



Before: Judge Coral Shaw

Registry: Geneva

Registrar: René M. Vargas M.

ROUCHE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Simon Buettner, UNOG

Stephanie Cochard, UNOG

Introduction

1. On 2 July 2014, the Applicant filed an application with the Geneva Registry of the Tribunal against the decisions not to convoke him for the 2013 Young Professionals Programme (“YPP”) in Administration and in Public Information.
2. The Respondent filed his reply on 4 August 2014, raising receivability issues with respect to the decision not to convoke the Applicant to the YPP in Public Information.

Preliminary Matters

3. The Tribunal decided that this case was suitable for an oral hearing on the merits, and the parties filed a joint statement of agreed facts and witness statements.
4. The Tribunal held that the Applicant’s challenge to his not being convoked to the YPP in Public Information was not receivable as it was not a separate administrative decision (Order No. 50 (GVA/2015) of 5 March 2015). However the Tribunal noted that the facts relating to that issue are relevant to the consequence of the delay in considering the Applicant’s appeal against his eligibility to sit for the YPP in Administration.
5. In line with the decision in *Terragnolo* UNDT/2013/093, the Tribunal also held that as the decision of the Central Examinations Board (“CEB”) on the Applicant’s appeal replaced the initial determination on the Applicant’s eligibility to sit for the YPP 2013 in Administration, that is the decision that is the subject of the present proceedings.

Facts

6. The following facts are taken from the parties’ joint statement of agreed facts and from evidence given at the oral hearing including additional documents concerning the contested decision, which were submitted by the Respondent at the close of the oral hearing.

7. The Applicant currently serves as Human Resources Assistant (G-6), at the Office of the United Nations High Commissioner for Human Rights (“OHCHR”), Geneva. He holds a permanent appointment.

8. In 1997, he obtained a Bachelor of Arts in French with Russian Studies, at Queen Mary and Westfield College, University of London.

9. In 2011, the YPP examination in the Administration job family was advertised. It required at least a first level university degree in a number of fields, including “Linguistics”. The Applicant applied to the advertisement as a G to P candidate.¹ He met the eligibility criteria that year but did not pass the examination.

10. In 2013, a new advertisement for the YPP examination in the Administration job family required at least a first-level university degree in one of several fields of study, but Linguistics was removed as a required field of study. The field of study “Humanities” included “Cultural Studies”.

11. In evidence, Ms. Jansen, Examinations Officer, Examinations and Tests Section (“ETS”), Department of Management, told the Tribunal that in 2013 the CEB discussed in depth what an applicant would have to have studied in order to include his or her study programme under “Cultural Studies”. The CEB concluded that, in contrast to the eligibility requirements of 2011, Applicants who studied languages were not considered to fall within the scope of “Cultural Studies” and therefore, could not be admitted to sit for the YPP examination in the Administration job family. However, these candidates could be admitted in the job family of Public Information for which “Languages” was a specified eligibility criterion.

12. On 8 July 2013, the Applicant applied for the 2013 YPP examination in Administration scheduled for 3 December 2013. In his Professional History Profile (“PHP”), under “Education”, he listed his University degree as “Bachelor’s Degree”. Under “main course of study/field of study/specialization” the Applicant put “other” and under “title in English or French” he added “2ii

¹ Cf. para 2.1 of ST/AI/2012/2 (Young professionals programme).

French with Russian”. Under “[r]esponses to screening questions”, the Applicant answered “yes” to the question “[d]o you hold at least a three-year first level university degree acceptable to the job family for which you are applying?”

13. In his evidence to the Tribunal, the Applicant could not confirm that he had read the job opening for the 2013 YPP in Administration before filling out his PHP, and although he had a transcript of his studies, he did not submit it with the application, or with his request for reconsideration.

14. The Applicant received an acknowledgment of his application by a system-generated email on 8 July 2013.

15. On 23 October 2013, the Applicant inquired by email to ETS/YPP 2013 Secretariat about the status of his application. He received an out-of-office reply.

16. On 4 November 2013, when the Applicant enquired again, ETS responded the same day forwarding to him a letter dated 23 October 2013 that had previously been sent to the Applicant at an incorrect email address.

17. The 23 October 2013 letter informed the Applicant that the CEB had found that he did not fulfil the requirements as specified in the job opening. The reason given was “your degree is not acceptable for the job family for which you have applied”.

18. The letter continued, “you may meet the requirements for [the examination in the job family of] Public Information. If you wish to sit for this job family, kindly let us know within five calendar days”. It also advised that he could appeal the decision not to be convoked for the exam in the field of Administration, within ten calendar days from the date of the letter. It stated, further, that “[i]f you were rejected because of missing information such as a missing performance document, please add/attach this information to your appeal email”.

19. Within 90 minutes of receipt of the rejection letter the Applicant responded:

Please find my belated response to this rejection letter since I didn't receive this email until now.

I am very disappointed with this decision that won't allow me to take the YPP in the area where my experience lies and where I had hoped to continue my UN career. I have 10 years' experience in Administration within the UN Secretariat. In 2011, I was deemed eligible to sit this exam holding the same degree and now I have further experience which I thought would make me more eligible than (sic) previously. I have recently completed the eCornell certificate in Human Resources for supervisors/managers, which I was volunteered to take part in by my supervisor.

I would be very grateful if you could reconsider this decision however if you are not able to do so I would take up the offer of taking part in Public Information although this is not where my expertise lies.

Many thanks for your consideration.

20. On the same day, 4 November 2013, ETS notified the Applicant that the CEB would make a decision by the coming Friday, 8 November 2013, and that they would send him a response as soon as possible.

21. In the absence of a response by 8 November 2013, the Applicant wrote again to ETS on 11 November 2013 asking, "[w]ould you be able to indicate whether the CEB made a decision on my application?"

