



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Morten Albert Michelsen, Officer-in-Charge

SURVO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a P-4 level Chief of Section in the Statistical Information Services Section (“SISS”), Statistics Division (“SD”), Economic and Social Commission for Asia and the Pacific (“ESCAP”), contests: (a) the decision not to reclassify the P-4 Section Chief post to the P-5 level for the period 2003-2009, during which he contends that he performed functions at a P-5 level in SISS without due compensation or recognition; (b) the decision not to select him for the P-5 post of Chief of the Statistical Development and Analysis Section (“SDAS”); and, (c) the decision not to select him for the P-5 post of Chief of SISS. The Applicant also complains of abuse of authority and discrimination by the Chief of SD during these two selection processes.

2. The Applicant requests the following reliefs: financial compensation for the difference in salary and benefits between the P-4 and P-5 level post for the functions he performed from June 2003 to the date of selection of another candidate for the post of Chief, SISS; financial compensation for the violations of his due process rights as a result of the selection and promotion of a candidate other than him for the P-5 level posts of Chief, SISS, and Chief, SDAS; financial compensation for the demotion from Chief of Section to statistician and the permanent damage to his professional record and reputational damage as well as a delay in career advancement; financial compensation for the humiliation and suffering related to the prolonged and sustained mental stress; specific performance in relation to measures to rightfully receive the promotions to which he was entitled or otherwise to be offered a comparable post.

## **Relevant background**

### *Reclassification of P-4 post of Chief SISS to the P-5 level*

3. In July 2009, the P-4 level post of Chief, SISS, which was encumbered by the Applicant since 1 June 2003, was re-classified at the P-5 level. Following this reclassification, the P-5 post of Chief, SISS, was advertised on the United Nations employment website on 2 February 2010, through a vacancy announcement (“VA”).

### *Non-selection for P-5 post of Chief, SDAS*

4. On 12 October 2009, a VA for the post of Chief, SDAS, was published by ESCAP, with a deadline for applications of 11 December 2009. Following his application to the VA, the Applicant was short-listed and took a written test for this post on 7 January 2010 and was interviewed on 10 February 2010.

5. On 17 June 2010, the Applicant received a memorandum from a Human Resources Officer in the Human Resources Management Section informing him that following the completion of the selection process “the Head of Department ha[d] decided to select another candidate for the subject post”.

### *Non-selection for P-5 post of Chief, SISS*

6. On 2 February 2010, a VA for the P-5 post of Chief, SISS, was published by ESCAP, with a 3 April 2010 deadline for applications. Following his application, the Applicant was short-listed and, took a written test for this post on 4 May 2010. On 17 June 2010, following the completion of the written assessment, the Applicant was interviewed for the post of Chief, SISS.

7. On 3 September 2010, the Applicant received a memorandum from a Human Resources Officer in the Human Resources Management Section (“OHRM”) notifying him that the selection process for P-5 level post of Chief, SISS, had been completed and that while he had not been selected for the post, he had been placed on

the roster of candidates who had been endorsed by the Central Review Board (“CRB”) for future vacancies with similar functions.

8. On 14 September 2010, the Applicant met with the Executive Secretary, ESCAP, and Chief, Human Resources Management Services (“HRMS”), ASD, ESCAP, the purpose of which was to discuss his non-selection for the P-5 post of Chief, SISS.

*Management evaluation*

9. On 29 October 2010, the Applicant requested management evaluation of:

- a. The 3 September 2010 non-selection decision for the P-5 post of Chief, SISS;
- b. The 17 June 2010 non-selection for the P-5 post of Chief, SDAS, in light of facts learned on 3 September 2010; and
- c. That his Division Chief be investigated for abuse of authority and discrimination with regard to the two post selection exercises.

10. The Applicant’s request for management evaluation indicated that these contested decisions violated his rights to: “(i) Fair consideration for two P-5 posts as a 30-day candidate, (ii) freedom of discrimination and abuse of power, (iii) correct classification of [his] post”.

11. On 13 December 2010, the Management Evaluation Unit (“MEU”) informed the Applicant that: (a) his request for the review of the selection for the post of Chief, SDAS, was not receivable as the Applicant had not requested management evaluation in time and that there were no exceptional circumstances that would justify a waiver of the time limits; (b) he had been given full and fair consideration for the post of Chief, SSIS; and (c) his post “[had] been reclassified at the P-5 level, and the contested decision reflects the outcome of the selection process resulting from that re-classification. Accordingly, a request for management evaluation in this regard

is moot. In any event, the MEU considers that the re-classification of the Post was effected in 2009, and accordingly any request for management evaluation of that decision would undoubtedly be time-barred”.

### **Procedural history**

12. On 9 March 2011, the Applicant filed a request for extension of time to file an application. Pursuant to the Tribunal’s direction, the Respondent filed a response on 14 March 2011. That same day, by Order No. 86 (NY/2011), the Tribunal rejected his request for an extension of time to file the application on the grounds invoked by the Applicant but, due to delay caused by technical difficulties experienced by the Registry in processing his request, granted him leave to file his application on 18 March 2011.

13. On 18 March 2011, the Applicant filed the present application together with seven annexes. The Respondent filed his reply on 20 April 2011 together with six annexes.

14. By Order No. 340 (NY/2013), dated 13 December 2013, the Tribunal informed the parties that it considered that this case could be decided on the papers before it and that the parties were to file their closing submissions.

15. On 3 January 2014, the Applicant filed a motion seeking directions with regard to the production of documents, the scheduling of a case management discussion and that the Tribunal rescinds its order for summary judgment. By Orders Nos. 1 and 4 (NY/2014), dated 6 and 10 January 2014, the Tribunal ordered that the Respondent file a response to the Applicant’s motion. The Respondent duly filed his response on 23 January 2014 and submitted that the Applicant failed to demonstrate the relevancy of the production of additional documents, the need for a hearing or that the Tribunal could not order the filing of closing submissions. The Respondent further reiterated that the two decisions contested by the Applicant were not receivable.

16. In response to the Applicant's motion for directions, the Tribunal noted in Order No. 22 (NY/2014), dated 30 January 2014, that neither party had requested, nor had the Tribunal indicated, that a hearing is required or that this matter should be dealt with by means of summary judgment. The Tribunal further indicated that it is for the Tribunal to determine whether there are any questions of facts or law that need to be clarified during a hearing baring which the Tribunal may, on its own volition, determine that a judgment may be rendered based on the papers before it. The Tribunal reaffirmed that, as previously stated in Order No. 340 (NY/2013), it considered that the case was to be decided on the papers before it and that the purpose of the closing submissions is to enable the parties to inform it succinctly of the key facts and legal arguments that they presented during the proceedings. The Tribunal further noted that the factual and legal elements of the present case are related to those that formed the basis of the Dispute Tribunal's Judgment in *Survo* UNDT/2011/109 which dismissed Case No. UNDT/NY/2011/030 following the parties having arrived at a mediated solution in that matter. Considering that this related matter was resolved amicably, the Tribunal invited the parties to consider whether an informal dispute resolution of this case was possible and set aside the remainder of Order No. 340 (NY/2013) requiring that the party file closing submissions.

