



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

GUSAROVA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Amal Oummih, OSLA

**Counsel for Respondent:**

Stephen Margetts, ALS/OHRM, UN Secretariat

## **Introduction**

1. By application filed on 2 February 2012, the Applicant contests the decision to consider her ineligible for the generic vacancy announcement concerning P-5 positions of Chief Civilian Personnel Officer (“CCPO”) with the Department for Peacekeeping Operations (“DPKO”), United Nations Secretariat.

## **Facts**

2. The Applicant entered the service of the United Nations Framework Convention on Climate Change (“UNFCCC”) in 2009, as a Human Resources Officer, at the P-3 level, on the basis of a fixed-term appointment, a post that she held at the time of her application to this Tribunal.

3. On 25 February 2011, the Applicant applied for CCPO positions at the P-5 level with the United Nations Peacekeeping Operations, under generic vacancy announcement No. 11-HRE-PMSS-425171-R-MULTIPLE D/S. The Applicant was subsequently invited to participate in a written assessment and having successfully passed it, she was invited for a telephone interview conducted on 7 July 2011.

4. Since her Personal History Profile (“PHP”) did not contain information on her status and personal grade, the Interview Panel asked the Applicant at the beginning of the interview the level at which she was currently serving at UNFCCC. After the Applicant informed the Panel that she was holding a P-3 position, the Panel considered her ineligible to apply for a P-5 post at the Secretariat and decided to end the Applicant’s interview.

5. By email of 7 July 2011, the Applicant sought clarification from the Administration with respect to the basis on which she was considered ineligible for the P-5 positions, and requested that the decision be reconsidered.

6. On 13 July 2011, the Occupational Group Manager, Recruitment, Outreach and Career Development Section (“OCDS”), Field Personnel Division, Department of Field Support (“FPD/DFS”), United Nations, responded to the

Applicant, confirming that as a staff member currently serving at the P-3 level, she was not eligible to apply for positions more than one level above her grade. She stressed that “with the harmonization of the conditions of service and the new staff selection system, the organizations that fall within the larger United Nations family [...] are all subject to the same rules and regulations governing the recruitment process”.

7. By email dated 26 July 2011, the Applicant requested further clarification from the Occupational Group Manager, Recruitment, OCDS, FPD/DFS.

8. By email of 12 September 2011, the Applicant requested clarification from the Management Evaluation Unit (“MEU”) of the decision not to consider her eligible for the P-5 position. She subsequently submitted to MEU the management evaluation form on 16 September 2011.

9. By email of 4 November 2011, MEU sent to the Applicant its response dated 2 November 2011, assuming that the Applicant had submitted her “request for management evaluation on 12 September 2011” and upholding the decision to deem her ineligible for the above generic vacancy announcement.

10. After the selection process for the generic vacancy announcement was completed in September 2011, a roster was endorsed and in the following months several of the rostered candidates were selected for posts at the P-5 level.

11. The Applicant filed her application on 2 February 2012 and it was served to the Respondent for a reply. On 2 March 2012, the Respondent requested an extension of time for filing a reply, which was granted, as both parties were making efforts to find an informal resolution to the claim. After informal efforts failed, the Respondent submitted his reply on 19 March 2012.

12. On 16 October 2012, Counsel for the Applicant submitted an additional note to the application and by order No. 6 (GVA/2013), Counsel for the Respondent was invited to submit comments on the Applicant’s additional note. Counsel for the Respondent filed his comments on 30 January 2013.

13. A hearing was held on 15 March 2013, at which Counsel for the Applicant was present, while the Applicant participated via phone and Counsel for the Respondent via videoconference.

#### **Parties' submissions**

14. The Applicant's principal contentions are:

a. Since the principle of priority consideration of internal candidates was abolished by ST/AI/2010/3 (Staff selection system), the new recruitment procedures do no longer make a meaningful distinction between internal and external candidates. Treating the Applicant as an internal candidate under sec. 1(o) of ST/AI/2010/3 and, as a result of this, finding her ineligible to be considered for P-5 positions within the United Nations Secretariat under sec. 6.1 runs counter the *rationale* of the new staff selection system, which was meant to provide female staff members of the separately administered funds and programmes an advantage in order to achieve gender balance. In other words, by identifying her as an internal applicant, she was subjected to stricter conditions than external staff members or staff members of funds and programmes who do not meet the requirements of sec. 1(o);