22. Having still not received a response on 13 November 2013, the Applicant wrote again to ETS, "[p]lease could you tell me if my further request to sit the YPP has been successful? Time is passing and I don't know which exam, if any, I need to prepare for".

23. By letter of 14 November 2013, the Applicant reiterated his request for a definitive response, noting, *inter alia*, the following:

At this stage I am concerned because there are fewer than 3 weeks before the YPP exam and I as yet do not know whether my application is a) still unsuccessful, b) successful for Administration or c) successful for Public Information. In order to have a fair chance of success at this exam, I feel that this lack of clarification in a timely manner will have an adverse effect on my chances even if at the last stage I am considered eligible to sit in one of the two job groups, particularly if it is decided that I am to sit Public Information where I am deemed eligible due to having received a BA in modern languages over 15 years ago. While the memo of 23 October 2013 offered the expectation that I may meet the

requirements for Public Information, the delay in clarifying the situation has decreased this expectation.

24. In his evidence to the Tribunal the Applicant said that this further information might have been more thorough but he was not sure how to phrase it or how to attach his transcript of studies.

25. On 3 December 2013, the day of the written examination, the Applicant sent yet another reminder email to ETS, having still not received a response.

26. On 6 December 2013, the Officer-in-Charge (“OIC”), ETS, responded to the Applicant expressing regret that he had not yet received a response to his appeal from the CEB and stressing that he would look into the matter.

27. Ms. Jansen explained to the Tribunal that as the Applicant’s request for a review was considered to have been sent after the 10-day deadline, it was dealt with after requests that had been received on time.

28. On 10 December 2013, Ms. Jansen submitted the Applicant’s case to Ms. Lane, Co-Chair of the CEB, by an email with the following subject line: “missed case”.

29. Between 10 and 19 December 2013, the CEB deliberated on the review of the Applicant’s appeal by email communications among the seven members of the review panel² rather than by a meeting of the Board. All emails were copied to all CEB members. Ms Lane, Co-Chair of the CEB, told the Tribunal that the usual procedure was to hold meetings in person with some members attending either by video link or phone but that this procedure was adopted for cases that required a quick decision.

30. On 17 December 2013, Ms. Lane forwarded the Applicant’s case by email to each of the other six CEB members³ and copied Ms. Jansen. In her covering message she said: “[u]nfortunately, even though the exam has already taken place,

² The Tribunal notes that at the time, the CEB was not constituted with the eight members required by the ST/AI. As this issue was not addressed at the hearing and in light of other findings in this case, it refrains from considering this as a substantive issue.

³ Mr. AD, Ms. AN, Mr. AP, Ms. CA, Mr. CT and Mr. MG.

the Examinations Unit has found a case that was appealed and missed by them and was therefore not reviewed by the CEB”. She further said that they needed to review it “for legal reasons”. She explained to the Tribunal that the Office of Human Resources Management (“OHRM”) had advised the CEB that even though the request was sent to the CEB after the exam had taken place, it should still be considered in case anyone asked questions.

31. In her email to the CEB members, Ms. Lane noted that the Applicant’s Undergraduate degree was French and Russian, that no transcripts of the studies had been provided, and that the appeal he made was “for job experience”. She concluded that she “[w]ould appreciate [their] thoughts”.

32. According to Ms Lane, in 2013 the CEB would look at any additional information provided by the candidate on appeal, but only asked for transcripts or further information about the candidates’ qualifications if the degree listed by the candidate was not clear as to its content, or the candidate made a claim in their appeal or application on a specialisation that was not apparent in the title. In an effort to make the procedure clearer to candidates, in 2014 the CEB sent unsuccessful candidates a standard letter stating, *inter alia*, “if you think that you fulfil (the Field of Study degree requirement) please submit the relevant documentation”.

33. Following a reminder email from Ms. Lane, the CEB members began a chain of emails copying each other. The first email came from Board member Ms. AN on 18 December 2013. She asked for some clarification from the Administration as the exam had already taken place. Ms. Jansen replied that (if the Applicant were eligible) he would exceptionally be admitted to next year’s exam.

34. Board member Mr. CT shortly after asked “Next year or next cycle? (2 years later when the same group comes)”.

35. On 19 December 2013, the Chair noted that the candidate had a degree in French and Russian and that the CEB had previously “determined that studying a language alone [did] not fall under Cultural Studies and therefore the [Applicant]

[could] not sit the Administration exam”. He further stated that “[t]he fact that [the Applicant] [had] not give[n] [them] additional details about the nature of his studies [made] it impossible—at least for [the Chair]—to change this decision.”

36. By email also on 19 December, copied to the other Board members, Ms. Lane thanked the Chair, and said that so far only he and she had given an opinion, and that she hoped that the others would “chime in”.

37. Board member Ms. AN immediately sent an email in which she stated that they should apply the same criteria to all cases, and agreed “with the above”. Ms. Lane asked her whether she was saying that she agreed with Mr. AP, to which Ms. AN replied that from a fairness point of view, she had to agree.

38. CEB member Mr. MG then emailed all other members: “I will excuse myself from this case, similar to other cases that were previously reviewed by the Board.” He gave no explanation for this.

39. The next CEB member to join in was Mr. AD. He said he agreed with Mr. AP and Ms. AN.

40. On 30 December 2013, the Chair of the CEB, Mr. AP, emailed the OIC, ETS. He wrote, “at least four of us (R (Lane), A, A and I) had agreed to reject the case (i.e. not allow him to sit the Admin exam)”.