17. On 27 February 2014, by Order No. 39 (NY/2014), the Tribunal, upon receiving the parties' views on attempting to resolve the present matter informally, referred the present case to the Office of the Ombudsman and Mediation Services and suspended the proceedings until 29 May 2014, at which time the parties were to inform the Tribunal as to whether or not the case had been resolved. In the event that informal resolution was unsuccessful, the parties were instructed to file their closing submissions on 13 June 2014. Following several orders extending the period for the parties to achieve informal resolution (Order No. 126 (NY/2014), dated 29 May 2014, and Order No. 219 (NY/2014), dated 1 August 2014), the Office of the Ombudsman and Mediation Services advised the Tribunal on 18 August 2014 that

despite good faith efforts by both parties, this matter had not been resolved through mediation.

18. By Orders Nos. 126 and 219 (NY/2014), dated 29 May 2014 and 1 August 2014, the parties were also instructed that, in case the informal resolution was unsuccessful, they were to file closing submissions by 14 August 2014 and 2 September 2014. On 2 September 2014, both parties filed their closing submissions as required by Orders Nos. 126 and 219. In his closing submissions, the Applicant recalled his “motion for directions” and indicated that he has a list of witnesses who could be called to testify that grave multiple violations occurred and that this had a wider impact affecting the morale of ESCAP staff-at-large. He also stated that, as a direct consequence of the events from 2010, he has been sidelined to interim positions and, since he has yet to be assigned to a suitable position, the selection for the P-5 post of Chief, SISS, and the Applicant’s non-selection remained illegal.

19. The Tribunal recalls that the purpose of the closing submissions is to enable the parties to inform it succinctly of the key facts and legal arguments that they presented during the proceedings.

20. In the present case, which is not related to a disciplinary decision, based on the extended submissions and evidence filed by the parties before the case was assigned to the undersigned judge, including on receivability issues, the Tribunal considers that no further documents or additional oral evidence is required and a case management discussion and/or a hearing is not needed. The case is to be decided on the papers before it. The parties were instructed in December 2013, and further between February-August 2014, to file their closing submissions if the mediation efforts were to be unsuccessful, since the Tribunal already considered that the case is to be decided on the papers filed before it. Therefore the motion refiled by the Applicant is rejected.

### **Applicant's submissions**

21. The Applicant's principal contentions may be summarized as follows:
- a. The Applicant had "a legitimate expectation to due compensation [including SPA] and reward for [his] efforts at the time they were provided or to the expectation of recognition of this contribution in enhancing [his] prospects within evaluations made in the promotion process";
  - b. The fact that since 2006 he acted as a *de facto* Officer-in-Charge of the Statistics Division for a period of three months in 2005, "is clear evidence of the level of [the Applicant's] qualification and competence that was ignored in both of the selection processes for promotion";
  - c. The Administration failed to follow the applicable rules regarding post selection processes, including overseeing the integrity and the fairness of it, resulting in a breach of the Applicant's right to due consideration, including by choosing to give more weight to the results of the written examination and interview over the Applicant's performance history. He was unfairly considered by the interview panel for post of Chief, SDAS, where questions were developed to favor the selected candidate. The selected candidate for the post of Chief, SISS, did not meet the minimum requirements and did not have comparable experience;
  - d. The delay in contesting his non-selection for the post of Chief, SDAS, stems from his supervisor making him believe that he would be in line for the reclassified P-5 level post of Chief, SISS, resulting in him deferring his appeal. Further, the violations regarding the non-reclassification of his post and his non-selection for the post of Chief, SISS, are ongoing. The entire selection processes were affected by a number of procedural violations, blatant and systematic abuse of authority, "persistent discrimination and bias, intended to damage the Applicant's career, and must therefore all be



receivable. [Each of the] violations are continuing and receivable on that basis, too”.

### **Respondent’s submissions**

22. The Respondent’s principal contentions may be summarized as follows:

a. The Applicant did not request management evaluation of the decision not to select him for the position of Chief, SDAS, within 60 calendar days. This decision was therefore not receivable by the MEU and cannot be contested before the Tribunal;

b. The decision regarding a refusal to classify the post of Chief, SISS, from the P-4 level to the P-5 level is not receivable as the Applicant did not identify a contestable administrative decision and no details are provided as to who took the challenged decision, when the decision was taken and what the decision concerned. Further, the Applicant failed to exhaust the relevant administrative procedure before filing an appeal in accordance with ST/AI/1998/9 (System for the classification of posts). The Tribunal is not the appropriate forum for deciding matters that are within the jurisdiction of the Classification Appeals Committee;

c. The allegations regarding the decision not to select the Applicant for the post of Chief, SISS, have no merit. The Applicant was one of two candidates recommended to the Executive Secretary of ESCAP who selected the candidate that she considered best suited for the post. The Applicant received a full and fair consideration for this position. He has no right to be promoted and he had no legitimate expectation to promotion. There is no evidence that the competitive process was not followed in this case. The Applicant and the selected candidate were both considered to have met the requirements for the post and were placed on the list of candidates recommended to the CRB. Upon not being selected, the Applicant was placed on a roster of pre-approved candidates for similar posts. His qualifications and

skills were fully considered.

## **Consideration**

### *Applicable law*

23. ST/AI/1998/9 (System for the classification of posts) dated 6 October 1998 states:

#### Section 1

##### Request for the classification or reclassification of a post

1.1 Requests for the classification or reclassification of a post shall be made by the Executive Officer, the head of Administration at offices away from Headquarters, or other appropriate official in the following cases:

(a) When a post is newly established or has not previously been classified;

(b) When the duties and responsibilities of the post have changed substantially as a result of a restructuring within an office and/or a General Assembly resolution;

(c) Prior to the issuance of a vacancy announcement, when a substantive change in the functions of a post has occurred since the previous classification; and

(d) When required by a classification review or audit of a post or related posts, as determined by the classification or human resources officer concerned.

1.2 The Office of Human Resources Management (OHRM), or the local Human Resources office in those cases where authority for classification has been delegated, shall provide classification advice when departments submit, with their budget requests, job descriptions for new posts and for the reclassification of existing posts.

1.3 Incumbents who consider that the duties and responsibilities of their posts have been substantially affected by a restructuring within the office and/or a General Assembly resolution may request the Office of Human Resources Management or the local human resources office to review the matter for appropriate action under section 1.1 (d).

...

## Section 4

### Implementation

4.1 Classification decisions shall become effective as of the first of the month following receipt of a classification request fulfilling the conditions of section 2.2 above. When a classification request is submitted for advice prior to a budgetary submission, the classification shall become effective once the reclassification has been approved in the budget.

4.2 The classification of a post shall not negatively affect the existing contractual status, salary or other entitlement of the staff member encumbering the post. Staff members whose posts are classified at a level below their personal grade level will retain their current grade and salary level, on the understanding that every reasonable effort will be made to reassign them to a post at their personal grade level.

4.3 Staff members whose posts are classified at a level above their current personal grade level in the same category may be considered for promotion in accordance with established procedures, including issuance of a vacancy announcement, where applicable.

## Section 5

### Appeal of classification decisions

The decision on the classification level of a post may be appealed by the head of the organizational unit in which the post is located, and/or the incumbent of the post at the time of its classification, on the ground that the classification standards were incorrectly applied, resulting in the classification of the post at the wrong level.

## Section 6

### Appeal Procedure

6.1 Appeals shall be submitted in writing to:

(a) The Assistant Secretary-General for Human Resources Management [(“ASG/OHRM”)], in the case of appeals regarding:

(i) Posts in the Professional category and at the D-1 and D-2 levels or reclassification of a General Service post to the Professional category;

(ii) Posts in the Field Service category;

(iii) Posts in the General Service and related categories at Headquarters and in small and medium-sized duty stations, except when posts in such duty stations are

administered by the offices indicated in subparagraph (b) below;

(b) The respective head of office in the case of posts in the General Service and related categories administered by ECA, ECLAC, ESCAP, ESCWA, the United Nations Office at Geneva, the United Nations Office at Nairobi and the United Nations Office at Vienna, up to and including posts at the G-7 level, except where the appeal involves a request for reclassification of such a post to the Professional category.

