UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/157
Judgment No.: UNDT/2016/055
Date: 6 May 2016
Original: English

Before: Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

DE LA VARGA FITO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Elizabeth Brown, UNHCR
Jan Schrankel, UNHCR

Introduction

1. By application filed on 28 August 2015, the Applicant, a staff member of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision by the High Commissioner not to promote her from the P-3 to the P-4 level during the 2013 Promotions Session.

2. It is noted that the facts relating to procedural requirements and grounds of appeal in this matter are, in large part, very similar to those in Case No. UNDT/GVA/2015/165 (Rodriguez-Viquez), which was heard jointly with the present case. Parts of Judgment *Rodriguez-Viquez* UNDT/2016/030, delivered on 14 April 2016, are repeated in this judgment.

Facts

3. The Applicant joined UNHCR in 2006 under the Junior Professional Officer ("JPO") scheme serving in San Jose, Costa Rica, as Associate Programme Officer (P-2). During her JPO assignment, she went on two missions of two months each to Goma, DRC, and Yaoundé, Cameroon. In December 2008, she was assigned to Iriba, Chad, as Associate Field Officer (Protection) at the P-2 level.

4. The Applicant was promoted to the P-3 level effective November 2009 and reassigned in August 2010 to Trincomalee, Sri Lanka, still as Associate Field Officer (Protection). In February 2012 and March 2013, she was re-assigned as Protection Officer (P-3) in Dadaad, Kenya, and Peshawar, Pakistan, respectively. Following a six-month temporary assignment as Human Resources ("HR") Officer (P-3) in Geneva, she was re-assigned to Yaoundé, Cameroon, as Programme Officer (P-3) on 15 June 2015.

5. On 5 February 2014, the High Commissioner promulgated the Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2) ("Promotions Policy"). In essence, the Promotions Policy provides for the High Commissioner to make available a number of promotion slots to the P-4, P-5 and D-1 levels, and to award these to the most meritorious

staff members based on recommendations made by a panel composed of senior UNHCR staff members, known as the Promotions Panel ("Panel") insofar as promotions to the P-4 level are concerned, which follows three rounds of evaluations of eligible staff members.

6. On 4 April 2014, UNHCR's Division of Human Resources Management ("DHRM") informed the Applicant that she was eligible to be considered for promotion to the P-4 level during the 2013 Promotions Session.

7. On 2 May 2014, the DHRM informed the Applicant that she had met the requirements to advance from the First Round to the Second Round of the Promotions Procedure.

8. From 21 July to 25 July 2014, the eight Panel members gathered in Geneva to conduct their individual comparative assessment of the candidates who had advanced to the Second Round. The individual rankings given by each Panel member were then aggregated by the DHRM, and consolidated lists of assessment rankings were compiled, separately, for female and male candidates.

9. The Panel members gave the Applicant the following "rankings" among the female candidates for promotion to the P-4 level: 111, 118, 119, 121, 125, 125, 131 and 131. The DHRM calculated that the arithmetic mean of the eight individual rankings was 122.63 and established that the Applicant received a consolidated ranking of 142 out of 187 female candidates for promotion to the P-4 level. As her consolidated comparative ranking did not place her among the top 120 female candidates, the Applicant's candidacy did not advance to the Third Round.

10. On 4 July 2014, namely towards the end of the Second Round comparative assessment, the High Commissioner announced that 240 slots would be available for promotions to the P-4, P-5 and D-1 levels during the 2013 Promotions Session and, in particular, that 158 slots would be available for promotion from the P-3 to the P-4 level, which, he decided, would be equally shared between female and male staff members.

11. By memorandum dated 17 October 2014 and distributed to all the UNHCR staff members via email on 20 October 2014, the High Commissioner published the list of promoted staff members. The Applicant was not among them.

12. By email of 28 October 2014, the Applicant requested the DHRM to provide her "all the necessary documentation to submit the recourse including documentation submitted to and considered by the Panel".

13. On 29 October 2014, the DHRM provided the Applicant with a copy of her fact sheet as reviewed by the Panel. The DHRM also reiterated the steps of the promotions process, as described in the Promotions Policy, and stated that "the Second Round individual evaluations by the eight [Panel] Members … resulted in an overall ranking that placed [her] outside the group of candidates who proceeded to the Third Round … [which] corresponded to 150% of the number of slots allocated for promotions to the P-4 level".