41. On the same day, the Applicant was informed that the CEB had rejected his appeal.

42. By email of 31 December 2013, from the OIC, ETS, the Applicant was informed that since his appeal for reconsideration to sit the YPP in Administration had not been submitted on time, he had “missed the chance to sit for Public Information this year, although as a G-to-P applicant [he] could have applied for it along with Administration during the regular application period if [he was] really interested in the job family of Public Information”. He was also informed that he could also have indicated his interest to sit for Public Information without condition immediately after receiving the first rejection letter for Administration.

43. On 30 January 2014, the Applicant filed a request for management evaluation and, by letter dated 29 April 2014, the Management Evaluation Unit informed the Applicant that the Secretary-General had decided to uphold the contested decisions.

44. The Administration released the first group of candidates from the 2013 YPP for placement on 1 June 2014. The Applicant filed the present application on 2 July 2014.

45. Ms. Jansen told the Tribunal that the fields of study relevant to eligibility to sit the examinations are determined by substantive departments. In 2013, it was determined that new staff members who had studied “Cultural Studies” might be needed in the field of Administration, but not those who had studied languages.

46. She further said that it is extremely difficult to pass a competitive process like the YPP examination, where only the top 40 candidates out of 40,000 candidates are invited to sit the exam. If one passes the exam, there are a limited number of places in the roster that are determined by probable future vacancies. Selection from the roster depends on a match between a candidate’s profile and the position to be filled.

47. The Applicant told the Tribunal that he experienced great frustration and stress associated with the unresponsiveness of the CEB, and the uncertainty about the job family test for which he would need to prepare, and that this intensified as the date approached and his emails remained unanswered. He said he spent most evenings checking his emails into the night to see if anything had been received from OHRM. The effect of remaining at the same grade level and duty station for another two years, following 15 years of working in Geneva, was also demoralizing. The Applicant further stated that he was now at the highest step in his grade, and at the highest grade for a Human Resources Assistant in his Department; therefore, with the current “barriers” to entry into the Professional category in the UN secretariat, there is very little chance of job progression in Geneva, and he would most likely remain at his current grade and step until retirement in 2036.

48. The Applicant stated that “[his] frustration [from] the Administration’s decision [was] greater because [his] appeal [had been] perceived as ‘conditional’ but [had been] made in response to the CEB’s conditional offer”. He said that in his work as a Human Resources Assistant he had never seen any entitlement refused or not acted upon simply because of the semantics of the request.

Issues

49. The Tribunal considers that based on the parties submissions, the issues in the case are:

- a. Did the CEB, on appeal, follow the correct procedure in coming to the conclusion not to convoke the Applicant to the YPP 2013 in Administration?
- b. Did the CEB correctly exercise its discretion in making that determination?
- c. If the Tribunal holds that the CEB determination was illegal, what were the consequences to the Applicant and, if applicable, what remedies are appropriate?

50. Additionally, the Tribunal decided to address the issue of whether the CEB reached its quorum when it decided on the Applicant’s request for review of his eligibility, and received additional submissions from the parties on this issue.

Parties’ submissions

51. The Applicant’s principal contentions are:

- a. He is contesting his express exclusion from the YPP 2013 in Administration, and his exclusion from the exam in Public Information, prompted by the Administration’s failure to reply in a timely manner to his queries with respect to the convocation for that exam;
- b. In failing to respond to a total of seven unambiguous messages he sent to it with respect to the exam, the Administration violated his procedural

rights; his communications remained unanswered, although he had been given an express written assurance that he would get a decision from the CEB almost a month before the date of the exam. Sec. 4.7 of ST/AI/2012/2 (Young professionals programme) expressly provides that upon receipt of an appeal, the CEB or OHRM have 10 calendar days to respond; the violation of his procedural rights was acknowledged by the MEU and OHRM;

c. An exam cannot be sat after its date has passed (i.e. 3 December 2013); therefore, the CEB's decision is irreversible. The CEB and OHRM knew that their failure to respond in time definitely excluded him from progressing to the Professional category in 2014;

d. The CEB did not have the required quorum under the terms of the applicable Administrative Instruction; the conduct of meetings by email entails a number of legal risks, and there is no evidence that any of the "non-voting" members deliberated collectively or considered the file; further, no timing was given for the vote and the record does not establish that any of the non-voting members intended to cast an "abstention" vote; the lack of quorum renders the proceedings a nullity;

e. He was found eligible and sat the YPP exam in Administration in 2011; the eligibility requirements of the 2011 and those of the 2013 exam in Administration were very similar; the screening questions explicitly asked whether a candidate had been convoked to sit for previous G to P examinations in the same job family, which he had; he also answered affirmatively to the question of whether he holds at least a three-year first level university degree acceptable for the job family for which he was applying;

f. The Applicant had difficulties determining where to indicate his degree in his PHP for the 2013 YPP in Administration, and ETS was aware that candidates tend to complete their PHPs imperfectly;

g. The CEB/ETS admitted that when making an eligibility determination they look at the substance of the degree, and if a significant part of the courses (“75%”) relate to the required field, it is considered to be relevant. The Applicant disposes of a Bachelor of Arts in French, with Russian Studies; ten out of the fifteen courses he took in the framework of these studies relate to foreign culture, and are thus presumably acceptable as “Cultural studies” for the UN Administration; the remaining courses were in UN languages which were considered an “advantage” and “desirable” in the relevant job opening;

h. Other candidates who had marked “other/other” in at least one of their qualifications in 2013 were asked for transcripts by ETS; the 16 candidates who were required to provide their transcripts were all ultimately convoked to sit the exam;

i. Further, the Administration’s dealing with another appeal in 2014, which was reviewed in time and in which the candidate was explicitly invited to submit relevant document and ultimately convoked to the exam, constitutes evidence of arbitrariness, irrationality and bias in the Applicant’s case;

