



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

KOROTINA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations Secretariat in New York, contests the decision finding her ineligible for an appointment to a temporary position at the P-3 level based on the determination that, at the time of the selection process, she did not possess the necessary years of experience.

2. The Applicant submits, *inter alia*, that the selection process for the contested post was flawed and that, as a result of the contested decision, she was improperly denied promotion to the P-3 level, and that the failure to give full and fair consideration to her candidature demonstrated a pattern of arbitrariness against her. The Applicant seeks compensation for her pecuniary and non-pecuniary loss.

3. The Respondent submits that the present application is not receivable as the vacancy in question was never filled. The Respondent further submits that the applicable guidelines on the determination of eligibility were correctly applied in deciding that the Applicant could not be appointed at the P-3 level. In particular, the Respondent submits that candidates applying for P-3 level positions who have a Master's degree must have at least five years of experience post-Master's degree.

4. The parties agreed that this case would be decided on the papers.

Scope of the case

5. The main issue in this case is whether the determination that the Applicant was ineligible for a P-3 level appointment was lawful. Although the Applicant acknowledges that “the only decision this Tribunal is competent to examine, and thus the only decision that it will consider in the present judgment, is the ... decision not to select the Applicant for the P-3 [level] [temporary vacancy]” in the Peacekeeping Procurement Section of the Procurement Division, Department of Management, she also refers to a number of additional matters, including her non-selection for several

other P-3 level vacancies. Having reviewed these additional claims raised by the Applicant, the Tribunal finds that they are not receivable in this case as the only decision contested by the Applicant in her request for management evaluation was the decision regarding her alleged ineligibility for the P-3 level temporary vacancy in the Peacekeeping Procurement Section (see art. 8.1 of the Tribunal's Statute, stating that "[a]n application shall be receivable if ... [a]n applicant has previously submitted the contested administrative decision for management evaluation, when required"). The Applicant's case is therefore limited to that contested decision. However, the Tribunal, in reviewing the present case, was cognizant of the relevant factual background as articulated by the parties in their submissions and supporting documents.

Relevant background

6. The Applicant was recruited on 10 March 2008 as an Assistant Procurement Officer, Procurement Division, Department of Management. She was recruited at the P-1 level. Her level was subsequently revised to the P-2 level. This revision took place in or around December 2009, albeit it was recorded retroactively as effective from 15 September 2008.

7. The Applicant obtained an undergraduate degree in June 2004 and a graduate degree (Master of Business Administration) in June 2005. She submits that, starting in February 2004, she worked full-time whilst pursuing her graduate studies. The Applicant provided a document from her former employer, Luxoptics Holding Company ("Luxoptics"), stating that she had been a full-time employee, with the title of Acquisition Manager, from February 2004 to April 2006. She was thereafter employed at another organization called "Viland Trading House" from April 2006 to November 2007. On 10 March 2008, she commenced her employment with the United Nations.

8. On 15 July 2009, the Applicant sent an email to the Office of Human Resources Management (“OHRM”), asking whether she could be considered for a P-3 level vacancy as a P-1 level candidate, “considering that [she is a] qualified candidate meeting all requirements of the [vacancy announcement] (Master’s degree, 5 years of related experience, etc.)”. In response, a Human Resources Officer from OHRM sent her an email on the same day stating that she “could be considered as a 60-day candidate for a P-3 post, subject to having the required years of experience for a P-3 post”.

9. The Applicant thereafter applied for several P-3 level posts, both regular and temporary. The present applicant concerns only one of these posts, that in the Peacekeeping Procurement Section.

10. The Applicant submits that, on 23 October 2009, she was verbally informed by the Chief of the Procurement Management Section (“PMS”), Procurement Division, Department of Management, that she would not be considered for P-3 level positions since sec. 5.2 of ST/AI/2006/3 (Staff selection system) prohibited consideration for promotion to posts more than one level higher than the staff member’s grade. The Applicant sought confirmation and clarification from the Chief of the Professional and Above Staffing Section (“PASS”) on the same day via email. She was informed by the Chief of PASS orally at a meeting three days later, on 26 October 2009, that while she was not eligible for regular P-3 level positions, she could be considered for temporary vacancy announcements at the P-3 level. The accuracy of the Applicant’s unrebutted recollection of that conversation is confirmed by her email exchange with the Chief of PASS on 11–13 November 2009 (see below).