14. On 25 November 2014, the Applicant submitted a recourse application.

15. On 22-23 January 2015, the Panel conducted the recourse session.

16. By memorandum dated 2 March 2015 and distributed to all the UNHCR staff members via email on 3 March 2015, the High Commissioner announced his decisions following the recourse session. The Applicant was not among the candidates promoted upon recourse.

17. By email of 4 March 2015, the Applicant requested the DHRM to provide her with the minutes of the recourse session. She received the minutes relating to the review of her recourse application on 9 March 2015.

18. On 1 May 2015, the Applicant submitted to the Deputy High Commissioner a request for management evaluation of the decision not to promote her to the P-4 level.

19. On 1 June 2015, the Applicant received an interim response informing her that her request for management evaluation was still under consideration. She did not receive any further response.

20. The Applicant filed her application with the Registry of this Tribunal on 28 August 2015.

21. The Respondent submitted his reply on 2 October 2015.

22. From 21 to 26 January 2016, the Tribunal held a hearing on the merits of the instant case, jointly with six other cases challenging contemporaneous decisions and raising similar issues, namely Cases Nos. UNDT/GVA/2015/076 (Tsoneva), UNDT/GVA/2015/132 (Natta), UNDT/GVA/2015/158 (Landgraf), UNDT/GVA/2015/163 (Spannuth Verma) UNDT/GVA/2015/165 (Rodriguez-Viquez) and UNDT/GVA/2015/166 (Muftic). Five witnesses from the DHRM were heard: the Head of the Human Resources Policy and Planning Service, the Chief of the Assignments and Promotions Section, the Head of the Assignments and Career Management Service, a Human Resources Officer in the Assignments and Promotions Section who served as Secretary for the Senior Promotions Panel for the 2013 Promotions Session, and a Performance Management Associate in the Performance Management Unit.

23. On 29 January and 5 February 2016, the Respondent and the Applicant, respectively, filed additional submissions, with leave from the Tribunal.

24. During the course of the proceedings, the Respondent filed a number of documents *ex parte*, which contain confidential information. The Tribunal made all these available to the Applicant, with redactions as necessary and on an under seal basis.

Parties' submissions

25. The Applicant's principal contentions are:

a. The UNHCR promotions mechanism entails that the UNHCR staff members, who focus on their work rather than on advancement, cede a degree of control over their career, which other staff members retain fully in organizations with a rank in post system. In return, it is incumbent upon the

UNHCR to put in place effective, fair and transparent procedures for reviewing its staff members' candidacy for promotion;

b. By failing to sufficiently define the two evaluation criteria for the Second Round, namely "performance" and "managerial achievements", to set objective standards and to align itself with the performance appraisal policy, the Promotions Policy did not allow for a fair and transparent comparative assessment of the candidates;

c. The arbitrariness resulting from the failure to define the evaluation criteria was exacerbated by the review mechanism, which entailed that each of the eight Panel members had to review the fact sheet of 187 eligible female staff members, thus having to read thousands of pages, and rank them in order against each other over the course of only a few days;

d. The DHRM's decision to divide candidates by gender in the Second Round did not conform with the Promotions Policy and may have prevented the Applicant from advancing to the Third Round;

e. The DHRM's decision not to provide the Panel members with the candidates' e-PADs or e-PADs' ratings prevented them from taking into account relevant information, and constitutes a procedural error in the implementation of the Promotions Policy;

f. By advising the Panel members to consider the candidates' suitability for placement to a post at a P-4 level in their respective area of responsibility as a determinative factor in their ranking, the DHRM introduced an additional criterion not reflected in the Promotions Policy;

g. The DHRM's suggestion to the Panel members to inform their rankings with personal knowledge of the candidates, and to embark on enquiries where they considered that relevant information was missing from the documents before them lead to an unequal treatment of the candidates;

h. The consolidated table of rankings for P-3 female candidates displays an enormous disparity between the rankings provided by different Panel members for the same candidate, although based on the same information; this cannot but indicate an arbitrary decision-making process and, in some instances, bias from the Panel members;

i. Furthermore, the consolidated tables of rankings display multiple errors in the application of the ranking system suggested by the DHRM, which allowed for multiple candidates to obtain identical rankings, and contain several other anomalies; despite significant and obvious errors, the DHRM did not take any remedial action and, as such, failed to exercise the required level of care and attention in the implementation of the Promotions Policy;