j. Nothing indicates that OHRM, in its initial review, or the CEB, on its late consideration of his appeal, took any of the above into account; as the Appeals Tribunal held, where no reasons are given for a decision, the decision can be presumed illegal (*Obdeijn* 2012-UNAT-201);

k. The fact that the CEB members who reviewed the appeal were the same as those who had originally reviewed the applications, and the fact that his case was labelled as a “missed case”, which had to be reviewed for “legal reasons” although the exam had already passed, shows that the CEB acted in haste/with urgency; all of the above indicates bias and that his case was not given serious consideration;

l. Discretionary decisions, including the content of vacancy announcements, may be reviewed by the Tribunal if they are arbitrary,

biased or irrational; the CEB/ETS determination—without approval by the Central Review Board as is the case for normal VAs—of the relevant educational requirements for the YPP in Administration was irrational and arbitrary: in 2011, there was no restriction on which humanities studies would suffice; the restriction of academic qualifications within the field of humanities in 2013 was arbitrary; to find e.g. a candidate with a degree in “Philosophy”, “Ethics”, “Psychology” or “Cultural studies” more qualified to work e.g. in human resources or procurement than a candidate with a degree in “Linguistics” is unreasonable;

m. According to the *Inspira Manual for Applicants*, education qualifications should match those of the Generic Job Description (GJD), which are naturally general; the relevant GJD for Associate Administrative Officer requires a degree in one of a few fields or “a related field”; similarly, the job description for the YPP in 2011 provided for broad fields, and the Applicant was found eligible at that time; the manual further provides that any departure from such general requirements has to be justified;

n. In 2014, the exam was not open to the Applicant due to his nationality; as such, by the fault of the Administration, he has been deprived of any opportunity to advance to the professional category in 2014 and 2015; further, since he was not convoked to the exam in Administration pending review of the legality of the non-convocation, he could not prove that he had an excellent chance to succeed had he been given the opportunity to sit the exam;

o. The foregoing led to a fundamental violation of his rights, warranting compensation (*Asariotis* 2013-UNAT-309), both with respect to the exam in Administration and Public Information;

- p. He requests:
- i. payment of the difference in salary between his current level and the P-2 level, from July 2014 to July 2016, calculated at USD3.400 in total;
 - ii. one month net base salary as compensation for moral injury (stress, anxiety directly connected to procedural breaches), for grave breaches of staff rights and emotional distress, as well as lack of career progression for two more years;
 - iii. pre-judgment interest upon the foregoing pecuniary damages, with interest at the US Prime Rate, accruing from the date each salary payment would have been made, compounded semi-annually; and
 - iv. post-judgment interest upon all of the foregoing amounts accruing at US Prime Rate from the date of judgment, and US Prime Rate plus 5%, including through any period of unsuccessful appeal, compounded semi-annually.

52. The Respondent's principal contentions are:

- a. The quorum required under ST/AI/2012/2/Rev. 1 (Young professionals programme) was met; the meeting was called by the Co-Chair, CEB (Ms. Lane) by email of 10 December 2013, and the relevant message was sent to all remaining six CEB members; all existing seven member were thus part of the meeting;
- b. Although CEB member Mr. CT did not cast an express vote, he did participate in the meeting by his email of 18 December 2013 enquiring what the impact of a decision to grant the appeal would be; member Mr. MG excused himself from voting, but did not recuse himself from participating at the meeting. His email of 19 December 2013 has to be understood as an "intention to abstain from voting"; the remaining four members clearly expressed by email their vote to reject the appeal; as such, the quorum of at

least five members was met, in that four members had voted for rejection and at least one member abstained;

c. Under sec. 3.3 of ST/AI/2012/2/Rev. 1 (Young professionals programme), staff members “may apply to take the examination in a maximum of two job families in a given year”; hence, the Applicant was invited to accept the Administration’s offer to sit for the YPP in Public Information, regardless of the determination of his eligibility to sit for Administration; had he accepted, he would have been able to take the general paper of the exam and, had his appeal been successful, he could have sat the specialised paper for both the exam in Administration and Public Information, or only the former if he had so decided; however, he decided not to accept the unconditional offer to sit for YPP in Public Information, independently from the outcome of his appeal on Administration;

d. The Secretary-General disposes of broad discretion in promotion matters, and it does not fall upon the Tribunal to substitute its judgment to that of the Secretary-General; with respect to recruitment exercises, the Tribunal is limited to examine “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration” (*Majbri* 2012-UNAT-200; *Abbassi* 2011-UNAT-110); the Appeals Tribunal further has clarified that “there is always a presumption that official acts have been regularly performed. This is called the presumption of regularity” (*Rolland* 2011-UNAT-122);

e. The Respondent made a minimal showing that the applicable procedure was adhered to, and the Applicant failed to show any procedural error or bias towards him when he was found ineligible to sit for the YPP in Administration; his application to sit for the exam was given full and fair consideration, and proper reasons were given on why he was not convoked for it; in fact, he was never eligible to sit for the 2013 YPP in Administration. Hence, the contested decision, as far as it concerns the

regrettable delays in the consideration of the Applicant's appeal by the CEB, did not impact on his employment or have any other consequences on the Applicant;

f. Candidates like the Applicant who only hold a degree in languages were not convoked to the YPP in Administration, but were offered to sit in Public Administration; the CEB or ETS did not inquire further in clear cut cases of fields of study; the Applicant did not argue that his studies were in the field of cultural studies and did not even use the words "cultural studies" either in his application, or in his appeal;

g. On the basis of the information available at the time, the CEB conclusion that the Applicant was not eligible was not manifestly unreasonable and should be maintained; it fell in the Administration's discretion to determine that a Bachelor in French and Russian studies, which appeared to focus on languages and linguistics, did not fall under "Cultural Studies" as provided for in the job opening for the YPP 2013 in Administration;