6.2 Appeals must be accompanied by the job description on the basis of which the post was classified.

6.3 Appeals must be submitted within 60 days from the date on which the classification decision is received.

6.4 The appeal shall be referred for review to:

(a) In the case of appeals submitted to the Assistant Secretary-General for Human Resources Management, the responsible office in the Office of Human Resources Management, which will submit a report with its findings and recommendation for decision by, or on behalf of, the Assistant Secretary-General;

(b) In the case of appeals submitted to the head of office, the local human resources service or section, which will submit a report with its findings and recommendation for decision by, or on behalf of, the head of office.

6.5 If the review results in an upgrading of the classification to the level sought by the appellant, the appellant shall be notified in writing of the decision.

6.6 If it is decided to maintain the original classification, or to classify the post at a lower level than that claimed by the appellant, the appeal, together with the report of the reviewing service or section, shall be referred to the appropriate Classification Appeals Committee established in accordance with the provisions of section 7 below.

6.7 The Secretary of the Appeals Committee shall transmit a copy of the report of the reviewing service or section to the appellant for comments which must be submitted within a period of three weeks. The appellant's comments will be provided to the Office of Human Resources Management or the human resources service or section concerned, as appropriate, for their observations which must be submitted within a period of two weeks.

6.8 In cases where the Administration has questioned the receivability of the appeal, the Committee shall first determine

whether the appeal is receivable. The following appeals shall not be receivable:

(a) Appeals submitted after the 60-day time-limit, unless exceptional circumstances warrant the waiver of the time-limit;

(b) Appeals which are based on new functions which were not the subject of the contested decision;

(c) Appeals which are based exclusively on comparison with other posts without any reference as to the reason why the classification decision, on its own merits, would be incorrect;

6.9 If the appeal is found to be non-receivable, the appellant shall be informed of the decision and of the reasons therefor.

6.10 If the appeal is found to be receivable, the Committee shall so inform the parties. The Committee shall then determine whether it requires any additional information. It may invite any staff member who may have information relevant to the appeal to appear before it or request any additional written information which it deems useful.

6.11 For a meeting of the Committee, a quorum shall be required consisting of a majority of the members and comprising:

(a) The chairperson or a member designated by him or her to act in his/her absence, and

(b) An equal number of members designated by the administration and the staff.

However, if no members have been designated by the staff in accordance with the provisions of section 7.2 - 7.5 of this instruction, within three months of a formal request to that effect, the quorum requirement shall be satisfied if the chairperson or a member designated by him or her to act in his or her absence, and at least two members of the Committee, are present.

6.12 The Appeals Committee shall adopt its report by majority vote. If the recommendation of the Appeals Committee is not adopted unanimously, any member who dissents from the majority position may have his or her opinion included in the report.

6.13 The Appeals Committee shall submit its report to the Assistant Secretary-General for Human Resources Management or the respective head of office, as appropriate. The report shall constitute the official record of the proceedings in the appeal. It shall contain a summary of the case and a reasoned recommendation concerning the disposition of the appeal.

6.14 The Assistant Secretary-General for Human Resources Management, or the head of office, as appropriate, shall take the final

decision on the appeal. A copy of the final decision shall be communicated promptly to the appellant, together with a copy of the report of the Appeals Committee. Any further recourse against the decision shall be submitted to the United Nations Administrative Tribunal.

6.15 In those cases where the appeal is successful, the effective date of implementation of the post classification shall be, subject to the availability of a post, the same effective date as that of the original decision, as defined in section 4.1 above.

...

24. ST/AI/1999/17 (Special post allowance) (“SPA”) dated 23 December 1999 states:

## **Section 2**

### **General provisions**

2.1 Under staff rule 103.11, staff members are expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher-level posts. Nevertheless, payment of a non-pensionable SPA is authorized by the same rule in exceptional cases when a staff member is called upon to assume the full duties and responsibilities of a post which is clearly recognizable at a higher level than his or her own for a temporary period exceeding three months

...

## **Section 3**

### **Temporary assignments**

#### *Temporary assignments to temporarily vacant posts*

3.1 Temporary assignment to a post that is temporarily vacant shall be made in accordance with section 2.4 of ST/AI/1999/8 on the placement and promotion system, and section 2.2 of ST/AI/1999/9 on special measures for the achievement of gender equality, which require that the department or office concerned inform its staff of temporary vacancies expected to last for three months or longer so as to give staff members the opportunity to express their interest in being considered.

#### *Temporary assignments to vacant posts*

3.2 In addition to the requirements set out in section 3.1 above and in order to implement paragraph 10 of section III.B of General Assembly resolution 51/226, in which the Assembly requests

the Secretary-General “to take effective measures to prevent the placement of staff members against higher-level unencumbered posts for periods longer than three months”, temporary assignments to vacant posts shall require that the department or office concerned has already initiated the proper procedures for filling the post on a permanent basis. This may be demonstrated by requesting:

(a) Issuance of a vacancy announcement for the vacant post, unless the requirement of such issuance has been waived in accordance with section 3.4 of ST/AI/1999/8;

or:

(b) Classification of the post, where this is a precondition for issuing a vacancy announcement in accordance with section 3.2 of ST/AI/1999/8;

or:

(c) Filling of the vacant post through the competitive examination process, where applicable.

The purpose of the present requirement is to ensure that assignments to higher-level vacant posts, as well as any SPAs granted on that basis, are limited to cases where vacant posts cannot be filled within three months under the established procedures for recruitment or placement and promotion, and where successful programme delivery requires temporary assignment to vacant posts for longer than three months.

...

#### **Section 4**

##### **Eligibility**

Staff members who have been temporarily assigned to the functions of a higher-level post in accordance with the provisions of section 3 above shall be eligible to be considered for an SPA when they meet all of the following conditions:

(a) They have at least one year of continuous service under the 100 series of the Staff Rules;

(b) They have discharged for a period exceeding three months the full functions of a post which has been (i) classified, and (ii) budgeted at a higher level than their own level. Such period may be part of the one year required by subsection 4 (a) above;

(c) They have demonstrated their ability to fully meet performance expectations in all the functions of the higher-level post.

...

## **Section 6**

### **Effective date of SPAs**

6.1 The earliest date from which an SPA may be paid shall normally be the beginning of the fourth month of service at the higher level. Exceptionally, an SPA may be paid as of the date when the staff member has assumed the higher-level functions in the following cases, provided that the staff member has discharged those functions for a period exceeding three months, in accordance with subsection 4 (b) above:

(a) When a staff member has assumed the functions of a post classified more than one level above his or her level;

(b) When a staff member has assumed higher-level functions in a mission;

(c) When a staff member in the General Service or related categories has assumed the functions of a post in the Professional category, subject to the special conditions set out in section 10 below.

6.2 Notwithstanding the provisions of section 6.1 above, the effective date of an SPA may not predate either:

(a) The original request for an SPA by more than one year;

or:

(b) The effective date of the classification decision in cases of upwards classification of the post.