11. On 28 October 2009, the Procurement Division, Department of Management, advertised a temporary vacancy position at the P-3 level in the Peacekeeping Procurement Section, which is the subject of the contested decision. The vacancy announcement required the following:

Experience: A minimum of five years of progressively responsible experience in procurement or administration in an international organization, of which at least two years should be directly related to firsthand procurement experience at the international level.

Education: Advanced university degree (Master's degree or equivalent) in Business Administration, Public Administration, Commerce, Engineering, Law or other related field. A first level university degree with a relevant combination of academic qualifications and experience may be accepted in lieu of the advanced university degree.

12. On 9 November 2009, the Chief of PMS sent an email to the Applicant informing her that it was the Chief's understanding that the Applicant had been advised by OHRM that she was ineligible for consideration for any P-3 post, whether regular or temporary. As this was contrary to what the Chief of PASS had told the Applicant on 26 October 2009, the Applicant sought, on 11 November 2009, clarification from OHRM regarding this discrepancy. The Applicant stated that "[d]uring our meeting [on 26 October 2009] you informed me [the Applicant] that I am not eligible for permanent P-3, however, you see no problem of eligibility if I apply for [temporary vacancy] P-3".

13. The Chief of PASS replied two days later, on 13 November 2009. He stated that as he "ha[d] already mentioned to [the Applicant's] supervisor, that you can be considered for the P-3 [level temporary vacancy] and can be granted SPA [Special Post Allowance] to [the] P-2 [level], subject to satisfactory performance".

14. Having applied for the position advertised on 28 October 2009, the Applicant was interviewed in November 2009. She was one of eight applicants, of whom two, including the Applicant, were short-listed for interviews. The Applicant's overall rating was assessed as "acceptable", and the second candidate was given an overall rating of "marginal". On 16 November 2009, the Applicant was recommended for recruitment to the temporary P-3 level position.

15. On 23 November 2009, after the Applicant was recommended for the position, the Chief of PMS emailed the Executive Office of the Department of Management, with a copy to the Applicant, enquiring whether the Applicant was eligible for the position as she had been recruited as a P-1 level staff member. Specifically, the email stated:

[The Applicant] has applied to a [temporary vacancy] for a P3 position in Peacekeeping Procurement Section. [The Applicant] started in [the Procurement Division] on 10 March 2008 at P-1 level. Her present appointment expires on 28 February 2010. She has previously been informed that she would not be eligible for a regular P3, as she cannot apply for a post two levels above her own grade (ST/A1/2006/3 [s]ection 5.2).

However, would she be eligible for this P3 [temporary vacancy]?

16. In response to the Chief's email, on 30 November 2009, the Chief and the Applicant were informed by email from the Executive Office, Department of Management, that the Applicant "[did] not, as yet, have the requisite experience for reappointment at the P-3 level". It is a matter of record, however, that the Applicant had been assured previously that her placement on P-1 would not be an issue for the purposes of consideration of the temporary P-3 vacancy and, in fact, her P-1 level was thereafter corrected retroactively to the P-2 level (see para. 46 below).

17. On 30 November 2009, the Applicant emailed the Executive Office, Department of Management, seeking clarification of her situation.

18. On 1 December 2009, the Executive Office, Department of Management, informed the Applicant by email that in determining whether staff members could be appointed to a position at the P-3 level, OHRM considers whether the staff member has five years of post-Master's degree experience, or seven years of post-bachelor's degree experience. The Applicant was referred to the Guidelines for determination of level and step on recruitment to the professional category and above ("Guidelines") (for more on the Guidelines, see paras. 29–33 below).

19. On 16 December 2009, OHRM sent an email to the Executive Office, Department of Management, stating that based on the review of the Applicant's work experience, OHRM had determined that her professional work experience started in April 2006, with her employment at Viland Trading House from April 2006 to November 2007. The email further stated that OHRM

cannot start counting her work experience after she obtained her Master's Degree in June 2005 as her work experience acquired while working at "Luxoptics Holding Company" from February 2004 to April 2006 is not considered to be at professional level.