b. Even if sec. 6.1 of ST/AI/2010/3 would apply to staff members of the separately administered funds and programmes who are considered to be internal candidates under sec. 1(o), the use of the word "respectively" in sec. 1(o) indicates that the Applicant does not fall under the definition of internal candidates for P-5, but only for positions at the P-4 level;

c. Alternatively, the Applicant submits that nothing in the terms of ST/AI/2010/3 indicates that sec. 6.1 applies to "internal candidates": sec. 6.1 provides that it applies to "staff members holding a permanent, continuing, probationary or fixed-term appointment", and in view of sec. 2.3 of ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances), it is clear that the term staff member refers to staff members of the United Nations Secretariat. As such, sec. 6.1 of ST/AI/2010/3 does not

apply to staff members of the UNFCCC, even those who have been qualified as ‘internal’ under sec. 1(o) of ST/AI/2010/3;

d. The fact that she was found eligible for a post at the P-5 level in a subsequent selection exercise supports her case that sec. 6.1 does not apply to her;

e. The Applicant requests the rescission of the decision to consider her ineligible for the respective generic vacancy announcement, and to be compensated for the mental distress as well as for the loss of chance to be rostered and thereafter be selected for vacant posts of CCPO at the P-5 level.

15. The Respondent’s principal contentions are:

a. Since the Applicant is applying for a post in the FPD/DFS, ST/AI/2010/3 is applicable, including sec. 6.1. UNFCCC is part of the United Nations common system and while UNFCCC has its own staff selection policy, the latter only applies to selection procedures for positions within the UNFCCC and cannot govern selection exercises for positions within the United Nations Secretariat, including within the FPD/DFS, which are governed by ST/AI/2010/3;

b. Since the Applicant is an internal applicant under sec. 1(o) of ST/AI/2010/3, sec. 6.1 clearly applies to her and she is precluded from applying to positions more than one level above her own grade. Accordingly, finding her ineligible to apply for a P-5 post was a lawful exercise of discretion in the case at hand;

c. The use of the word “respectively” in sec. 1(o) cannot be interpreted to mean that internal applicants can circumvent the rule set out in sec. 6.1 which precludes them from applying to a post two grades above their current level. The purpose of sec. 1(o) was to give female candidates a status as internal candidates, subject to the restrictions of sec. 6.1;

d. Section 6.1 has to be read in conjunction with sec. 1(o) and as such applies to those staff members of the funds and programmes who are granted internal status under sec. 1(o), as is the case of the Applicant;

e. By virtue of sec. 1(o), the Applicant gains the advantage to be given internal status for posts one level above her current grade, which did in fact happen when she applied for a P-4 roster and was admitted to the P-4 roster;

f. The fact that she took the written test did not cause her any moral injury. If the Applicant had indicated on her PHP the grade she held at the time of her application to the vacancy announcement, i.e. P-3, she would have been screened out and would not have been invited to the written assessment;

g. The jurisprudence is clear in that awards for compensation may only be made in case of proof of actual harm, and that claims of moral injury and emotional distress must be supported by sufficient evidence. Since the Applicant did not provide any evidence of such harm, her claims should be dismissed;

h. Contrary to what is alleged by the Applicant, her career advancement was not unfairly restricted by the decision. She was offered a P-4 position at a mission in November 2011, which she declined for family reasons, hence she did in fact have an opportunity for career advancement which she did however not take on;

i. The fact that the Applicant was considered eligible for a P-5 position in a subsequent selection exercise, on the basis of a specific exception made to the application of sec. 6.1 of ST/AI/2010/3 for the Applicant and other female staff members, does not mean that the Administrative Instruction was not lawfully applied in the case at hand.

### **Consideration**

16. The Applicant contests the decision to consider her ineligible for the generic vacancy announcement concerning P-5 positions of CCPO and requests that it be

rescinded and she be granted compensation for mental distress and the loss of chance to be rostered and thereafter be selected for vacant posts of CCPO at the P -5 level.