## **Section 7**

### **Duration and extension of SPAs**

7.1 SPAs shall be granted for a specific period determined in accordance with the provisions of the present section.

#### *SPA for assignment to a temporarily vacant post*

7.2 When an SPA is granted to a higher-level post which is temporarily vacant, it may be granted for an initial period of up to one year.

7.3 The SPA may be extended by the department or office without reference to the SPA panel to cover a total period of up to two years, including the initial period, upon the supervisor's certification that the staff member continues to satisfactorily perform the full functions of the higher-level post.



*SPA for assignment to a vacant post or a post reclassified at a higher level*

7.4 When an SPA is granted to a staff member temporarily placed against a higher-level vacant post or a post reclassified at a higher level, the SPA may be granted for an initial period of up to three months.

7.5 Any extension beyond the initial period shall require resubmission to the SPA panel, with justification based on the progress made in filling of the post and certification by the supervisor that the staff member has continued to satisfactorily perform the full functions of the higher-level post. Extensions may be given for periods of up to three months at a time only

25. ST/AI/2006/3/Rev.1 (Staff selection system) dated 11 January 2010 states:

**Section 2**  
**General provisions**

...

2.3 Selection decisions are made by the head of department/office when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. If a list of qualified candidates has been approved, the head of department/office may select any one of those candidates for the advertised vacancy, subject to the provisions contained in section 9.2 below. The other candidates shall be placed on a roster of pre-approved candidates from which they may be considered for future vacancies with similar functions.

...

**Section 7**

**Consideration and selection**

...

7.5 For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required. Competency-based interviews must be conducted in all cases of recruitment or promotion. Programme managers must prepare a reasoned and documented record of the evaluation of those candidates against the requirements and competencies set out in the vacancy announcement.

...

## **Section 9**

### **Decision**

9.1 The selection decision for posts up to and including at the D-1 level shall be made by the head of department/office when the central review body finds that the evaluation criteria have been properly applied and/or that the applicable procedures have been followed. The selection shall be made by the official having authority to make the decision on behalf of the Secretary-General when the central review body finds that the evaluation criteria were improperly applied and/or that the applicable procedures were not followed, in accordance with the provisions of section 5.6 of ST/SGB/2002/6. In all cases, the recommendations of the central review body shall be given due consideration. Recommendations for selection for posts at the D-2 level shall be made by the head of department/office for review by the Senior Review Group. The Senior Review Group shall provide its recommendation to the Secretary-General, who will make the selection decision. When the post to be filled involves significant functions in the management of financial, human and physical resources and/or information and communications technology, the executive or local personnel office shall inform OHRM of the proposed selection so that the approvals required by Secretary-General's bulletin ST/SGB/2005/7 may be obtained prior to selection. [Footnotes omitted]

9.2 When recommending the selection of candidates for posts up to and including at the D-1 level to the head of department/office, the programme manager shall support such recommendation by a documented record. The head of department/office shall select the candidate he or she considers to be best suited for the functions, having taken into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and shall give the fullest regard to candidates already in the service of the Organization. For posts in the Professional and higher categories subject to geographical distribution, if the head of department/office proposes to select an external candidate from an overrepresented Member State, the proposed selection decision must be justified to, and approved by, OHRM prior to selection of the candidate. If the head of a department/office who has not met the gender targets set out in the departmental action plan proposes to select a male candidate where an equally qualified female candidate exists, the proposed selection decision must be justified to, and approved by, OHRM. For vacancies at the P-3 level, prior to selection of an external candidate, that decision must be justified on the record to, and approved by,

OHRM. When recommending the selection of candidates for posts at the D-2 level, section 4.2 of ST/SGB/2009/2 shall apply.

26. ST/AI/2010/3 (Staff selection system) dated 21 April 2010 states

**Section 12**

**Transitional measures**

12.1 The provisions of ST/AI/2006/3/Rev.1 shall continue to govern recruitment, placement and promotion in respect of applications for job openings advertised before 22 April 2010 through the “Galaxy” system.

12.2 The provisions of the present instruction shall apply to the selection process of candidates for positions in the peacekeeping and special political missions initiated from the effective date of this instruction.

12.3 Roster candidates falling under the provisions of section 9.3 of ST/AI/2006/3/Rev.1 shall maintain their status for the remaining period stipulated for their roster eligibility.

**Section 13**

**Final provisions**

13.1 The present administrative instruction shall enter into force on 22 April 2010.

13.2 Administrative instructions ST/AI/2006/3/Rev.1, entitled “Staff selection system”, ST/AI/297 and Add.1, entitled “Technical cooperation personnel and OPAS officers”, and ST/AI/360/Rev.1 and Corr.1, entitled “Movement of staff from the Field Service category to the Professional category”, are hereby abolished.

13.3 The provisions of the present administrative instruction shall prevail over any inconsistent provisions contained in other administrative instructions and information circulars currently in force.

27. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) dated 11 February 2008 states:

**Section 5**

**Corrective measures**

5.1 Individuals who believe they are victims of prohibited conduct are encouraged to deal with the problem as early as possible after it has occurred. The aggrieved individual may opt for an informal or

a formal process, as explained below. Regardless of the choice made, the aggrieved individual is encouraged to keep a written record of events, noting dates, places, a description of what happened and the names of any witnesses and of anyone who may have information concerning the incident or situation at issue.

...

*Formal procedures*

5.11 In circumstances where informal resolution is not desired or appropriate, or has been unsuccessful, the aggrieved individual may submit a written complaint to the head of department, office or mission concerned, except in those cases where the official who would normally receive the complaint is the alleged offender, in which case the complaint should be submitted to the Assistant Secretary-General for Human Resources Management or, for mission staff, to the Under-Secretary-General for Field Support. Formal resolution may also be initiated by the submission of a report of prohibited conduct from a third party who has direct knowledge of the situation to one of the officials listed above (the “responsible official”). The aggrieved individual or third party shall copy the written complaint or report to the Office of Human Resources Management for monitoring purposes.

...

5.13 The complaint or report should describe the alleged incident(s) of prohibited conduct in detail and any additional evidence and information relevant to the matter should be submitted. The complaint or report should include:

- (a) The name of the alleged offender;
- (b) Date(s) and location(s) of incident(s);
- (c) Description of incident(s);
- (d) Names of witnesses, if any;
- (e) Names of persons who are aware of incident(s), if any;
- (f) Any other relevant information, including documentary evidence if available;
- (g) Date of submission and signature of the aggrieved individual or third party making the report.

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission

concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

...

5.17 The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

28. ST/STGB/2009/7 (Staff Regulations of the United Nations and provisional Staff Rules), dated 16 June 2009 states:

**Rule 11.2**

**Management evaluation**

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within thirty calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within forty-five calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

29. ST/SGB/2010/6 (Staff Regulations and provisional Staff Rules) dated 2 September 2010 states:

**Regulation 1.1**

Status of staff

...

(d) The Secretary-General shall seek to ensure that the paramount consideration in the determination of the conditions of service shall be the necessity of securing staff of the highest standards of efficiency, competence and integrity;

**Regulation 4.3**

In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis

**Rule 3.10**

**Special post allowance**

(a) Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts.

(b) Without prejudice to the principle that promotion under staff rule 4.15 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member holding a fixed-term or continuing appointment who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level.

(c) In the case of a staff member holding a fixed-term or continuing appointment who is assigned to serve in a mission, or when a staff member in the General Service category is required to serve in a higher level post in the Professional category, or when a staff member in any category holding a fixed-term or continuing appointment is required to serve in a post which is classified more than one level above his or her level, the allowance may be paid immediately when the staff member assumes the higher duties and responsibilities.