Therefore, the total professional work experience of [the Applicant], as at 31 December 2009, will be 3 years and 9 months, which is short of the 5 years required for a P-3 position.

20. On 18 December 2009, the Executive Office informed the Applicant that, "since [her] total experience as of 31 December 2009 [was] 3 years and 9 months and that this period is less than the required 5 years for a P-3 position, [she was] not eligible for a P-3 position yet". She was also informed that based on OHRM's review of her case, she would be reappointed, with retroactive effect at the P-2 level from 15 September 2008.

21. The Respondent submits that the temporary vacancy in question was never filled "because there was no suitable candidate for the [temporary vacancy position]".

22. On 28 January 2010, the Applicant submitted a request for management evaluation of the decision finding her ineligible for the temporary P-3 level position. She was informed by letter dated 25 February 2010 that the Management Evaluation Unit had concluded that the contested decision was lawful. On 30 May 2010, the Applicant filed the present application.

Consideration

Receivability

23. In his submission filed on 9 August 2012, approximately two years after the filing of the Respondent's reply in this case, the Respondent submits that the decision regarding the Applicant's ineligibility for the P-3 level temporary vacancy was not a final decision as the temporary vacancy was never filled. Thus, according to the Respondent, the contested decision was preparatory and not capable of adversely affecting the Applicant's rights.

24. The language of art. 2.1(a) of the Dispute Tribunal's Statute is clear—the Tribunal is competent to hear and pass judgment on an application appealing “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.

25. The Tribunal finds that the decision that the Applicant was ineligible signified the end of the process as far as she was concerned, and in fact the end of the entire selection process as she was the recommended candidate, and thus this decision cannot be described as merely preparatory. The fact that the particular vacancy was never filled does not necessarily mean that the Applicant lacks standing to claim that her rights were violated. It may very well be that the selection process was never finalized as a result of the very decision the Applicant seeks to challenge. The Respondent's submission on receivability in this respect lacks basis in law and defies logic.

26. Despite the growing jurisprudence and numerous cases of a similar nature having been found receivable, submissions on receivability which hold little or no merit, particularly with regard to what constitutes an appealable administrative decision, continue to be advanced in cases before the Tribunal. Parties must endeavour to make the necessary concessions and avoid arguments that require an uneconomic use of the Tribunal's time to adjudicate issues that are well settled.

Judicial review of non-selection cases

27. Matters of selection, promotion, and appointment being of managerial prerogative, the Secretary-General has broad discretion in such matters and it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General (*Abbassi* 2011-UNAT-110). The Tribunal will not substitute its own decision for that of the decision-maker in substantive determinations of eligibility and selection matters. However, the exercise of managerial prerogative is not absolute and the Tribunal may examine whether the selection procedures were properly followed or were carried out in an improper, irregular or otherwise flawed manner, as well as assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable (*Krioutchkov* UNDT/2010/065, *Liarski* UNDT/2010/134, *Abbassi, Charles* 2012-UNAT-242).

Reasons behind the determination that the Applicant was not eligible

28. The finding that the Applicant did not have the required years of experience was based on two considerations. As explained by the Respondent in his reply and subsequent submissions, and as confirmed by the email of 16 December 2009 from OHRM to the Executive Office of the Department of Management, as well as the email of 18 December 2009 from the Executive Office to the Applicant, these two considerations were:

- a. Firstly, that her experience prior to obtaining her Master's degree should not be counted in accordance with OHRM's interpretation of the Guidelines on the determination of eligibility; and
- b. Secondly, that her experience at Luxoptics (from February 2004 to April 2006) could not be counted at all because it was "not considered to be at a professional level" as it was determined to be equivalent to a general service experience at the G-5 or G-6 level.

Legal status of the Guidelines

29. The Respondent submits that the contested decision was in line with the Guidelines on the determination of eligibility.