j. Neither an average of the rankings given by the eight Panel members, nor the existence of a Third Round can cure the arbitrariness of the individual rankings given by the Panel members and the errors they committed;

k. The UNHCR failed to consider the mathematical and statistical implications of the ranking system suggested by the DHRM, which allowed for Panel members to have a different input in the candidates' overall average, and the conversion of the individual rankings into a numerical value by way of an arithmetic mean;

l. The UNHCR failed to provide reasons for its decision not to promote the Applicant, thus preventing her from identifying ways to strengthen her candidacy, and having elements in support of her claim to have the Tribunal review the Organization's exercise of discretion;

m. Accordingly, the Applicant requests:

i. Rescission of the contested decision and retroactive grant of promotion;

ii. In the alternative, compensation equivalent to the difference in salary between her current salary and her salary on promotion, for a two-year period counted as of the time of the contested decision;

iii. Compensation for moral injury in the amount of one month net base salary for grave breaches of staff rights and emotional distress; and

iv. Pre-judgement and post-judgement interests on pecuniary damages.

26. The Respondent's principal contentions are:

a. The Secretary-General has broad discretion in matters of promotion; accordingly, review of administrative decisions regarding promotions involves an examination of "(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";

b. The Respondent has "minimally shown" that the Applicant's candidacy for promotion was given full and fair consideration as the eight Panel members separately reviewed her fact sheet, which included the narrative of her performance appraisals during the five years preceding 31 December 2013, and only three of them ranked the Applicant's candidacy among the 120 top female candidates who advanced to the Third Round. The presumption of regularity stands satisfied and it is incumbent upon the Applicant to show, through clear and convincing evidence, that she was denied a fair chance of promotion;

c. In turn, the Applicant failed to establish that the contested decision was unlawful, for the reasons set forth below;

d. Firstly, the Tribunal has no authority to review the Promotions Policy itself. In any event, the comparative assessment of the candidates for promotion at the P-4 level complied with the requirements of fairness and transparency, as it was conducted individually by eight independent senior

staff members appointed by the High Commissioner, upon nomination by the DHRM and the Staff Council, who relied on set criteria and were provided with clear guidance;

e. Secondly, the Applicant failed to demonstrate any procedural error in the implementation of the Promotions Policy that would warrant rescission of the contested decision; in particular:

i. The Panel members' conduct of the comparative assessment and ranking based on the narrative part of the e-PADs as reproduced on the candidates' fact sheet, to the exclusion of the ratings contained in the e-PADs, was consistent with sec. 5.9.1 of the Promotions Policy; it was also justified by the need to ensure fairness to all candidates given the important variations in the use of ratings by individual managers;

ii. The promotions process has been implemented in compliance with the gender provisions of the Promotions Policy, which provided that at least 50% of the promotion slots had to be awarded to female staff and did not prevent separate review of female and male candidates during the Second Round. Even if this constituted a procedural error, it did not have any impact on the Applicant's candidacy as there was a number of female candidates equivalent to more than 150% of the allocated slots that ranked higher than her;

iii. The DHRM did not introduce an additional criterion of evaluation by suggesting to the Panel members to take into account their operational requirements; rather it merely provided an example to illustrate the rationale of the Promotions Policy as stated in sec. 3 thereof;

iv. Although there is a certain degree of variation in the rankings provided by various Panel members to the same candidate, these are not indicative of an arbitrary process or bias as the Promotions Policy allowed for different views among Panel members, based on their various experiences. Furthermore, five of the eight Panel members ranked the Applicant above the threshold of 120 for advancing to the Third Round and her consolidated ranking of 142 placed her 22 places above said threshold;

v. Although errors were committed by the Panel members in the ranking of candidates, these had no impact on the Applicant's chances to be promoted;

vi. The process provided a number of safeguards that limited the element of subjectivity, which cannot be totally eliminated from a competitive selection process, and possible human errors as the eight individual rankings provided by each Panel member were averaged by the Promotions Secretariat. The number of candidates retained for the Third Round amounted to 150% of the available slots for promotions at the P-4 level. The Third Round provided an opportunity to probe the reasons for discrepancies in the Second Round rankings;

vii. The Applicant did not adduce any evidence of bias and her allegations in this respect are no more than speculative;