(d) The amount of the special post allowance shall be equivalent to the salary increase (including post adjustment and

dependency allowances, if any) which the staff member would have received had the staff member been promoted to the next higher level.

...

### **Rule 3.16**

#### **Retroactivity of payments**

A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made written claim:

...

(ii) In every other case, within one year following the date on which the staff member would have been entitled to the initial payment.

30. The United Nations Dispute Tribunal's Statute provides that:

#### Article 8

1. An application shall be receivable if:

...

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

...

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

4. Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.



## **Consideration**

### *Post classification*

31. The first contested decision identified by the Applicant consists of the “[i]llegal actions taken in bad faith, in that there was a persistent refusal to reclassify the P-4 Section Chief post (the only P-4 Chief of a substantive Section at ESCAP) for seven years when [he] held the post”.

32. The Applicant’s grounds for contesting this decision are that: since 1 June 2003, he managed the SISS section which consisted of 10 to 11 staff members as well as occasional consultants and temporary staff; he also provided advice to all staff members of SD and he often acted as Officer-in-Charge; and, he worked at the P-4 level despite the requirements of staff regulation 1.2(e) and ST/SGB/1999/15. Further, the fact that all of the other Chiefs of the substantive sections at ESCAP were classified at the P-5 level, and that the post of Chief, SISS, was finally reclassified at the P-5 level, is a recognition that the previous classification was inappropriate. Despite his performance for over seven years at a P-5 level as Chief of Section, he has been denied compensation for those efforts and has been denied promotion to the reclassified P-5 level post for which he already demonstrated leadership as Chief of section. He considers that he was consistently led to believe that in return for his financial and personal sacrifice serving the Organization at the P-5 level he would be promoted as he had earned a legitimate expectation to the compensation and reward for his extra work and overtime performed at a higher level than the one he was assigned to.

33. The Tribunal makes the following findings in relation to the procedure established by ST/AI/1998/9:

- a. In accordance with sec. 5 of ST/AI/1998/9, the classification of a post may be appealed by the head of the organizational unit in which the post is located and/or the incumbent of the post, at the time of its classification on the ground that the classification standards were incorrectly applied, resulting

in the classification of the post at the wrong level. It results that such an appeal can be filed, by either the head of the unit and/or by the incumbent of the post;

b. Consequently, even in the absence of such an action from the head of the unit, at the time of its classification, the incumbent of a post has the right to appeal a classification decision on the ground that the classification standards were incorrectly applied, resulting in the classification of the post at the wrong level;

c. Section 6 of ST/AI/1998/9 states that the procedure to follow when contesting the classification level of post is as follows:

i. An appeal must be submitted to the Assistant Secretary-General for Human Resources Management (“OHRM”) or to the head of office together with the job description on the basis of which the post was classified within 60 days from the date on which the classification decision is received (arts. 6.1-6.3);

ii. After being filed the appeal must be referred for review to the responsible office in OHRM or to the local human resources service or section who will then submit a report with its findings and recommendations for decision by or on behalf of the ASG or the head of the office (art. 6.4);

iii. If the original classification is maintained or the post is classified at a lower level than that claimed by the appellant, the appeal together with the report of the reviewing service or section shall be referred to the appropriate Classification Appeals Committee (art. 6.6.);

iv. The Secretary of the Appeals Committee shall transmit a copy of the report of the reviewing service or section to the appellant for comments, which must be submitted within a period of three weeks and the appellants comments will be provided to the OHRM or

the human resources service or section concerned as appropriate for their observations which must be submitted within a period of two weeks. In cases where the Administration has questioned the receivability of the appeal, the Committee shall first determine if the appeal is receivable. The following appeals shall not be receivable: (i) appeals submitted after the 60 day time limit, unless exceptional circumstances warrant the waiver of the time limit; (ii) appeals that are based on new functions which were not the subject of the contested decision, and (iii) appeals that are based exclusively on comparison with other posts without any reference as to the reason why the reclassification decision, on its own merits, would be incorrect (arts. 6.7-6.8);

v. The Assistant Secretary-General, OHRM, or the Head of Office, as appropriate, shall take the final decision on the appeal. A copy of the final decision shall be communicated promptly to the Appellant, together with a copy of the report of the Appeals Committee. Any further recourse against the decision shall be submitted to the United Nations Administrative Tribunal (art. 6.14).

34. As previously established by the Dispute Tribunal, in *Fuentes* UNDT/2010/064, affirmed by the Appeals Tribunal in *Fuentes* 2011-UNAT-105, “ST/AI/1998/9 was intended to create a special procedure to challenge a refusal to classify a post”.

35. The Tribunal considers that ST/AI/1998/9 is still applicable since it was neither modified nor abolished. Further, ST/AI/1998/9 establishes the special procedure for challenging a decision not to reclassify a post at a higher level, thereby maintaining the original classification, or to reclassify a post at a lower level than that claimed. Since all the legal provisions mentioned above include the term “shall”, this procedure is mandatory. This procedure is not only mandatory, but also constitutes

a preliminary step that a staff member has to follow before filing an appeal against such a decision before the Dispute Tribunal.

36. On 17 March 2009, the General Assembly adopted Resolution 63/253 “Administration of justice at the United Nations” and decided to abolish United Nations Administrative Tribunal as of 31 December 2009 and to create a new formal system of justice comprised of the United Nations Dispute Tribunal and the United Nations Appeal Tribunal which became operational as of 1 July 2009. All the cases pending before the former Administrative Tribunal were transferred to the Dispute Tribunal and consequently, after 1 July 2009 an appeal against a non-reclassification decision could be filed before this Tribunal.

37. Article 8.1(d) from the Tribunal’s Statute states that an application is receivable if an applicant has previously submitted the contested administrative decision for management evaluation, where required.

38. The Tribunal notes that the former incumbent of the Applicant’s post retired on 30 April 2003. On 15 January 2003, before the former incumbent’s retirement, the post was classified at the P-4 level, as a result of a 2 January 2003 classification request formulated by the Chief, HRSM. The reasons provided for the classification decision in 2003 were “vacancy announcement and revision of duties”. On 1 June 2003 the applicant was appointed as Chief, SISS, at the P-4 level.

39. There is no evidence on the record that, after becoming the incumbent of the post the Applicant filed a request for reclassification of his post and an appeal before the ASG/OHRM, within 60 days from 1 June 2003 as per the procedures described in ST/AI/1998/9. The Tribunal finds that the Applicant did not pursue the applicable procedure to contest the classification of his post and, therefore, in the absence of an actual administrative decision denying such a request, the application against the “continuous” refusal to reclassify the Applicant’s post from the P-4 level to the P-5 level is not receivable.

40. Further, the Tribunal finds that a management evaluation request was not required in the present case, since a request for review of a classification decision, or lack thereof, should have first been made before of Classification Appeal Committee, which is a specialized body, and not before the Management Evaluation Unit.

41. With regard to the refusal to reclassify his post, the Applicant refers to the “illegal actions taken in bad faith” without indicating elements to identify the specific administrative decision(s), the date of the alleged refusal(s) to reclassify his post, and why any such decision(s) was in non-compliance with the terms of his contract of employment.