30. The Guidelines were approved on 30 July 2004, although there is no information in the Guidelines or in the Respondent's submissions as to who drafted or approved them. The Guidelines were revised in 2009 and 2010—again, it is not known from the text of the Guidelines who authored and approved the revisions—to update references to amended administrative instructions (the exact dates when these revisions were made are not apparent from the document).

31. As the Tribunal stated in *Villamorán* UNDT/2011/126, at the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions. Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

32. Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (*Tolstopiatov* UNDT/2010/147, *Ibrahim* UNDT/2011/115, *Morsy* UNDT/2012/043).

33. Just as a staff rule may not conflict with the staff regulation under which it is made, so a practice, or a statement of practice, must not conflict with the rule or other properly promulgated administrative issuance which it elaborates (Administrative Tribunal of the International Labour Organization, Judgment No. 486, *In re Léger* (486)). It is also important to highlight that a distinction must be made between

matters that may be dealt with by way of guidelines, manuals, and other similar documents, and legal provisions that *must* be introduced by properly promulgated administrative issuances (*Villamorán, Valimaki-Erk* UNDT/2012/004).

Whether it was lawful to disregard the Applicant's experience prior to June 2005 because it was acquired prior to her Master's degree

34. The Guidelines provide that candidates with a Master's degree who apply for P-3 level positions are to have at least five years of professional experience, but the Guidelines do not explicitly require that the relevant qualifying experience be acquired after the Master's degree. The Respondent submits, however, that it has been OHRM's practice and interpretation of the Guidelines that, in order to be appointed at the P-3 level, a prospective candidate who has a Master's degree must have gained five years' experience *after* receiving this degree. Specifically, para. 30 of the Respondent's reply of 7 July 2010 states that, "in order to be appointed at the P-3 level, a prospective candidate who has a Master[']s degree must have five years' experience post Master[']s degree". (See also para. 8 of the Respondent's submission dated 9 August 2012.) The Respondent submits that this interpretation is "[a]ccording to paragraph 6 [sic. para. 5] of the Guidelines", although it is not included anywhere in the Guidelines, and, in fact, the Respondent acknowledges in the very same paragraph of his reply that "there is no express requirement under the table in paragraph 6 [sic. para. 5] of the Guidelines that the relevant experience must be post-qualification experience".

35. The Tribunal observes that while the vacancy announcement required "a minimum of five years of progressively responsible experience in procurement ... and an advanced university degree (Master's degree or equivalent)", it did not state that the progressively responsible experience was to be counted only if it *followed* the Master's degree. Nor is such requirement included in the Guidelines, as is in fact acknowledged by the Respondent.

36. As the Dispute Tribunal stated in *Neault* UNDT/2012/123, the criteria to be used in evaluating candidates must be clearly stated in the vacancy announcement. Not having specified that the five years of experience had to be completed *after* the Master's degree, in the absence of properly promulgated issuances stating otherwise the Respondent was bound by the terms of the vacancy announcement, which did not include any such requirement (*Id.*).

37. Furthermore, it is a contractual right of every staff member to receive full and fair consideration for job openings to which they apply. Even if the Guidelines contained a provision that only experience obtained after a Master's degree shall be counted, the lawfulness of such provision would be questionable, as it would appear to be manifestly unreasonable and imposing unwarranted limitations on qualification requirements. Such a provision, if it were added to the Guidelines, may constitute an unfair restriction on eligibility of a group of staff members for appointment and promotion without proper basis in properly promulgated administrative issuances. It may be possible for a staff member to obtain relevant professional experience prior to obtaining a Master's degree. In the Tribunal's considered view, the currently unwritten practice of not counting the experience obtained prior to the Master's degree is not supported by any regulations, rules, or other properly promulgated administrative issuances forming part of the staff member's contract and lends itself to being arbitrary and manifestly unreasonable.

38. The Tribunal finds that the decision to disregard part of the Applicant's work experience because it was obtained prior to her Master's degree was not in accordance with the language of the temporary vacancy announcement and OHRM's own Guidelines and, furthermore, was not based on any properly promulgated administrative issuances. For reasons stated above, the Tribunal finds that the decision to disregard part of the Applicant's work experience because it was obtained prior to her Master's degree was unlawful.