f. The Applicant was provided with sufficient reasons for the contested decision as she was informed that her overall ranking placed her outside the 150% margin of the number of slots allocated for promotion to the P-4 level, and was given a copy of her fact sheet used by the Panel members for their review of her candidacy;

g. In respect of the remedies sought, the Respondent submits that even if the Tribunal were to find that the promotions process was tainted by any shortcomings, these should not lead to the rescission of the contested decision as the Applicant had no "significant" or "foreseeable" chance for promotion, for the reasons set out above;

h. Furthermore, the Applicant's claim for compensation equivalent to the difference in salary between her current salary and her salary on promotion for two years is without merit as the implementation of any promotion would require the Applicant to first obtain a position at the P-4 level, which has not happened yet. Additionally, given that the Applicant is eligible for promotion during the 2014 Promotions Session, which is ongoing, she cannot be awarded compensation for more than one year;

i. The Applicant's claim for moral damages is also without merit given that she has adduced no evidence of her alleged emotional distress;

j. Finally, the Applicant's claim for interests is excessive and unjustified; and

k. Consequently, the Respondent requests the Tribunal to reject the application in its entirety.

Consideration

27. Before examining the alleged errors in the contested decision, the Tribunal considers it appropriate to give a brief overview of the Promotions Policy, which is unique to the UNHCR and stems from its "rank in person" system. This Policy was applied for the first time in the 2013 Promotions Session, and fundamentally departs from the previous policy as staff members are no longer given a point-based scoring but rather subjected to a comparative assessment among each other by a panel composed of senior staff members of the UNHCR. Whilst some of this Tribunal's previous holdings in respect of the UNHCR promotions sessions remain of relevance, most of these cannot be applied *mutatis mutandis* to the present case.

Overview of the Promotions Policy

28. Unless they serve on an expert post, the UNHCR staff members in the International Professional category who are serving on indefinite and fixed-term appointments are conferred personal grade levels. They apply for assignments at their personal grade level or one level above. These staff members may be promoted to the P-4, P-5 or D-1 levels in accordance with the procedures set forth in the Promotions Policy.

29. The Promotions Policy, adopted on 5 February 2014, introduced a "new methodology and procedures for the promotion of International Professional staff" (sec. 1). Pursuant to this Policy, the High Commissioner determines each year the number of available promotion slots at the P-4, P-5 and D-1 levels, upon recommendation from the Joint Advisory Committee (sec. 4.1.2). He then receives recommendations for promotion by the Panel, for promotions to the P-4 level, following its review of the eligible candidates as outlined in the Policy (sec. 4.1.1).

30. The Promotions Policy establishes the eligibility criteria, namely that the candidate "must meet minimum seniority-in grade requirements" (sec. 5.1), and the procedures for three potential rounds of evaluation.

31. To advance from the First Round to the Second Round, a candidate must satisfy at least three out of five "Evaluation Criteria, or Green Lights", namely: language proficiency, number of rotations, service in D, E and/or U duty stations, functional diversity, and performance records (i.e., absence of any gap in e-PADs) (sec. 5.7). Alternatively, candidates with twice the minimum seniority-in-grade at their current level advance automatically to the Second Round, regardless of whether they have sufficient "green lights" (sec. 5.8.4).

32. The Second Round, which is at the heart of this case, entails a comparative assessment of the candidates by the Panel members based on the following two criteria: performance and managerial accountability.

33. More specifically, sec. 5.9.1 of the Promotions Policy provides the following in respect of the Second Round:

> 5.9.1 A comparative assessment of the staff members who advanced from the First Round will be undertaken in the Second Round evaluation of the promotions procedure. Panel Members will individually conduct a comparative assessment and ranking of the staff members who have passed the First Round based on their evaluation of the following criteria:
>
> (i) **Performance:** A staff member's performance during the past five years must be at the minimum "Achieved", or its equivalent, for overall work objectives and must be at the minimum "Proficient", or its equivalent, for overall competencies indicating the staff member's ability and readiness to perform at a higher level as reflected in the narrative of the performance appraisal in the PAR/e-PAD and the Fact Sheet. The highest regard will be given to consistently demonstrated exceptional performance and documented exemplary service, including in emergency operations during the past five years. In addition, service at the higher grade level for one year or longer, during the past five years, recognized through the receipt of a SPA [Special Post Allowance] or RALP [Remuneration At the Level of Post] shall be considered.
>
> (ii) **Managerial Accountability:** For promotion to any level, and particularly to the P-5 level and above, a staff member must have demonstrated a high level of competence and professionalism in the management of human, financial, material resources, programmes or operations. Managerial achievements shall be demonstrated by their reflection in the PAR/e-PAD performance evaluations and Fact Sheet narrative.
>
> …
>
> 5.9.3 The number of staff to be advanced from the Second Round to the Third Round will correspond to the minimum of 150% of the number of slots available for promotions to P-4 and to a minimum of 200% of the number of available slots available for promotion to P-5 and D-1. Based on the Panel Members' assessments, the Panel Secretariat will compile the Second Round assessment rankings and develop a consolidated list of substantially equally meritorious candidates for consideration by the Panel Members in the Third Round.