42. The Tribunal notes that arts. 8.3 and 8.4 from the Tribunal’s Statute state that, in exceptional cases, upon receiving a written request by an applicant, the deadline by which one has to file an application with the Tribunal may be waived or suspended for a limited period of time. An application, even when there are exceptional circumstances, is not receivable if it is filed more than three years after the Applicant’s receipt of the contested decision. The Applicant alleged that the contested decision was the continuous refusal to reclassify his post between 2003-2009. In the present case, and aside from the Tribunal’s finding that there is no actual contestable administrative decision before the Tribunal, the Applicant did not request that the Tribunal waive or suspend the deadline for filing an appeal against a particular decision(s) either with or prior to filing his appeal. The Applicant has not provided the Tribunal with any information that would enable it to establish that this application was filed within three years from the date of notification.

43. In *Reid* 2013-UNAT-389, the Appeals Tribunal stated that

14. As recalled in Art. 7(6) of the rules of Procedure of [the Dispute Tribunal, “(UNDT)”] “in accordance with art. 8.4 of the Statute of the Dispute Tribunal, no application shall be receivable if filed more than three years after the Applicant’s receipt of the contested administrative decision”. Moreover, as the Appeal Tribunal has previously held, “under Art. 8(4) of the UNDT Statute, the UNDT cannot waive the time limit to file an appeal more than three years

after the applicant's receipt of the contested administrative decision”  
(*Bangoura* 2012-UNAT-268).

*Special post allowance*

44. In *Massabni* 2012-UNAT-238, the Appeals Tribunal held that:

2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties submissions.

3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not the requested judgment.

45. The Tribunal considers that the second decision being contested by the Applicant is directly related to his request for reclassification and can be found in the remedy section of his application whereby he requests “financial compensation for the difference in salary and benefits between P-4 and P-5 since June 2003 to the date of selection of another person for that post”.

46. The Tribunal observes that the Applicant also mentioned in the grounds of appeal related to the first contested decision that while he was encumbering a post at the P-4 level, he performed functions at the P-5 level for seven years without due compensation or recognition “while being provided with the expectation that this service was required if eventually [he] would be selected for the post”. In mid-July 2008, a P-5 post was redeployed from another division to SD titled “Statistical Analyses and Publications Coordinator”. Following the retirement of the incumbent of that post in July 2009, that post was reclassified at the P-5 level of Chief, SISS. In his application, the Applicant stated that his “rights have been violated many times

before over and above [his] current submission, but never before [did he] ma[ke] complaints that [he] was entitled to take before the Tribunal”.

47. The Tribunal notes that in his 29 October 2010 request for management evaluation, the Applicant expressly indicated that one of the remedies he was seeking was “monetary compensation for the P-5 level work that [he] has been doing with P-4 benefits since June 2003”. Based on the facts of the case and accompanying documents, the MEU requested comments from the Executive Secretary, ESCAP, which were filed on 16 November 2010.

48. According to staff rule 3.10 of ST/SGB/2010/6, applicable in the present case, a staff member is expected to assume temporarily, as a normal part of his/her customary work and without extra compensation, the duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period and, if this period exceeds three months, he/she may, in exceptional cases, be granted a non-pensionable SPA from the beginning of the fourth month of service at a higher level. As results from staff rule 3.16 from ST/SGB/2010/6, the staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made a written claim within three months following the date of a cancellation or modification of the staff rule governing eligibility or, in other cases, within one year following the date on which the staff member would have been entitled to the initial payment.

49. Further, according with sec. 2.2 from ST/AI/1999/17, “payment of an SPA is a discretionary grant for which staff members may be considered when the conditions set out in staff rule [...] and section 4 [...] are met. Consideration for granting an SPA shall be given in accordance with the procedures, set out in section 5 [...]”.

50. The Applicant’s request for compensation relates to the period June 2003-September 2010 which can be divided in to two time periods: June 2003–end of

July 2009 (when the Applicant's post was reclassified at the P-5 level) and 1 August 2009-6 September 2010 when the new Chief, SISS, was appointed.

51. The Tribunal considers that the grounds of appeal mentioned above are related to the request for compensation and finds that it represents a retroactive request for SPA. It results that by including the same request, even though it was inserted in the wrong section, in his 29 October 2010 request for management evaluation, the Applicant, made a written request for retroactive SPA.

52. After carefully reviewing the MEU's 13 December 2010 conclusions which were endorsed by the Secretary-General, the Tribunal finds that this specific request was not previously considered as a distinct request for SPA. Not being part of the facts, it was not brought before nor analyzed by the Executive Secretary, ESCAP, in her comments from 16 November 2010 or reviewed by the MEU.

53. The Tribunal considers that it is not for it to exercise the Administration's discretion and its role is not to substitute its own decision for that of the Secretary-General. Consequently, since the request for retroactive compensation, namely SPA, as qualified by the Tribunal, represents a new legal matter, the Tribunal considers that it is appropriate to give the Administration the opportunity to consider the Applicant's request to receive retroactive payment of SPA. This request for SPA consists in the differences in salary and benefits between the P-4 level post which he encumbered and the P-5 level post whose functions he claims he fulfilled. Following the Appeals Tribunal jurisprudence in *Malmström* 2013-UNAT-357 and *Egglefield* 2014-UNAT-399, the Tribunal remands this specific request to the Administration for a full and fair consideration and directs that the process be completed within 90 days of the publication of this judgment.

#### *Observations*

54. As stated above, the Applicant did not request that his post be reclassified at the P-5 level between June 2003 and July 2009, nor does it appear that he submitted a written request for SPA for either this period or for the one following the July 2009



reclassification of his post at the P-5 level until the successful candidate was assigned to the post, prior to his filing a request management evaluation on 29 October 2010.

55. The Tribunal observes that it is not contested that, following the decision to reclassify the P-5 level post at the end of July, namely between 1 August 2009 and 6 September 2010 when the new Chief of SISS was appointed, the Applicant performed duties at a clearly recognizable higher level, namely at the P-5 level. Since this period was longer than three months, it appears that the Applicant was eligible to be considered for an initial payment of SPA on 1 December 2009 and the deadline for him to file a written claim for this period expired on 30 November 2010. By requesting SPA in his management evaluation, it appears that the Applicant made a written request for compensation prior to 30 November 2010.

56. The Tribunal underlines that in *Chen* 2011-UNAT-107, the Appeals Tribunal found that art. 23(2) of the Universal Declaration of Human Rights, which states that “[e]veryone, without discrimination, has the right to equal pay to equal work”, applies to United Nations staff members. The Appeals Tribunal further stated that “[t]he Secretary-General has wide discretion in the reclassification of posts. But like any discretion, it may not be exercised in an arbitrary, capricious or illegal manner. There is no discretion to violate the principle of equal pay for equal work”. The same principle is reflected in art. 2 from the International Labour Organization’s Equal Remuneration Convention, 1951 (No. 100), which states that: “[e]ach member shall, by all means appropriate to the methods in operation for determining rates of remuneration, promote and in so far as consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value”.

*Chief, SDAS*

57. The third decision contested by the Applicant is his non-promotion to the P-5 level post of Chief, SDAS. This non-selection decision was notified to the Applicant on 17 June 2010.

58. Pursuant to staff rules 11.2(a) and (c) a staff member who wants to formally contest an administrative decision shall as first step, submit to the Secretary General in writing a request for management evaluation within 60 calendar days from the date on which the staff member received notification of the contested decision. Consequently, the deadline to file a request for management evaluation of his non-selection for the P-5 level post of Chief, SDAS, was 18 August 2010.