h. The job openings for the YPP in Administration in 2011 and 2013 were different: particularly, the field of "linguistics", which had been included under "Social Sciences" in the YPP in Administration in 2011, was no longer included in the 2013 job opening. Work experience is not an eligibility criterion under the YPP; hence, the additional experience acquired by the Applicant since 2011 was not relevant, and could not serve to override the educational requirements;

i. It is the prerogative of the Secretary-General to determine the organizational needs of the Organization, which change over time; hence, job descriptions are adjusted according to such changing needs. Further, eligibility does not necessarily imply suitability, and the Applicant failed the exam in 2011;

j. The educational requirements of the YPP 2013 job opening in Administration were properly applied to the Applicant, and the decision to find him ineligible was lawful;

k. The Administration's inadvertence in sending to the Applicant the memorandum of 23 October 2013 to an incorrect email address, and later in transmitting his appeal to the CEB, which reached the CEB only on 10 December 2013, had no detrimental effect on the Applicant; in fact, his appeal was technically late hence should not have been considered; it was nevertheless received and reviewed by the CEB;

l. The CEB considered the case on the merits, without prejudice to the fact that the date of the exam had already passed; the CEB decision was taken on 19 December 2013, within nine calendar days of receipt of the request, namely within the time-limits provided for in the relevant administrative instruction; however, it was communicated to the OIC, ETS, and to the Applicant only on 30 December 2013, that is, within 20 calendar days from the receipt of the appeal by the CEB; the relevant rules provide that the CEB will "normally" respond within ten calendar days. The additional delay was justified by exceptional circumstances, such as the absence of the CEB members. A longer response period does not lead to the invalidity of the CEB decision which merely confirmed the initial determination that the Applicant was ineligible. He did not lose any opportunity to take the exam; the decision not to convoke the Applicant to the 2013 YPP in Administration was lawful;

m. Since the relevant rules explicitly provide for the possibility for a staff member to take the exam in two job families, said decision did not violate the Applicant's rights and "any harm caused by his failure to participate in the YPP for Public Information was self-created";

n. None of the Applicant's rights were violated;

o. On remedies, compensation can only be granted if harm was suffered. The Applicant has to prove that he suffered loss or injury as a consequence

of a breach of contract. The Applicant did not prove that had he been convoked for the YPP 2013 in Administration, or that if he had participated in that for Public Information, he would have been successful in the relevant examinations and/or that he would have been placed (hence promoted) to a P post upon his inclusion on the roster; hence, he did not suffer any economic harm;

p. The Appeals Tribunal held in *Farr* 2013-UNAT-350 that in ordering that the Applicant's name be placed on the roster, the Dispute Tribunal exceeded its competence, "because the legal consequence of the annulment of the selection procedure is restricted to placing the staff member in the same position she would have been in if the illegality had not occurred";

q. The Appeals Tribunal ruled in *Wu* 2010-UNAT-042 that "not every violation of due process rights will necessarily lead to an award of compensation";

r. The Respondent recalls Judgment *Mirkovic* 2013-UNAT-290 in which the Appeals Tribunal found that the impugned decision had no consequence for an Applicant who was never eligible to sit for an exam; hence, any hurt she may have experienced did not amount to the level of compensable damages;

s. The Tribunal held in *Appleton* UNDT/2012/125 that an Applicant has "a legal obligation to take steps to mitigate his possible losses"; since the Applicant had the opportunity to take the YPP in Public Information, he cannot be compensated for the failure to take that exam;

t. No compensation or any other relief should be granted to the Applicant;

u. The application should be dismissed in its entirety. However, should the Tribunal consider that moral damages are warranted for a breach of duty of care towards the Applicant, they should not exceed the amount of USD1,000.

Considerations

Legal provisions

53. ST/SGB/2011/10 (Young professionals programme), ST/AI/2012/2 (Young professionals programme) and its revised version ST/AI/2012/2/Rev.1 are administrative instructions concerning the YPP that set forth the procedures for the competitive examinations for recruitment at the P-1 and P-2 levels.

54. ST/AI/2012/2 was in force until 6 November 2013 and governed the initial decision of 23 October 2013. ST/AI/2012/2/Rev.1 (“the ST/AI”), introduced amendments that do not affect the present case. It came into force on 7 November 2013, and is relevant to the contested CEB decision dated 19 December 2013.⁴

55. The CEB has no formal rules of procedure beyond these administrative issuances.

56. The ST/AI provides that up to 10 per cent of the positions available under the programme in a given calendar year can be filled by staff members from the General Service who successfully pass the YPP examinations.

57. Section 2 of the ST/AI sets out the requirements for the applicants to be eligible to sit the YPP examination. Applicants who are staff members must have a specific number of years of service, hold a UN appointment, have a minimum performance rating, be proficient in French or English and, relevant to this case, “meet the minimum educational criterion set out in section 2.7 of the present instruction”.

58. Section 2.7 of the ST/AI states:

Unless otherwise specified, the minimum educational eligibility criterion is a first-level three-year university degree (Bachelor's degree or its equivalent) conferred on the applicant and recognized by the United Nations, and acceptable for the job family for which the applicant has applied. University degrees accepted for specific job families shall be provided in the annual announcement of the

⁴ All references to specific sections of “the ST/AI” here below will be to ST/AI/2012/2/Rev.1.

examinations through the United Nations Intranet (iSeek) and the United Nations Careers portal.

59. Section 3 of the ST/AI requires candidates to complete the profile and application section on the UN Careers portal, and to submit all required documentation by the applicable deadline.

60. The CEB shall determine the eligibility of staff members to take the exam.

61. Section 3.3 of the ST/AI provides that eligible staff members who apply as “G to P” candidates “may apply to take the examination in a maximum of two job families in a given year”.