34. The Third Round entails a collective review of the "substantially equally meritorious candidates" by the Panel members, and the making of final recommendations corresponding to the number of available slots (secs. 5.10.1 and 5.10.2). The evaluation is based on the Second Round criteria, and provides for the need to ensure geographical distribution as well as to take into account any disciplinary measure, documented reprimand, financial mismanagement or gross negligence during the past five years (sec. 5.10.2).

35. The High Commissioner awards promotions, which are conditional on the staff member obtaining a specific position at the higher level. This condition does not apply to staff members who already serve on a position at the higher level or on an expert post, or are within two years of retirement age (sec. 5.12).

36. Pursuant to sec. 5.10.2, "[a]t grade levels where gender parity had not yet been achieved, at least 50% of the promotion slots will be awarded to substantially equally meritorious female staff".

37. Finally, staff members may, without prejudice to their right to formally contest the non-promotion decision in the internal justice system, seek recourse "on the basis that some documentation relating to the period under review that may have had an impact on the final recommendation was not available at the time of the review" (sec. 5.13).

Standard of review

38. It is well established that the Secretary-General has broad discretion in matters of appointment and promotions. When reviewing such decisions, the Dispute Tribunal shall 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" (*Abbassi* 2011-UNAT-110, para. 23; see also *Majbri* 2012-UNAT-200, para. 35; *Ljungdell*, 2012-UNAT-265, para. 30).

39. More specifically, the Appeals Tribunal held in *Rolland* 2011-UNAT-122 that (para. 21):

> All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

40. In *Rolland*, the Appeals Tribunal also distilled the burden of proof for challenges against promotion decisions, holding that (para. 26):

> There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

41. Whereas the parties agree that the Tribunal may conduct the type of review set out above, they disagree on whether the Tribunal may go any further and entertain challenges to the Promotions Policy itself. Seeking to rely on the jurisprudence of this Tribunal dealing with comparative assessments conducted in the context of downsizing exercises, the Applicant argues that the Tribunal shall not be limited to reviewing errors in the *implementation* of the Promotions Policy but also examine, *inter alia*, whether the procedures in place for the comparative review of candidates for promotions at the UNHCR were "fair and transparent", and whether the comparative review of the candidates was based on "fair objective criteria as part of an impartial process". The Respondent argues that the Tribunal should not engage in a review of the Policy, and should limit itself to the standard of review set out by the Appeals Tribunal in respect of promotion exercises as described above.

42. Having reviewed the jurisprudence and the submissions of the parties, the Tribunal is of the view that the standard of review for decisions in the context of downsizing exercises is substantially the same as that for appointments and promotions. For instance, in *Hersh* 2014-UNAT-433, which concerns a downsizing exercise, the Appeals Tribunal held that it had to examine if the applicable rules were followed and applied in a fair, transparent and non-discriminatory manner. In *Adundo* UNDT/2012/118, the Dispute Tribunal held that procedures in place for the comparative review of candidates, in the context of post reductions, had to be based on fair objective criteria as part of an impartial process. However, in *Adundo* the Tribunal was dealing with an *ad hoc* competitive process conducted outside the framework of any applicable procedure, hence a situation that is different from the one at hand. In none of the cases cited by the Applicant did the Dispute Tribunal engage in a review of applicable rules.