### *Receivability*

17. The Applicant was first informed by the Interview Panel on 7 July 2011 that she was ineligible to apply for a P-5 position. Upon the Applicant's request, the Occupational Group Manager, Recruitment, OCDS, FPD/DFS subsequently confirmed by email of 13 July 2011 that in view of her personal grade at the P-3 level, she was considered ineligible under ST/AI/2010/3 to apply for a P-5 position. The Applicant sent messages to MEU on 12 and 16 September 2011.

18. If one were to conclude that the 60-day time-limit to request management evaluation under staff rule 11.2 (c) had started to run as from 7 July 2011, it would have expired by the time the Applicant first contacted MEU. Therefore, the Tribunal first has to consider whether the present application is receivable, *ratione temporis*. The jurisprudence of this Tribunal and of the Appeals Tribunal has consistently emphasized the importance of complying with the statutory time limits set out in the Staff Rules (*Morsy* UNDT/2009/036; *Zewdu* UNDT/2011/043; *Ibrahim* 2010-UNAT-069; *Rosana* 2012-UNAT-273).

19. To determine when the 60-day time-limit under staff rule 11.2 (c) started to run in the present case, the Tribunal has to determine when the administrative decision to consider the Applicant ineligible to apply for the generic P-5 positions of CCPO, under sec. 6.1 of ST/AI/2010/3, was notified to her.

20. The Appeals Tribunal has endorsed the definition of an administrative decision provided by the former United Nations Administrative Tribunal in Judgment No. 1157, *Andronov* (2003):

[A]n “administrative decision” is a unilateral decision taken by the Administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order ... Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry

direct legal consequences. (see *Schook* 2010-UNAT-013, *Tabari* 2010-UNAT-030; and *Hamad* 2012 – UNAT – 269)

21. The Tribunal notes that it is not an essential element of an administrative decision that it be notified in writing. In contrast to former staff rule 111.2 (a) according to which the letter requesting administrative review had to be sent within two months from the date the staff member “received notification of the decision in writing”, current staff rule 11.2(c), which was already in force at the material time, does not entail such a requirement. Indeed, current staff rule 11.2 (c) reads that the request for management evaluation must be sent within sixty days from the date the staff member “received notification of the administrative decision to be contested”. Therefore, for the case at hand it is irrelevant that on 7 July 2011 the Applicant had been informed about her ineligibility by the Interview Panel only orally, over the telephone.

22. This Tribunal further held in *Elasoud* UNDT/2010/111 that for a decision to be contestable, it must be final, since it will only be able to affect an applicant’s legal rights once it was actually made.

23. For the reasons outlined below, the Tribunal finds that the decision by the Interview Panel to consider the Applicant ineligible, which led the Panel to terminate the interview, does not satisfy the requirements of an administrative decision as defined above, particularly in that it did not produce direct legal consequences and did not affect the Applicant’s legal rights.

24. The determination of whether a candidate is eligible under the requirements of sec. 6 of ST/AI/2010/3 clearly falls on the relevant Human Resources Office or Filed Personnel Division of the Department of Field support, which, according to sec. 7 of ST/AI/2010/3, is in charge of pre-screening candidates on the basis of the information provided in the application. The *Manual for the Recruiter on the Staff Selection System* (Inspira), 2012 (“the Manual”), highlights the responsibility of the Recruiter to ensure that individual applicants are eligible or not for a particular job opening, under each eligibility rule. As such, the Recruiter has the authority to find candidates ineligible when compliance issues are found, at any stage of the process. According to the Manual, “the role of the Recruiter is comprised of the



functions currently carried out in the Organization by [OHRM], Executive Offices (EO) and local Human Resources Offices”. Therefore, it is clearly established who has the authority and duty to assess the eligibility of a candidate within the Organization.

25. According to sec. 7.5 of ST/AI/2010/3, pre-screened, hence short-listed, eligible candidates are assessed by way of competency-based interviews and/or other appropriate evaluations mechanisms, to determine whether they meet the technical requirements and competencies of the job opening. Therefore, the mandate of an Assessment Panel is restricted to assess candidates to a given post, that is to evaluate whether they meet all, most, some or none of the requirements of the position under recruitment (cf. sec. 1 (b) and (c) of ST/AI/2010/3). At the interview, the mandate of the Assessment/Interview Panel is to assess if candidates meet the competencies as set out in the vacancy announcement; it is not for the Assessment Panel to determine whether a candidate is eligible for the advertised position.