59. The Tribunal notes that the time limits set by staff rule 11.2(c) may be extended and/or suspended by the Secretary-General based on pending efforts for informal resolution conducted by the Office of Ombudsman. However, neither occurred in the present case.

60. On 29 October 2010, the Applicant requested management evaluation of the decision made on 17 June 2010 “in light of facts [he] learned on 3 September 2010”, stating that there is a direct link between this non-selection decision and the decision of 3 September 2010 not to select him to the post of Chief, SISS.

61. On 13 December 2010, the MEU concluded that the Applicant’s request for management evaluation should have been received no later than 18 August 2010 and that there were no new facts or exceptional circumstances which would warrant a waiver of the statutory time-limit for requesting a management evaluation. The MEU therefore decided that the Applicant’s request for management evaluation of his non-selection decision for the P-5 level Post of Chief, SDAS, was time-barred and therefore not receivable.

62. While art. 8.3 of the Tribunal’s Statute states that “the Dispute Tribunal may decide in writing upon written request by the applicant to suspend or waive the deadlines for a limited period of time and only in exceptional cases” it also states that the “Tribunal shall not suspend or waive the deadlines for management evaluation”.

63. The Tribunal has no competence to suspend or waive the deadlines for management evaluation. The MEU determined that the Applicant had not requested

management evaluation of his non-selection decision for the P-5 level post of Chief, SDAS, within the applicable time limits and his request for management evaluation is therefore not receivable. In the absence of a timely request for management evaluation, the appeal against the decision not to select him for the P-5 level post of Chief, SDAS, is not receivable and the substantive grounds of appeal related to this decision are not to be analyzed.

*Chief, SISS*

64. The fourth decision contested by the Applicant is the 3 September 2010 decision not to select him for the P-5 level post of Chief, SISS.

65. The Tribunal notes that the Applicant's 29 October 2010 request for management evaluation was filed within 60 days from the date on which the contested decision was notified to him. Further, the application before the Tribunal was filed within the applicable time limits following the Applicant's receipt of the decision from the MEU. Consequently the Tribunal considers that the appeal against this decision is receivable.

66. The Applicant considers that he was deliberately sidelined in two successive promotion cases. The Applicant submits that staff regulation 4.3, which emphasizes that the selection of staff members shall be made without distinction as to race, sex or religion, and staff regulation 1.1(d), which requires that the Secretary-General ensure that the paramount consideration in the determination of the conditions of service shall be the necessity of securing staff of the highest standards of efficiency, competence and integrity, were not respected by his Chief during this selection process. Further, his consistent performance at the level of "exceeds expectations" should carry more weight than the subjective setting of an interview or examination.

67. The Applicant contends that, after becoming his supervisor upon being appointed as Chief of SD, Ms. HF stated to the Applicant, in both public and private, that he should seek a transfer to the Programme Management Division and that there were inexplicable delays in the eventual classification of the P-5 level post of Chief,

SISS, and in announcing his non-promotion to the post. The Applicant considers that his reliance on the bad faith representation made by the Chief, SD, vitiated his rights and the Chief, SD, had a systematic abusive and discriminatory position against him which improperly influenced his career. Finally, the Applicant considers that the selected candidate did not meet the minimum selection criteria as defined in the VA seeing that she had no comparable statistical expertise and seeing that he was the only candidate with such an expertise. The Applicant considers that the CRB should have stated that he was the most qualified candidate and that the Organization's preference to appoint women should not apply in this case.

68. The Tribunal notes that the former incumbent of the Applicant's post retired on 30 April 2003. Before his retirement, the post was classified at the P-4 level, after a 2 January 2003 classification request formulated by the Chief HRMS and approved on 15 January 2003. On 1 June 2003, the Applicant was appointed as Chief, SISS, at the P-4 level and at the end of July 2009 the post was reclassified at the P-5 level.

69. Section 4 from ST/AI/1998/9 states that staff members whose posts are reclassified at a level above their current level in the same category may be considered for promotion in accordance with the established procedures including, where applicable, the issuance of a vacancy announcement. The VA for the P-5 level post of Chief, SISS, was advertised on 2 February 2010 with a deadline for applications of 3 April 2010. No 15-days mark candidates applied for the vacancy and, out of the five 30-days candidates which applied for the post, four, including the Applicant, were deemed to meet the approved evaluation criteria and were invited to take a written assessment. Two candidates, including the Applicant, passed the written assessment and were invited for an interview. The Applicant and another candidate were considered to have met the requirements of the vacancy and were placed on the recommended list.

70. The Tribunal considers there is no evidence to support the allegation that the reclassification of the post and the VA were deliberately delayed by the Chief, SD, or that all the positive elements in the Applicant's career, such as his reputation

and exceeding performance appraisals, were not correctly assessed during the selection process.

71. The VA for the P-5 post of Chief, SISS, included the following qualifications requirements:

**Education**

Advanced university degree (Master's degree or equivalent), preferably in statistics, economics, demography or relevant field. A first level university degree with a relevant combination of academic qualifications and experience in the above field or a related area may be accepted in lieu of the advanced university degree.

**Work experience:**

At least 10 years of progressively responsible professional experience in statistics development, data dissemination and programme management at national and/or international level; working experience in Asia and Pacific Region is considered desirable; a strong track of record of innovative development of statistical publications and products and policy- relevant statistical analysis and publications is desirable.

**Language:**

English and French are the working languages of the United Nations Secretariat. For this post fluency in written and spoken English is essential; knowledge of another official UN language, preferably Russian or Chinese, is desirable.

**Other skills:**

Familiarity with the United Nations programmes, policies, rules and regulations is an asset; knowledge of, and ability to apply, statistical data quality assessment frameworks is required.

72. The Tribunal notes that while the Applicant did not contest whether the selected candidate met the education, language and other skills requirements for the VA, he submitted that the selected candidate did not meet the work experience requirement. More specifically, the Applicant stated that “[his] competitor [...] did not have anywhere comparable experience as [him]” and that there “was an unexplainable delay in (i) issuing the VA for the post, during which the favourite candidate conveniently reached ‘10 years of progressively responsible professional

experience in official statistics development and technical cooperation programme management at national and international level””. The Tribunal considers that the Applicant presented contradictory arguments and, eventually, recognized that the selected candidate met the work experience requirement.

73. As part of his reply, the Respondent produced the official overall evaluations of the two recommended candidate. The Tribunal notes that a comparative analysis of the two recommended candidates’ written test indicates that the Applicant obtained a lower score than that of the selected candidate—77.5 versus 88.5.

74. Regarding the Applicant’s allegations referring to the questions pertaining to creativity, the Tribunal considers that there is no evidence to support his position that the questions were prepared by the Division Chief to put him in an unfavorable position in comparison to the other candidates.

75. After the conclusion of the interview, which focused on the four core requirements (Education, Experience, Languages and Other Skills), the Applicant’s total score was 87 out of 100 and the selected candidate had a total score of 89 out of 100. The two candidates received the same score with regard to the evaluation of their levels of work experience, language and other skills, including leadership, with the selected candidate receiving a higher score for the core requirement of education 20 points out of 20 versus 18 for the Applicant. More specifically, it was noted that the selected candidate had a Masters degree in Mathematics and Statistics whereas the Applicant had a Masters degree in Agricultural Economics. The Applicant did not contest this point which is distinct from the evaluation of their work experience. Further, the Tribunal notes that the panel’s assessment of the Applicant appears to be in line with his 2009 ePAS and it cannot be concluded that the members were biased against the Applicant.

