entitled to compensation within the parameters prescribed by art. 10 of the Statute of the Dispute Tribunal for the salary that he would have received but for the breach. However, the following unusual and particular circumstances of this case justify a departure from this usual consequence.

114. While there was a high chance that he would have been appointed, that was not a forgone conclusion. No staff member has a right to be selected even though he is the only recommended candidate. As a matter of law, a staff member cannot rely on such recommendation for a selection unless he can establish that he had a proper legitimate expectancy that he would be selected (see *Sina* UNDT/2010/060, as affirmed by the Appeals Tribunal in *Sina* 2010-UNAT-094 on its liability findings).

115. The well-known differences of opinion between the USG/OIOS and the SRG and the fact that the Applicant had received no formal notification about the status of his candidature should have put him on notice that there was a real prospect that he was unlikely to be appointed to the Post. This uncertainty was confirmed when the Post was re-advertised in March 2009. By then, he was no longer employed by the United Nations and he should have anticipated that, as there would be no early resolution of the issues that was causing the delays to the selection process, he would need to find alternative regular employment.

116. In the light of these factors, it was unrealistic for the Applicant not to make alternative plans for his future in the event that the differences between the USG/OIOS and the SRG were not resolved and he was not selected. Consequently,

despite his having a likely chance of getting selected to the Post, he had a legal obligation to take steps to mitigate his possible losses by applying for other positions but failed to do so.

117. The Applicant remained without full-time employment for 17 months from his separation on 31 December 2008, though he held some irregular consultancy jobs during this period. He told the Tribunal that he was not restricted by the USG/OIOS from applying for other posts but, apart from the consultancy work, he did not start “in earnest” a search for other full-time employment until he applied for a position with the Global Fund after the end of 2009 when he realised that the recommendation of his candidature for the Post would not be approved. The Tribunal finds that he failed to mitigate his losses until assuming the position with the Global Fund.

118. According to the Applicant after being employed with the Global Fund, the salary he received, and still receives, was, at minimum, comparable to that which he would have received had he been appointed to the Post. Accordingly, the Tribunal finds that the Applicant suffered no actual income loss from May 2010 and onwards.

119. The Tribunal also finds that the Applicant has not established that he suffered compensable pecuniary loss because he had to relocate to Geneva to find new employment. Nor can he be compensated for his choice to maintain residences in two countries. There is no causal link between his relocation and the breaches of his employment contract with the United Nations.

Non-pecuniary damages—the Applicant’s other losses

120. The Applicant submits that some public comments regarding the selection processes from the Administration, particularly those of the Chef de Cabinet, have harmed his reputation and that he has lost the possibility of a future career with the United Nations. The Applicant further contends that he suffered humiliation, stress and uncertainty as a result of the Respondent’s actions.

121. The Tribunal observes that it is highly inappropriate for high-level United Nations officials to comment publicly on a pending selection process, and that it is particularly inappropriate to identify the candidates involved even in response to public questioning. Such comments open the administration to criticism for wrongful influence in the selection process and may potentially be very harmful and damaging to the process as well as to the candidates.

122. In this case, there is no evidence that the Applicant has applied for and been unsuccessful in other applications for any positions with the United Nations. Consequently, he is not entitled to compensation for the loss of opportunity of further employment with the United Nations. His success in obtaining a largely comparable high-level position with the Global Fund is testimony to his continuing employability. There is no evidence that his reputation suffered any harm from the publicity concerning the selection processes for the Post or that he has lost any prospects of a career with the United Nations.

123. However, it is abundantly clear to the Tribunal that the Applicant was the unwitting and blameless victim of an internal dispute between senior managers of the United Nations. His evidence and demeanor at the substantive hearing clearly demonstrated that he has been deeply distressed and frustrated by the lengthy, flawed and highly public selection processes. In addition, the Applicant was not notified of the outcome of his application in a timely manner, causing further delay and anxiety. To compensate for these injuries, the Tribunal awards him USD30,000.

Conclusion

124. The Applicant is awarded USD30,000 arising from the stress and anxiety caused by the violations of his rights under his employment contract by officials of the Respondent.

125. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed in paragraph 124 is to be paid to the Applicant 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 Coral Shaw

Dated this 14th day of August 2012

Entered in the Register on this 14th day of August 2012

(Signed)

Hafida Lahiouel, Registrar, New York