62. Section 4.6 of the ST/AI provides that staff members who have applied but have been found to be ineligible shall be informed of the reasons for the determination, and may submit a request for review of the eligibility determination by the CEB. The request for review must be received within 10 calendar days of the receipt of the determination. The CEB will “normally” respond within 10 calendar days of the request (sec. 4.7).

63. Annex 1 to the ST/AI specifies, at paragraph 1, that the CEB is composed of eight members appointed by the Secretary-General. It comprises a Chair and a Co-Chair selected from among staff serving at Headquarters. Three members are to be nominated by staff representatives. One of these is to be from a duty station away from Headquarters. At least three members are nominated by the Assistant Secretary-General for Human Resources Management, one of who is to be from a third duty station.

64. The Annex further provides that “[d]ecisions by the Board shall require a quorum of five members”. The Board shall have a non-voting *ex officio* member, and there are to be alternates for all positions except for the Chair and Co-Chair. The CEB is responsible to determine the eligibility of staff members applying to sit for the examination, and to respond to their requests for review with respect to eligibility determination.

Issue one: Did the CEB on appeal follow the correct procedure in coming to the conclusion not to convoke the Applicant to the YPP in Administration?

65. There are several aspects to this issue commencing with the basic requirement of a quorum.

66. A quorum is generally the minimum number of members of an entity authorised to cast a vote, and who must be present at a meeting to lawfully conduct business in the name of the entity. In the absence of a specific provision in this regard, the minimum quorum is 50% of its members. Voting members may vote in favour, against or abstain. Entities may alter the definition of a quorum to suit their particular purposes by specifying the nature and number of a quorum in any particular case.

67. It is obligatory for the Chair of an entity to ensure that the decision is taken by at least the required quorum in order for it to be lawful.

68. In the case of the CEB, the definition of quorum in Annex 1 to the ST/AI is different from that general definition in two respects: the number of voting members required to make a quorum, and their involvement in the process.

69. First, participation by five out of the statutory eight CEB members exceeds 50% of the members.

70. Second, the ST/AI does not stipulate the method by which the Board should reach a decision, but it can be inferred from the reference to the non-voting *ex officio* representative that it shall be by vote.

71. The first question is whether the mere inclusion of the voting members of the CEB in the email chain on 18 December 2013 was sufficient to meet the quorum required by the ST/AI, as submitted by the Respondent, or whether five members had to participate in the voting. This relates to the interpretation of para. 1 of Annex 1 to the ST/AI.

72. There is no express provision in the ST/AI for decisions to be made by email exchange, nor is it excluded. In principle, there is no reason why this

method should not be adopted in place of a meeting of members in person or by phone or videoconference. However, before a decision is made in this manner, it is incumbent on the Board to take particular care to ensure that there is clarity about the mode of decision making and certainty about the proper constitution of the quorum required by the ST/AI.

73. Para. 1 of Annex 1 refers to “**decisions** taken by the Board” which “**shall** require a quorum of [five] members” (emphasis added). These clear and unambiguous words impose a mandatory obligation on the Board to ensure that its decisions are taken by a quorum of five members. This means five members who participate in a decision by either casting a vote or abstaining. By implication, members who do not participate in the decision taken by the Board cannot be included in the quorum.

74. This interpretation is consistent with the rest of the first part of para. 1 of the Annex. This paragraph ensures diversity in the composition of the CEB by requiring equal representation from staff and management along with a non-voting *ex officio* member. Geographical distribution is met by requiring at least one staff and one management representative be from different duty stations away from headquarters. In that context, the active participation in the decision by at least five members is necessary to ensure the retention of that diversity.

75. Based on the wording of para. 1 of Annex 1 to the ST/AI, the Tribunal holds that the quorum of the CEB is met when five members actively take a decision.

76. In this case, four members of the CEB unequivocally participated in the decision concerning the Applicant. Of the remaining three members, one did not respond at all to the exchanges. Board member Mr. CT asked a question on 18 December 2013, but did not vote, abstain or give an opinion on the merits of the case. Ms. Lane confirmed this on 19 December 2013, when she noted that at that stage only her and the Chair had expressed an opinion.

77. Board member Mr. MG excused himself from the case. The Tribunal considers that in doing so he did not abstain. He removed himself from the

decision making process without expressing an opinion on the merits or making a decision either by voting or abstaining from the vote.

78. The Chair of the CEB subsequently advised ETS that at least four Board members had agreed to reject the case. He named those members. They did not include Mr. MG. The Tribunal finds as a fact that only four members of the Board made any decision at all on the Applicant's case.

79. The Tribunal concludes that the mandatory requirement of a quorum of five CEB members was not fulfilled as neither Mr. CT nor Mr. MG participated in the decision about the Applicant's appeal. In the absence of a quorum, the decision is null and void.

80. The Tribunal also accepts the Applicant's contention that the decision is a nullity because it was knowingly taken by the CEB after the exam date had passed. The Respondent's later justification was that if the Applicant, upon appeal, were found to be eligible, he could be convoked to an exam within the next two years, should one be available. The Tribunal does not accept this contention. Once the date of the examination had passed he could no longer sit the examination in 2013 and the review by the CEB, which took place after the examination date had passed, was of no effect whatever the result. In view of the foregoing, the Tribunal finds that the Applicant was unlawfully denied his right to appeal under sec. 4.6 of the ST/AI.

81. Notwithstanding the finding that the decision was a nullity, it is necessary to canvass the other issues raised in the case as they have a bearing on the question of remedies.