26. In view of the foregoing considerations, the Tribunal finds that the conclusion of the Interview Panel, on 7 July 2011, that the Applicant was ineligible to apply for the generic P-5 positions of CCPO, was merely a preliminary determination requiring confirmation from the competent authority within the Organization. As such, the Interview Panel’s conclusion did not amount to an act producing direct consequences to the legal order and affecting the Applicant’s legal position. The final, authoritative decision, which ought to be qualified as an administrative decision for the purpose of staff rule 11.2(c) and art. 2(a) of the Tribunal’s Statute, as per the definition above, was the decision taken by the Occupational Group Manager, Recruitment, OCDS, FPD/DFS, United Nations, finding the Applicant not eligible to apply for positions more than one level above her current grade, i.e. for the generic P-5 CCPO job opening, and notified to the her by email of 13 July 2011.

27. Therefore, the 60-day statutory time-limit set forth in staff rule 11.2 (c) started to run only as of 13 July 2011. The Applicant’s message of 12 September 2011 to MEU, correctly interpreted as a request for management

evaluation, fulfilled the time requirement under said staff rule. Since the Applicant also complied with the filing deadline under staff rule 11.4(a) and art. 8(d)(i)(a) of the Tribunal's statute, the application is receivable *ratione temporis*.

### *Merits*

28. While former ST/AI/2006/3 (Staff selection system) provided for a tiered treatment of internal candidates by setting a clear order of priority in the consideration of candidates (cf. sec. 7.1 of ST/AI/2006/3), this is no longer the case under ST/AI/2010/3 (Staff selection system). Indeed, ST/AI/2010/3 refers to internal applicants only in three provisions, namely in sec. 1(o), 6.7 and 9.5 (which refers to sec. 9.3). Section 9.3 provides that “[p]rior to selection of an external candidate, that decision must be justified in writing to, and approved by, OHRM”. Managers are thus no longer precluded from considering external candidates if suitable internal candidates are identified.

29. Section 1(o) of ST/AI/2010/3 defines internal applicants as follows:

*Internal applicants:* serving staff members holding an appointment under the Staff Rules, other than a temporary appointment, who have been recruited after a competitive process under staff rule 4.15 (review by a central review body) or staff rule 4.16 (competitive recruitment examination). Staff members of the separately administered United Nations funds and programmes are not considered internal applicants. However, women who are serving with the separately administered United Nations funds and programmes or any specialized agency or organization of the United Nations common system holding a current appointment at the P-3 or P-4 levels and who have been in service for a continuous period of 12 months and whose appointments have been reviewed by a review body or equivalent in their organization are considered internal applicants for positions at the P-4 or P-5 levels, respectively. [...]

30. The Tribunal notes that the third sentence of sec. 1(o), expresses an overall purpose and intent to give a competitive advantage to female staff members working at the P-3 or P-4 level at a fund and programme by extending to them the status of internal applicants when applying for P-4 or P-5 posts falling within the scope of ST/AI/2010/3.

31. The Tribunal notes that by applying sec. 6.1 to the Applicant, she would be disadvantaged vis-à-vis her male colleagues in the same situation. Indeed, sec. 6.1 obviously does not apply to male staff members of the separately administered funds and programmes working at the P-3 or P-4 level applying to P-4 or P-5 posts, who, unlike their female colleagues, are not considered as internal applicants under sec. 1(o) and, as such, would not be precluded from applying for posts more than one level higher than their personal grade.

32. Therefore, applying the status of internal candidate under sec. 1(o) to the Applicant and, based on this, concluding that she is ineligible to apply to a post two grades higher than her personal grade, amounts to discrimination against her vis-à-vis male applicants in the same contractual situation. In view of the fact that the third sentence of sec. 1(o) was clearly meant to provide female candidates of the funds and programmes with a competitive advantage, the interpretation and application of sec. 6.1 to the Applicant leads to an unjustified discrimination and is in clear contradiction to the intent and purpose of sec. 1(o) of ST/AI/2010/3.

33. The Tribunal finds that the contested decision finding the Applicant ineligible to apply to the vacancy announcement in question has to be rescinded since it was discriminatory and illegal. The Tribunal notes that the Respondent appears to have come to the same conclusion, in that he decided, in a subsequent selection exercise, that sec. 6.1 shall no longer be applied to women in the same situation as that of the Applicant, including the Applicant herself.