76. In *Muratore* UNDT/2011/129, the Tribunal held that given the large discretion of the Administration in selection matters, the review of such decisions by the Tribunal is limited to abuse of power, procedural flaws, errors of fact and

manifest errors of judgment. In *Ljungdell* UNDT/2011/208, the Tribunal held that it is for the Administration to determine the suitability of each candidate and the Tribunal should not substitute its judgment to that of the Secretary-General in the assessment of a candidate's suitability for a given post. Similarly, in *Gordon* UNDT/2011/173 and *de Saint Robert* UNDT/2011/175, the Tribunal found that, in reviewing selection decisions, it is not for the Tribunal to substitute its own assessment for that of the selection panel except where errors of facts have been committed. Finally, in *Roland* UNDT/2010/095, the Tribunal stated that the assessment of candidates in a promotion exercise involves a high degree of judgment and experience which will not be replicated by a Judge and that accordingly, unless there was some obvious anomaly or evidence that irrelevant material was taken into account, relevant material ignored or of a mistake of fact or law, the Tribunal will not be able to conclude that the process was significantly flawed.

77. The Tribunal considers that the above does not reflect a mistake of fact or law or an obvious anomaly in the selection process. There is no evidence of a biased attitude by the members of the selection panel or that the selection process was otherwise flawed.

78. The Applicant stated that “in relation to the denial of the first P-5 Post [...] [the Chief, SDAS, Ms. HF] made [him] clearly understand and believe that [he] would be in line for the reclassified Section Chief post, [...] in his own Section” and he considered that as a promise of promotion for the P-5 level post of Chief, SISS.

79. The Tribunal considers that the letter from 17 June 2010 sent by the Chief, SD, to the Applicant whereby she said that she “would like to encourage [him] to apply for other vacant posts for which [he] believe[s] he has the necessary qualifications” is a standard recommendation by a manager to one a staff member and is not equivalent to a promise for promotion. Rather, it consists of an encouragement to apply for other vacant P-5 posts. The Tribunal further considers that there is no evidence that the Chief, SD, as the Applicant also alleged, made repeated remarks, in

public and/or private, that the Applicant should seek transfer to the Programme Management Division. The Tribunal also notes that this allegation contradicts other ones made by the Applicant, as underlined in the previous paragraph.

80. In *Parmar* UNDT/2010/006, the Tribunal held that staff regulation 4.4 which provides that the fullest regards shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations “does not confer an absolute (as distinct from qualified) preference in favor of staff already in service in filling the vacancies”. Further, the Tribunal stated in *Douaji* UNDT/2011/160 that a promise of priority consideration must be understood as giving priority only over other equally qualified candidates. When qualifications of another candidate are superior, the Administration is by no means bound to grant the post to the candidate enjoying priority consideration.

81. In this case, the Executive Secretary of ESCAP was responsible for making the final decision based on the recommendation of the interview panel which were endorsed by the CRB. She took the decision to select the other recommended candidate and to place the Applicant on the roster. There is no reference in the application and/or evidence that she abused her discretion in taking this decision.

82. As held by the Appeals Tribunal in *Andrysek* 2010-UNAT-070, staff members do not have a right to promotion. The Applicant was recommended for the position as he was deemed a suitable candidate.

83. Even if the Applicant believed that he had received a promise for promotion, such a promise had no legal consequences and, as previously found, the two candidates were not found to be equally qualified.

84. The Tribunal concludes that the Applicant’s right to a full and fair consideration for the post of Chief, SISS, was respected.



*Abuse of authority*

85. The final ground of appeal refers to the allegation of systematic abuse of authority and discrimination by the Chief, SD, during the selection exercise for the P-5 level post of Chief, SISS.

86. The Tribunal notes that, sec. 5 of ST/AI/2008/5 states that individuals who believe that they are victims of prohibited conduct are encouraged to deal with the problem as early as possible using either the informal and/or the formal procedure established.

87. In the present case, there is no evidence that prior to bringing this matter before the Tribunal, the Applicant followed the procedure established in ST/AI/2008/5 and in Chapter XI of the Staff Rules requiring that a staff member attempt to use either the formal or informal approved mechanisms to deal with a complaint prior to filing an appeal with the Dispute Tribunal. The Tribunal has the competence only to review the legality of a decision taken by the responsible official and not to substitute his/her judgment and decide directly on a complaint of abuse of power and discrimination or to consider it as being a relevant background for a case. Consequently, the grounds of appeal against this decision are to be rejected.

*Other matters*

88. In the closing submissions, the Applicant filed, without leave from the Tribunal, new documents and a new additional ground of appeal, stating that as a direct consequence of the events from 2010, he has been side-lined to interim positions, has yet to be assigned to a suitable position, and the selection for the P-5 level post of Chief, SISS, remains illegal.

89. The Tribunal notes that the parties were informed by Order No. 22 (NY/2014), dated 30 January 2014, that the closing submissions consists of

a summary of the “the key facts and legal arguments that [the parties] presented during the proceedings”. If a party wants to file any new submission and/or additional new evidence, he/she must, in good faith, file a reasoned request prior to the expiration of the deadline for the submission of closing submissions. Such a request cannot be filed without leave from the Tribunal and should not represent a reason to delay the Tribunal’s deliberations.

90. The Tribunal observes that the case *Survo* UNDT/2011/109, where the contested decision was “the Administration’s attempt to identify the incumbent (Applicant) ‘a suitable post’, which should have been done before the successful candidate assumed the duties on 13 September 2010”, was successfully resolved through mediation thereby resulting in the Tribunal dismissing the Applicant’s application for suspension of action.

91. The Tribunal, after reviewing the Applicant’s submissions, notes that no criticisms, based on art. 10.2 from ST/AI/2006 Rev.1, of the selection decision for the post of Chief, SISS, implemented in September 2010 prior to a suitable position being identified for the Applicant who was the incumbent of the post, were included in his application prior or after the issuance of *Survo* UNDT/2011/109 in response to his application for a suspension of action of 15 April 2011.

92. Based on the principle of equality of arms, these new issues are not to be considered by the Tribunal as part of the appeal against the non-selection decision for the post of Chief, SISS, and/or evidence in the present case, since they were not part of the initial application. No additional ground of appeal and/or evidence can be allowed in a case without all parties being given an opportunity to respond to them. As results from the above, the Tribunal determined pursuant to art. 18 from the Rules of Procedure that the documents filed by the parties were sufficient for it to render a decision on the papers before, without the need for a hearing, with regard to both the part of the application that was found to be not receivable as well as the one found to be receivable.

## **Conclusion**

In the light of the foregoing, the Tribunal DECIDES:

93. The appeals against the persistent refusal to reclassify the Applicant's post at the P-5 level during the period June 2003-July 2009 and his non-selection for the P-5 level post of Chief, SDAS, are dismissed as non-receivable;

94. The Applicant's request for compensation for the difference in salary and benefits between the P-4 level post he encumbered and that of the P-5 level post of Chief, SISS, for the period of June 2003 to the date of selection of another person for that post is remanded to the Administration for a full and fair consideration within ninety days of the date of publication of this judgment;

95. The appeal against the Applicant's non-selection for the P-5 level post of Chief, SISS, is dismissed as unfounded.

*(Signed)*

Judge Alessandra Greceanu

Dated this 11<sup>th</sup> day of December 2014

Entered in the Register on this 11<sup>th</sup> day of December 2014

*(Signed)*

Morten Albert Michelsen, Officer-in Charge, Registrar, New York