82. The ST/AI requires the CEB to review its own decisions. This is a matter of policy and is not reviewable by the Tribunal. However, given that this policy creates a system that has the potential for apparent bias, the normal expectation that the CEB will comply with the procedural rules in the ST/AI as well as with basic requirements of due process is especially important.

83. The evidence established a number of errors in processing the Applicant's application to be convoked for the 2013 YPP examination in Administration. These began with the clerical error of sending the initial decision to the wrong email address. The Administration failed to respond to numerous and increasingly urgent requests by the Applicant for information about the outcome of his case. This was explained by witnesses for the Respondent as a common problem given the thousands of applications to be processed.

84. Although the CEB may have reviewed the case within 10 days of receiving the request from the secretariat, it responded to the Applicant's request well outside the normal 10-day timeframe in breach of sec. 4.7 of the ST/AI.

85. The reason given to the Tribunal was that as the Applicant's appeal had been made "out of time" it was only examined once the "timely" requests had been dealt with.

86. It is neither factually nor legally correct that the Applicant's request was made out of time. The ST/AI allows requests to be made within 10 calendar days of the receipt of the determination. The Applicant sent his request a mere 90 minutes after receiving the determination on 4 November 2013.

87. This error meant that the Applicant's request for review was incorrectly treated as if it had been made out of time. It took the secretariat over a month to review and submit it to the CEB for consideration, and a further 20 days for the CEB to communicate its decision.

88. This is not just an inconvenient delay that caused stress and frustration to the Applicant but, being weeks outside the normal timeframes contemplated by the ST/AI, was a substantive breach of the deadline set for the CEB to review cases.

89. These delays resulted not only in the meaningless consideration of eligibility for an examination which had already been held, but also in the loss of opportunity for the Applicant to be convoked for the Public Information examination.

90. The Respondent submitted that the Applicant was responsible for the loss of opportunity to sit the Public Information examination. The Tribunal rejects this submission based on the evidence.

91. In his first communication with ETS, dated 4 November 2013, on the subject of the Public Information examination, the Applicant made it clear that he was awaiting the reconsideration of the decision about the YPP in Administration before taking up the offer to take part in Public Information. In the second of two requests for information on the progress of his review, the Applicant stated: “[w]hile the memo of 23 October 2013 offered the expectation that [he] may meet the requirements for Public Information, the delay in clarifying the situation has decreased this expectation”.

92. If the CEB had considered the review within the 10 days required by the ST/AI, or within 4 days by 8 November 2013, as promised by the Administration, the Applicant would have been able to make a timely application for the YPP in Public Information. He lost this opportunity because of the delays.

93. The Applicant, who had been convoked to the examination in Administration in 2011, and who stressed that this was where his centre of expertise lied, had not contemplated applying for the Public Information exam until it was suggested by the CEB. The Tribunal finds that in view of the various communications reflected above, the Applicant had legitimate reasons to wait for the outcome of the review of his appeal to sit the exam in Administration before committing himself to the Public Information examination. These reasons included the express written commitment to provide him with an answer to his request for review in four days (i.e. by 8 November 2013), and the CEB obligation to complete its review within 10 days.

94. Although the Tribunal considers that there was no separate administrative decision relating to the Applicant not being convoked for the 2013 YPP examination in Public Information,⁵ the fact that the Applicant did not sit that examination, although he was eligible, was a direct consequence of the

⁵ Cf. Order No. 50 (GVA/2015) of 5 March 2015

Administration's failure to timely respond to his appeal on Administration. This was explicitly accepted by ETS; indeed, when it wrote to the Applicant on 31 December 2013, it stated that since his appeal for reconsideration to sit for Administration had not been submitted on time, he had missed the chance to sit for the 2013 examination in Public Information.

Issues two and three: Did the CEB correctly exercise its discretion when deciding that the Applicant was not eligible for the Administration exam?

95. The Tribunal is limited to reviewing the decision of the CEB against the applicable eligibility criteria, and cannot substitute its assessment for that of the Administration with respect to the determination of the academic degrees it considers relevant for a certain job category, at any point in time, unless the criteria set are manifestly irrational or irrelevant, for example completely unrelated to the job category.

96. The evidence established that the criteria were set by the substantive departments which could ultimately employ those who were successful in the examination. Contrary to the submissions on behalf of the Applicant, the Tribunal finds that although they were not the only possible criteria or that another body acting properly could have devised different criteria, those applied by the CEB were rational and logical. The exclusion of the degree in languages from the wider category of Cultural Studies was, for example, explained by the fact that a language degree was specifically required to be eligible for the YPP examination in Public Information.

97. Further, while other candidates for the 2013 YPP in Administration were requested to provide additional information with respect to their education, the Applicant's PHP—unlike that of those candidates—did not contain any ambiguity in this respect. Although under "Education" "main course" he had stated "other" on his PHP, he clearly stated that he had a Bachelor's degree in "2ii French and Russian". The fact that he had answered "yes" to the question whether he had been convoked to sit for previous G to P examinations in the same job family did not in itself create any ambiguity either, since the educational requirements for a

job family are not systematically the same and had, as a matter of fact, been changed for the YPP 2013 in Administration.

98. In addition, at no stage of the process, neither upon his initial application for the 2013 YPP in Administration, nor upon his appeal to the CEB, did the Applicant raise any argument that his degree was one in Cultural Studies. In his letter to the CEB he referred to his qualification in “modern languages”.

99. The Tribunal is therefore satisfied that there was no reason for the CEB to request additional information in the Applicant’s case, and that it could legitimately classify the Applicant’s degree as a language degree rather than under Cultural Studies.

100. In addition, in the absence of a legal requirement in this respect under the applicable rules at the time, the fact that the practice with respect to requesting additional supporting documents was changed in 2014, as a matter of best practice, is irrelevant for the case at hand.