Whether it was lawful to disregard the Applicant's experience at Luxoptics in its entirety

39. The Respondent submits that, based on the Applicant's duties at Luxoptics between February 2004 and April 2006, OHRM determined that her entire work experience at Luxoptics was equivalent to a general service experience, at the level of a Procurement Assistant serving at the G-5 or G-6 level (see para. 8 of the Respondent's submission of 9 August 2012). Therefore, the Respondent submits, this experience cannot be counted towards relevant experience for the temporary P-3 level vacancy in question, and her total professional experience as at 31 December 2009 was determined to be three years and nine months, which was short of the required five years.

40. However, the temporary vacancy announcement stipulated "[a] minimum of five years of progressively responsible experience", and did not require the entirety of this prior "professional experience" to be at, or equivalent to, a certain professional level grade or general service level grade.

41. Furthermore, the Guidelines state that the minimum requirements for placement at the P-3 level, in terms of academic qualifications and relevant work experience, may include a combination of a Master's degree and five years of "relevant professional experience".

42. What is the meaning of the terms "relevant" and "professional" in the Guidelines? The term "professional experience" is not explicitly defined. However, the Guidelines state at para. 8 that, in determining the level of appointment, "[o]nly professional work experience will be counted [and] *in most cases*, this will be experience gained *after the first level university degree*" (emphasis added). It follows from this that "professional experience" is generally, "in most cases", understood to be work experience obtained after the first university degree. No reference is made in

the Guidelines to such experience having to be equivalent to a certain professional level grade or general service level grade.

43. The Guidelines state on page 2 that the term “relevant” is understood “as *any* type of experience that would contribute to professional competencies/skills and that would prepare a candidate to perform the functions of the post” (emphasis added).

44. Thus, it follows from the wording of the Guidelines that “relevant professional experience” is generally any work experience after the first university degree that contributes to professional competencies/skills and prepares a candidate to perform the functions of the post, and that such experience should generally be counted towards the requirement of five years. The expression “in most cases” also indicates that there is no absolute or hard and fast proscription or bar, and that there is room for discretion. In this case, having applied, qualified, and having been assured of her eligibility for the temporary P-3 level vacancy, the Applicant was short-listed, interviewed and recommended, presumably because this discretion was applied in her favour.

45. Not having included in the vacancy announcement the requirement that the candidates’ prior work experience had to be at a certain professional level and grade, and having solicited applications on that basis, in the absence of any properly promulgated issuances to the contrary the Respondent was bound by the terms of the vacancy announcement, which did not include any such requirement (*Neault*).

46. It should be reflected here that the temporary vacancy announcement stated that the vacancy was open to candidates at the P-2 or P-3 level. The Applicant’s level was eventually corrected in or around December 2009 to the P-2 level, with effect from 15 September 2008. Contemporaneous records render it beyond any doubt that, at the relevant time, the Applicant was effectively deemed to be at the P-2 level for the purpose of the selection exercise for the temporary P-3 level vacancy, and that it was understood by all concerned that the erroneous placement at the P-1 level was

not an issue and would be corrected. The Tribunal takes note, in this regard, of the Respondent's reply of 1 July 2010 (see para. 29 of the reply), in which the Respondent *concedes* that “[t]he Applicant was eligible to apply for the [temporary vacancy] at the P-3 level” (this submission is discussed in more detail at paras. 52–53 below).

47. The Tribunal further notes that the temporary vacancy announcement in this case required the candidates to possess experience “in an *international organization*” (emphasis added). No claims were made by the Respondent in the course of these proceedings and during the events in question as to whether the Applicant's experience at Luxoptics qualified as experience with an international organization. The Tribunal finds that, not having taken issue, the Respondent has accepted that the Applicant's experience at Luxoptics qualified as experience with an international organization or equivalent thereto.