43. In the context of a promotion exercise conducted under a specific policy, such as in the present case, the Tribunal's review is essentially focused on the implementation of the policy (see *Bofill* 2013-UNAT-283). It is not the Tribunal's role to examine whether a policy adopted by the Administration is well-founded or appropriate. This does not mean, however, that the Tribunal may not entertain challenges to the legality of the policy in respect of non-compliance with a higher norm, insofar as the irregularity may result in a staff member not being given fair and full consideration for promotion. For example, a promotion policy setting out a discriminatory criterion would lead to an unlawful decision even if it were correctly applied. Whereas there is no doubt that the Tribunal has no authority "to amend any regulation or rule of the Organization" (*Mebtouche* 2010-UNAT-045, para. 11), a decision may be rescinded if it is taken pursuant to a policy which does not comply with a higher norm. In this context, the Tribunal may also "point out what it considers to be a deficiency" in a policy and "recommend a reform or revision" (*Mebtouche* 2010-UNAT-045, para. 11; see also *Nguyen-Kropp and Postica* UNDT/2015/110).

44. In view of the foregoing, the Tribunal will examine whether:

a. The procedure as laid down in the Promotions Policy was followed;

b. The Applicant was given fair and adequate consideration for promotion to the P-4 level; and

c. The Applicant was provided sufficient reasons for the contested decision.

45. The Applicant's arguments related to the design of the Promotions Policy will be addressed under the second prong of the Tribunal's review, as per the standard set out above.

Whether the procedure as laid down in the Promotion Policy was followed

46. The Tribunal will examine, in turn, each of the alleged errors in the implementation of the Promotions Policy.

Separate consideration of female and male candidates

47. The Applicant takes issue with the fact that female and male candidates were evaluated separately during the Second Round, and awarded an equal share of the available places for consideration in the Third Round, instead of being evaluated in a single group of candidates. The Respondent argues that the Promotions Policy, in line with the UNHCR's Gender Policy, mandates that the available slots for promotion be awarded equally among female and male candidates and that, to achieve this purpose, candidates could be evaluated separately from the Second Round onwards as nothing in the Promotions Policy prevented it.

48. It has been established that female and male candidates for promotion were considered in two separate groups in the Second and Third Rounds, leading the Panel to recommend, and ultimately the High Commissioner to select, an equal number of female and male staff members. More specifically, it appears that after having identified the candidates who had passed the First Round, the DHRM

established separate lists of candidates for female and male candidates, which it submitted to the Panel members for their comparative assessment during the Second Round. The Panel members were instructed to rank the female and male candidates separately as, in the DHRM's view, "one group does not compete with another, [and] these are separate exercises".

49. At the hearing, the Head of the Human Resources Policy and Planning Service, explained that candidates for promotion were separated by gender from the Second Round onwards as the High Commissioner had decided that the available slots would be equally shared between female and male staff members. In this respect, the evidence shows that the High Commissioner, indeed, made this decision but only after the DHRM had already instructed the Panel members to consider candidates separately by gender. In his memorandum of 4 July 2014 to the Co-Chairpersons of the Joint Advisory Committee, the High Commissioner announced that:

> Pending the conclusion of the comprehensive review of the UNHCR Gender Policy, [he] ha[d], therefore, decided that the available slots for promotion this year shall continue to be equally shared between female and male staff members, which is in line with paragraph 5.10.2 of the [Promotions Policy].

50. The Tribunal notes that the Promotions Policy, which establishes the methodology for a three-round evaluation of candidates and sets out the evaluation criteria for each round, does not provide for the separate consideration of male and female candidates at any stage, nor does it refer to gender as being a factor for consideration in the evaluation of candidates. There is no reference to gender consideration in the Promotions Policy until the very end of the process, where sec. 5.10.2 provides that "[a]t grade levels where gender parity has not yet been achieved, at least 50% of the promotion slots will be awarded to substantially equally meritorious female staff".

51. Significantly, the Promotions Policy consistently refers to the comparative assessment and ranking of a single pool of candidates. In this respect, secs. 5.9.1 and 5.9.3 provide that in the Second Round, the Panel shall conduct "[a] comparative assessment of the staff members who advanced from the First

Round", following which "the Panel Secretariat will compile the Second Round assessment rankings and develop *a consolidated list of substantially equally meritorious candidates* for consideration by the Panel Members in the Third Round" (emphasis added). Then, secs. 5.10.1 and 5.10.2 provide that in the Third Round, "[p]anel members will collectively review *the list of substantially equally meritorious candidates* as retained after the second round review and make final recommendations", which "are not to exceed the number of slots available at each grade level" (emphasis added).