101. On the merits of his request for review, although the Applicant lost the chance for a proper review of the decision on his eligibility to sit the 2013 YPP examination in Administration, the Tribunal accepts the Respondent’s submissions that even if the decision had been lawful, the Applicant’s chances of success hence of material gain were very low.

102. On the evidence presented to the CEB by the Applicant upon his appeal, which he admitted was not thorough, the Tribunal finds it unlikely that the outcome of the review would have been different had the CEB been in possession of additional information, such as the one gathered during the present proceedings.

103. The Applicant presented a degree that, on the face of it, was a language degree, and in his letter requesting a review he did not refer to the Cultural elements, that he now alleges were part of the degree, but rather to his additional work experience. On evidence, he further admitted that he had not even looked at the VA for the 2013 YPP in Administration. Hence, he had not noted that the

educational requirements were different from those in 2011, which explains why he merely referred to the fact that he had been found eligible “with the same degree” in 2011.

104. As a result of its examination of the above-mentioned issues, the Tribunal holds that:

- a. The CEB decision on the Applicant’s appeal was null and void for want of a quorum, and because it was made after the event from which it arose;
- b. On the merits the Applicant was most unlikely to have been found eligible for the examination in Administration; and
- c. The consequence of the delay and other errors by the CEB was that the Applicant lost the opportunity to be convoked for the examination in Public Information for which he was most probably eligible.

Remedies

Did the Applicant suffer any compensable harm?

105. The Appeals Tribunal has ruled that if the process for selection for a position or for an examination is found to have been unlawful, this may give rise to material damages based on loss of chance (*Marsh* 2012-UNAT-205; *Terragnolo* 2014-UNAT-448).

106. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal accepted the submission of the Secretary-General that, in selection cases, a person loses an opportunity to be considered for a position when he or she is unlawfully determined to be ineligible for consideration, the selection process proceeds without that person, and it results in the selection of another candidate.

107. However where an Applicant was found to never have been eligible and, hence, had no chance of ever being able to sit for the relevant exam, the Appeals Tribunal found that the late response to an appeal did not impact on the

Applicant's employment, nor did it deprive him/her of any opportunity. In that case compensation was denied (*Mirkovic* 2013-UNAT-290).

108. In light of the evidence in this case, the Tribunal finds that there is no evidence that the Applicant suffered compensable material damages from the nullified decision as far as it relates to him not having been convoked to the 2013 YPP in Administration upon appeal.

109. However the Tribunal is satisfied that there were other breaches of the ST/AI and due process. The question is whether these caused him measurable material harm.

110. The Tribunal notes that as the Applicant held a degree that the CEB had determined to be a language degree, it is not contested that he would have been eligible to sit the Public Information examination. The procedural errors in processing the Applicant's request for review of his eligibility to sit for the 2013 YPP in Administration was the main cause of his loss of chance to sit for the 2013 Public Information examination.

111. In *Terragnolo* UNDT/2013/093, the UNDT held that “[a] lost chance to get on the list of successful candidates and ultimately to be selected and appointed to a P-2 post under the YPP, and as such to considerably improve one's status within the Organization, may give rise to material damages warranting moderate compensation”. This decision was affirmed on appeal in *Terragnolo* 2014-UNAT-448.

112. The Appeals Tribunal stated in *Hastings* 2011-UNAT-109 that “[w]hile not subject to exact probabilities, [assessments for loss of chance] are sometimes necessary in cases where a staff member is unlawfully denied a position—and in many cases alternative means of calculating damages may be available”.

113. The evidence establishes that the Applicant lost a chance to commence his process for promotion by sitting the 2013 YPP examination in Public Information. Had he passed the exam in Public Information, other conditions outside of his control needed to be met to be selected to a Professional post. The Applicant also

submitted, less convincingly, that having unsuccessfully sat a previous examination (in Administration) he was now better prepared.

114. The most compelling evidence relevant to the assessment of loss of opportunity is the fact that the Applicant will have to wait at least another two years before he can submit a new application; however, it is impossible to calculate on any rational basis what material loss would be sustained by the Applicant as a result of this.

115. In view of the foregoing, the Tribunal considers that the Applicant is not entitled to any compensation for material loss.

116. In relation to moral damages the leading case is *Asariotis* 2013-UNAT-309 where it is stated that:

To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee (footnote omitted).

117. This case concerns a fundamental breach of procedure by the Administration. First, was an act of negligence in sending a notification to a wrong email address. While not a fundamental breach, this was compounded by the Administration wrongly treating the Applicant's request for review as out of time without taking into account its own error. The Applicant was then promised a timeframe for reply that never materialised. His reliance on that promise resulted in him losing the chance to sit for an YPP examination for which he was eligible. In its attempt to make the process "legal", the Administration then adopted an

unlawful process of decision-making resulting in a nullity. All of this adds up to a fundamental breakdown in prescribed procedures.

118. The evidence of the Applicant's moral harm caused by these breaches is his frustration and stress, as demonstrated in his numerous emails requesting information and updates from the Administration. It was reiterated in his sworn testimony before the Tribunal.

119. On the basis of this evidence the Tribunal awards the Applicant the sum of USD2,000 as compensation for moral damages.

Conclusion

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

- a. The decision not to convoke the Applicant to the 2013 YPP in Administration, upon appeal, is null and void;
- b. The Respondent shall pay the Applicant USD2,000 for his moral damage resulting from the nullified decision;
- c. The above shall be paid within 60 day from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment;
- d. Any other pleas are rejected.

(Signed)

Judge Coral Shaw

Dated this 28th day of May 2015

Case No. UNDT/GVA/2014/053

Judgment No. UNDT/2015/044

Entered in the Register on this 28th day of May 2015

(Signed)

René M. Vargas M., Registrar, Geneva