48. The Tribunal finds that the decision to disregard the Applicant's experience at Luxoptics between February 2004 and April 2006 in its entirety, because it was deemed by OHRM to be equivalent to the G-5 or G-6 level, was not in accordance with the language of the temporary vacancy announcement and OHRM's own Guidelines, and, furthermore, was not based on any properly promulgated administrative issuances. In all the circumstances of this case, the Tribunal finds that the decision to disregard, in its entirety, the Applicant's experience during the period of February 2004 to April 2006 was unlawful.

The effect of the Administration's representations to the Applicant

49. In view of the findings above that the contested decision was unlawful, it is not necessary to examine in great detail the Applicant's claim that the decision on her eligibility was improperly revisited by OHRM after she had been declared eligible and selected for the temporary P-3 level vacancy. The Tribunal finds it sufficient to state that, having informed the Applicant on several occasions that she was eligible to

apply to the temporary P-3 level vacancy, then having considered her for the post pursuant to such confirmations, and having short-listed, interviewed and recommended her as the only suitable candidate for the post, and then having included the Applicant on post-selection communications, the Respondent created an expectation that the Applicant was eligible and selected or highly likely to be selected.

50. In particular, the Tribunal notes that the Applicant was interviewed on 10 November 2009 and was recommended for the temporary vacancy on 16 November 2009. On 23 November 2009, she was among the recipients of the email from the Chief of PMS to the Executive Office of the Department of Management, in which the Chief sought confirmation of the Applicant's eligibility for the temporary P-3 level position as she had been recruited as a P-1 level staff member. In the Tribunal's considered view, it is reasonable to conclude that this email indicated to the Applicant, at that stage of the process, that she was either the selected candidate or highly likely to be; otherwise, there was simply no point in that email being sent, with a copy to her, after all selection procedures had been completed. Moreover, the email raised *only* the already settled issue of the Applicant's level (see emails of July, October, and November 2009), which was shortly thereafter corrected to the P-2 level, and was not intended to re-open the issue of the Applicant's work experience. At this stage of the process, it was simply too late for the Administration to revisit the matter.

51. Moreover, ST/AI/2006/3 envisages that a selection process goes through separate stages, of which the review of eligibility is one of the first. Specifically, sec. 7.5 states that interviews or written tests are to be conducted *after* the candidates have been "identified as meeting all or most of the requirements of the post". Therefore, in the circumstances of this case, and on the assurances given to the Applicant regarding her eligibility with respect to the temporary P-3 level vacancy, it was improper for the Administration to re-open the matter at that late stage, all the

more so since the decision to revisit the issue was based on OHRM practices that were contrary to the vacancy announcement and OHRM's own Guidelines.

52. The Tribunal notes the Respondent's denial that any conflicting information regarding her eligibility had been provided to the Applicant. The Respondent submits (see para. 29 of his reply) that the Applicant was eligible to apply for the temporary vacancy position at the P-3 level, but, if selected, she would only be entitled to be appointed at the P-3 level in June 2010; until such time she could, if selected, only be appointed at the P-2 level for the very same post. (It must be added here that this submission is in itself sufficient to find for the Applicant, as it constitutes an admission on the part of the Respondent that the Applicant was, in fact, eligible for the temporary P-3 level position.)

53. The Respondent's submission that the information provided to the Applicant was meant to be understood as allowing her appointment at the P-2 level, until such time as she became eligible to be appointed at the P-3 level, is not supported by any documentary evidence and is actually contradicted by the emails sent to the Applicant by the Chief of PASS stating that she was eligible. The contemporaneous communications contain no references whatsoever to the interpretation now put forward by the Respondent. The Tribunal finds that the Applicant was provided with assurances of her eligibility for the contested temporary vacancy by OHRM at the relevant time and her reliance on them was reasonable.

Observation on the Respondent's submission of 2 October 2012

54. By Order No. 193 (NY/2012), the Tribunal directed the Respondent to file a submission explaining, with supporting documentation, why the selection exercise was not completed. The Respondent submitted on 2 October 2012 that this was because there was no suitable candidate for the temporary vacancy. In this final submission, the Respondent also introduced—for the first time in the proceedings—a claim that operational requirements also played some role, as the general temporary

assistance (“GTA”) funds that were initially assigned to the team where the temporary P-3 level vacancy was located were re-assigned at some point to a different team within the Procurement Division pending the recruitment of a P-2 staff member from the National Competitive Examination roster. The Respondent provided, on an *ex parte* basis, several documents in support of this contention.