52. The fact that the DHRM had already instructed the Panel members to consider female and male candidates separately before the High Commissioner had announced his decision to divide equally the promotion slots between the two groups raises serious doubts about the whole decision-making process in respect of gender consideration for the application of the Promotions Policy, and is indicative of a lack of transparency of process.

53. In any event, the Tribunal finds that although the Administration may have sought to achieve the High Commissioner's objective to award an equal number of promotions to female and male candidates, its separation of candidates by gender for consideration during the Second Round review was in violation of the Promotions Policy. Not only did it introduce a new criterion for consideration during the Second Round, but it was also entirely inconsistent with the terms of the Policy itself, which clearly envisaged a single pool of candidates for their comparative assessment and ranking by the Panel at this stage. All candidates who had passed the First Round were required to be assessed on their merits as one group in the Second Round to produce a list of "substantially equally meritorious" candidates for consideration by the Panel in the Third Round.

54. Furthermore, the Tribunal is of the view that the High Commissioner's decision to set the available number of promotion slots for female and male candidates before the actual promotions session was completed, rather than at the time of awarding promotions, also raises some concerns.

55. The High Commissioner's power to set the number of available promotion slots is defined in sec. 4.1.2 of the Promotions Policy, which provides:

> [The] Division of Human Resources Management (DHRM) will submit to the Joint Advisory Committee (JAC), at least 10 working days prior to the relevant promotions session, its recommendations on the number of available promotion slots using relevant statistics on positions and staffing, including but not limited to, distributions by grade level, expected separation and recruitment and trends in inter-agency exchanges. The number of promotion opportunities, reflected quantitatively as promotion slots, will be decided by the High Commissioner, taking into account the advice of the JAC.

56. Absent any reference in this provision to gender considerations, the High Commissioner's discretion is limited, at this stage, to determining the number of available slots for promotion at each level, based on the UNHCR's staffing table and staff movements prognostics. Although the High Commissioner may have sought to achieve gender parity in setting in advance the number of slots available for each gender group, which is most certainly a commendable and lawful objective in light of the UN Charter and the "Policy on Achieving Gender Equity in UNHCR staffing" (IOM 018/2007—FOM 019/2007) of 8 March 2007 ("Gender Policy") (see *Mebtouche* UNDT/2009/039, para. 17), he ended up making a predetermination of issues that had to be addressed at a later stage, that is, at the time of awarding the promotions, after the evaluation of the candidates had actually taken place. He also unlawfully limited the number of promotions slots that may have otherwise been awarded to women.

57. In this respect, the Tribunal stresses that the Promotions Policy does not provide for promotion quotas based on gender, as seemed to be considered by the High Commissioner. Rather, it provides for a *minimum* of 50% of the available slots to be awarded to "substantially equally meritorious female staff". Hence, the number of promotion slots that are to be awarded to women is clearly not limited to 50%, and ultimately depends on the merits of the candidates, in line with art. 101.3 of the UN Charter, which provides that "[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity". The intended consequence of sec. 5.10.2 of the

Promotions Policy is so apparent from the face of it that there can be no question as to its meaning. As the Appeals Tribunal stated in *Scott* 2012-UNAT-225:

> 28. The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

58. The Tribunal stresses that it was open to the High Commissioner to establish a promotion mechanism that entailed a separate consideration of female and male candidates in order to achieve gender parity, insofar as it otherwise complied with the UN Charter requirement that promotions be based on merit. However, this had to be done through the adoption of clear rules to this effect, as previously underlined by this Tribunal in *Mebtouche* UNDT/2009/039. Indeed, in that ruling related to the UNHCR 2007 Promotions Session, the Tribunal emphasized that any effort towards achieving gender parity must comply with the requirement of the UN Charter that promotions be based on merit and materialise through the adoption of clear rules for promotions that reconcile these two principles before the annual promotion session, rather than through a request to the DHRM to apply quotas.

59. In view of the foregoing, the Tribunal finds that the separation of female and male candidates for their comparative assessment and ranking at the Second Round constitutes a fundamental error in the implementation of the Promotions Policy, and cannot be justified by the High Commissioner's decision to award an equal number of promotions to female and male staff members which was, in any event, announced towards the end of said Round. The Promotions Policy had to be implemented as written, and not as the High Commissioner or the DHRM may have wanted it to be.