#### *Compensation*

34. Under the Tribunal's Statute, compensation may be awarded under art. 10.5(a) if the Tribunal orders "rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered [...]." This Tribunal has already held that art. 10.5(a), offering the Administration the choice to pay compensation in

lieu of rescission, has to be read restrictively (*Allen* UNDT/2010/009, and *Rockcliffe* UNDT/2012/121).

35. In the case at hand, the contested decision is to have found the Applicant ineligible to apply to the generic P-5 CCPO vacancy announcement. The Tribunal notes that applicants whose candidature for a generic vacancy announcement was successful are not automatically promoted to the P-5 level, but are merely selected to be put on a roster, from which they can subsequently be selected for posts at the P-5 level. In other words, the promotion of a candidate who was selected to be put on the roster only materialises if and when he/she is selected from the roster. Therefore, the decision to be found ineligible to apply for the generic vacancy announcement, and as such not to be selected for the roster, does not in itself constitute a promotion decision for the purpose of art. 10.5(a) of the Tribunal's statute. Since the contested decision does neither concern an appointment nor a termination, art. 10.5(a) does not apply to the case at hand.

36. The Appeals Tribunal noted that “[n]ot every violation will necessarily lead to an award of compensation” and that “[c]ompensation may only be awarded if it has been established that the staff member actually suffered damages”; as such, the Tribunal may “award compensation for actual pecuniary or economic loss, non-pecuniary damage, stress and moral injury” (*Obdeijn* 2012-UNAT-201).

37. In its Judgment *Marsh* 2012-UNAT-205, the Appeals Tribunal concluded that a “lost chance of being selected, even if slight, and the loss of a better chance of being recommended or included in the roster had in [that] case material and financial consequences and also deprived [the applicant] of an opportunity to improve his status within the Organization”. It further found that the UNDT did not err in fact or law when it awarded the applicant the moderate compensation of EUR2,500 for material damages. This Tribunal considers that the present case has to be seen in light of the above judgment. While it will not entertain any speculation of the actual probabilities of the Applicant's chances of success, it finds that had she been interviewed in July 2011, she might have been recommended to be put on the roster for the generic vacancy at the material time, and as such, ultimately, may have had a chance to be selected for P-5 positions of

CCPO as they became available. Therefore, the Tribunal emphasises that by finding the Applicant ineligible, after she had successfully passed the written test, and denying her the possibility to pass the interview, the Applicant lost a chance of being selected to be put on the roster and ultimately to be selected for a P-5 position. The Applicant also lost a chance to considerably improve her status within the Organization at the material time. Just like in the case of *Marsh*, these lost chances had material consequences for the Applicant. The Tribunal finds that this warrants a compensation of USD3,000 for the material damage sustained by the Applicant.

38. The Tribunal further has to consider whether the Applicant is entitled to compensation for moral damage. The Appeals Tribunal stressed that moral damage may not be awarded without specific evidence supporting the award (*Hastings* 2011-UNAT-109; *Zhouk* 2012-UNAT-224), with the burden of proof lying on the claimant (*Massabni* 2012-UNAT-238). The Applicant claims compensation for the mental distress suffered, without further substantiating her claim and without providing any evidence in support of it. The Tribunal also noted that in view of its ruling that the decision to find the Applicant ineligible has to be rescinded, the fact that she did take the written test could not possibly cause her any moral damage, since in order to qualify for the interview, she first needed to successfully pass the written test. The Tribunal therefore concludes that the Applicant is not entitled to any compensation for moral damage in the case at hand.

### **Conclusion**

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

- a. The decision of 13 July 2011 to find the Applicant ineligible to apply for the generic P-5 position of CCPO is rescinded;
- b. The Respondent is ordered to pay the Applicant the amount of USD3,000 for material damage;

- c. The above-mentioned compensation shall bear interest at the US Prime Rate from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the US Prime Rate 60 days following the date this Judgment becomes executable;
- d. All other claims are dismissed.

*(Signed)*

Judge Thomas Laker

Dated this 25<sup>th</sup> day of April 2013

Entered in the Register on this 25<sup>th</sup> day of April 2013

*(Signed)*

René M. Vargas M., Registrar, Geneva