55. At the time of the events and based on contemporaneous records, the only reason for the failure to complete the contested selection exercise was the finding of the Applicant’s ineligibility following her recommendation for the post. In the Tribunal’s considered view, the additional reason proffered by the Respondent for the first time in the final submission appears to be an after-thought as it is not supported by any contemporaneous documents from the relevant period of October to December 2009. The records provided by the Respondent in support of this new reason concern primarily the events that transpired after it became apparent that the P-3 level temporary vacancy would remain vacant due to the determination that the Applicant was ineligible. In the Tribunal’s considered view, the records in this case, including the documents provided by the Respondent on 2 October 2012, demonstrate that, had the Applicant’s eligibility not been revisited after the Applicant was recommended for recruitment, arrangements would have been made within the Procurement Division to accommodate her appointment.

Observation on the standards of the International Civil Service Commission

56. The Applicant submits that the evaluation criteria in this case were not applied in accordance with the standards of the International Civil Service Commission (“ICSC”). The Respondent submits that the ICSC standards concern classification, not selection processes, which are distinct from each other, and that the ICSC standards are not relevant to determining the eligibility of a given staff member or individual for a regular post or temporary position at a particular level, but rather apply to the classification of budgeted posts.

57. Indeed, classification of posts and selection of staff members for appointment are two distinct processes (see, e.g., *Gehr* UNDT/2011/178). As this case did not concern the classification of the contested post, and in view of the findings above, the Tribunal does not need to examine the claims regarding the ICSC standards, although it has taken due note of the parties' submissions on that issue.

Relief

Pecuniary loss

58. On the evidence before it, the Tribunal finds that, if not for the unlawful contested decision, the Applicant would have been appointed to the contested post.

59. The Applicant submits that, as a result of the contested decision, upon the expiry of her contract at the end of February 2010, she and her spouse had to leave New York and return to Kiev, Ukraine. On 1 March 2010, the Applicant joined the United Nations Development Programme ("UNDP") Country Office in Kiev as a National Officer at the P-2 level. She worked with UNDP until 24 January 2011. She subsequently moved to New York and has been working at the United Nations Children's Fund ("UNICEF") since February 2011 at the P-3 level.

60. The Applicant submits that the proper basis for the determination of the appropriate compensation is that she was deprived of her potential earnings and relevant entitlements and benefits at the P-3 level for a period of four months, i.e., from the expected appointment date of 1 December 2009 and until its expected expiration on 31 March 2010. The Applicant acknowledges that her actual earnings in the same period have to be taken into account. The Applicant submits that her pecuniary loss is the difference between the salary she earned during those four months and the salary she would have earned at the P-3 level. She calculates this to be USD8,496.76 for the period of December 2009 to March 2010, acknowledging that any possibility of extension beyond March 2010 would be largely speculative

(*Fayek* UNDT/2010/194). These calculations were not challenged by the Respondent and the Tribunal accepts them as reasonable and fair.

61. As this salary difference of USD8,496.76 would have been paid to the Applicant in four monthly installments during the period of December 2009 to March 2010, as stipulated in Annex 3 to the Applicant's submission of 26 July 2012, it follows that each monthly shortfall should be subject to retroactive interest, which shall be calculated in accordance with the established case law (see *Warren* 2010-UNAT-059, *Fayek*).

Non-pecuniary loss

62. The Applicant seeks non-pecuniary compensation for the substantial and unwarranted irregularities in the selection process for the post, breach of her procedural rights during the selection process, and loss of chance of career advancement.

63. As the United Nations Appeals Tribunal stated in *Antaki* 2010-UNAT-095, not every violation will necessarily lead to an award of compensation; compensation may only be awarded if it has been established that the staff member actually suffered harm. The Applicant tendered no evidence of any emotional turmoil and distress caused by the contested decision. The Tribunal is also not persuaded that the Applicant suffered any significant loss of chance of professional advancement, which is demonstrated by her employment history since the contested decision, albeit her successful employment is undoubtedly due to her qualifications, experience, and performance.

64. The Tribunal is also not persuaded by the Applicant's claim that she was subjected to a pattern of arbitrariness or discrimination. In support of this claim, the Applicant sought to rely on the circumstances of her initial employment at the P-1 level and the outcome of several other selection exercises in which she participated. The Tribunal notes, however, that the Applicant's level was retroactively revised to

the P-2 level, with effect from 15 September 2008, and that, in any event, neither her initial level nor any other selection exercises were challenged by her formally through the management evaluation process and before this Tribunal.

65. In these circumstances, the Tribunal finds that the Applicant's claims for compensation for non-pecuniary harm stand to be rejected.

Other relief sought

66. The Applicant requested, in her submission of 26 July 2012, to refer this case to the Secretary-General so that he could take appropriate measures to avoid irregularities in the selection practices applied by the Organization and to prevent damage to other staff members possessing similar professional track record.

67. Article 10.8 of the Tribunal's Statute provides that "[t]he Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability". This provision concerns only referrals for possible action to enforce accountability and does not empower the Tribunal to refer matters of general managerial practices for correction by the Secretary-General.

68. Nevertheless, the Tribunal notes, based on its findings, that there are a number of issues raised in this Judgment that may warrant appropriate attention by the Respondent with respect to the existing practices regarding the review of eligibility of staff members applying for positions within the Organization. It appears that OHRM, in its determination of matters of eligibility, relies on practices not present even in its own internal Guidelines, let alone properly promulgated administrative issuances. This may lead to arbitrary and manifestly unreasonable decisions. Furthermore, it is not clear what mechanisms are in place to ensure the consistency of OHRM's own Guidelines with properly promulgated issuances, particularly as these Guidelines do not bear the names of the officials who authored and adopted them. It may be prudent

for the Respondent to review these matters as they concern such an important area as selection of staff.

Conclusion

69. The Tribunal finds that the decision to revisit the issue of eligibility and to disregard part of the Applicant's work experience because it was obtained prior to her Master's degree was unlawful. The Tribunal also finds that the decision to disregard, in its entirety, the Applicant's experience between February 2004 and April 2006 because it was deemed by OHRM to be equivalent to the G-5 or G-6 level, was unlawful. Accordingly, the determination that the Applicant was ineligible for the P-3 level temporary appointment was unlawful. The Tribunal further finds in the particular circumstances of this case that, through representations made to the Applicant prior to and during the selection process, the Respondent created an expectation, in line with the standard selection procedures, that the Applicant was eligible and would be selected for the post. The Tribunal finds it appropriate to award the Applicant the amount of USD8,496.76, with retroactive interest, as compensation for the pecuniary loss suffered.

70. It must be reiterated that it is not the role of the Tribunal to instruct management on how to calculate the experience of candidates applying for positions in the United Nations, nor to set the qualifying criteria. It is not the Tribunal's role to substitute its own decision for that of the decision-maker in substantive determinations of eligibility, nor has the Tribunal done so in this case. Rather, the present Judgment is based on the Tribunal's findings regarding the Administration's own initial determination and further assurances given to the Applicant that she was in fact eligible for the temporary P-3 level position, which determination was belatedly and improperly revisited by OHRM in applying its unwritten internal practices that find no support in properly promulgated issuances, the vacancy announcement, or even OHRM's own Guidelines.

Orders

71. The Respondent is ordered to pay the Applicant the amount of USD8,496.76, with interest. The interest shall be calculated and paid on the basis that the total amount of USD8,496.76 would have been paid to the Applicant in four installments, as per Annex 3 to the Applicant's submission of 26 July 2012, commencing on 1 December 2009 and monthly thereafter for four consecutive months, with interest on each respective monthly shortfall calculated at the applicable US Prime Rate from the day each respective monthly shortfall became due to the date of payment under this Judgment. If payment is not made within 60 days of the date on which this Judgment becomes executable, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Ebrahim-Carstens

Dated this 16th day of November 2012

Entered in the Register on this 16th day of November 2012

(Signed)

Hafida Lahiouel, Registrar, New York