Failure to provide the Panel members with the candidates' e-PADs

60. The Applicant also challenges the fact that the Panel members were provided only with the candidates' fact sheet, to the exclusion of their e-PADs. The Respondent recognises this but argues it was in line with the Promotions Policy as the staff members' fact sheet reflected their e-PADs.

61. The evidence before the Tribunal was that the fact sheet displays the staff members' working history and part of their performance appraisal, namely the narrative section of their e-PADs. It does not include, however, the numerical ratings for the appraisal of each objective and competency contained in the e-PADs, and the overall ratings for such.

62. In this connection, it is recalled that the Policy for the UNHCR Performance Management & Appraisal System (IOM 087/2008—FOM 089/2008) ("PAMS"), introduced in 2008, governed the appraisal system in use during the performance assessment period relevant for the 2013 Promotions Session, namely 1 January 2009 to 31 December 2013.

63. In brief, the PAMS provided for an assessment of whether staff members had achieved their agreed work objectives, and demonstrated the competencies required for their post by the UNHCR based on a ten-point rating scale. More specifically, each work objective had to be rated pursuant to the scale below, and the scores for each objective were then combined by the system to generate an overall work performance rating on work objectives:

i. Not Achieved 1, 2
ii. Partially Achieved 3, 4, 5
iii. Achieved 6, 7, 8
iv. Exceptionally Achieved 9, 10

64. The same principle applied for the rating of competencies, which were assessed pursuant to the following scale:

i.	Not proficient	1, 2
ii.	Partially Proficient	3, 4, 5
iii.	Proficient	6, 7, 8
iv.	Exceptionally Proficient	9, 10

65. The ratings were to be accompanied by comments from the staff member's supervisor and, where applicable, from multi-raters (see secs. 25, 40, 50(b) of the PAMS).

66. At the hearing, the Head of the Human Resources Policy and Planning Service, testified that the experience had shown that some supervisors were more prone to give high rankings than others, causing what he referred to as a "rating inflation". He expressed the view that the ratings were "unreliable" and meaningless if not supported by comments. The Administration therefore considered that only the narrative part of the e-PADs should be disclosed to the Panel members for their assessment of candidates during the Second and Third Rounds, as they would give a better picture of the performance and abilities of any staff member under consideration.

67. The Head of the Human Resources Policy and Planning Service further explained that the UNHCR was not satisfied with the appraisal system established by the PAMS and reviewed it in 2014, notably to modify the rating scale, and to require that exceptional ratings be the subject of review, in order to remove the arbitrariness contained in the previous appraisal system. He also stated that the Promotions Policy was drafted in the light of the forthcoming new performance appraisal policy, and intended, from its inception, to exclude the e-PADs from the Panel members' review. The Chief of the Assignments and Promotions Section further testified that the Panel members were specifically advised in a briefing session that "e-PADs ratings [were] not to be disclosed" to them.

68. The Respondent also submitted documentary evidence showing that from 2009, following the first appraisal exercise pursuant to the PAMS, disparities in ratings among various managers and offices were noted with concern. In a broadcast email message of 4 June 2010, the then Director of DHRM, UNHCR, informed all staff members that "across offices around the world and in headquarters, there is a lot of variation in the ratings; and at the individual level, ratings and narratives sometimes do no correspond". He impressed upon the fact that measures would be taken to remedy the problem in the next appraisal cycle and that the DHRM would, upon its review of the individual e-PADs, "revert to staff members and managers with comments, and also draw lessons learned to improve practice in general". The DHRM also undertook to "a) update the guidance on the rating scale; b) introduce standards for the quality assurance of e-PADs; and c) provide guidelines to managers and Reviewing Officers on how to calibrate ratings". In the meantime, he announced that "all completed e-PADs will be accepted in the system but for purposes of reporting, the fact sheets of all staff members will include only the narratives for 2009". However, he specified that the e-PADs, including the ratings, could be "referred to by DHRM as needed, for example in cases of contract extensions or non-extensions, personal promotions, conversions or non-conversions".

69. A similar broadcast was sent on 18 May 2011 by the then Director, DHRM, although some improvements were noted. In particular, it was reported that "[a]s for the overall ratings, the vast majority of the e-PADs are in the range of 5.1 to 8.0 ('proficient'/'achieved'). So far, 19% of the completed e-PADs have at least one overall 'exceptional' rating, compared to 29% in 2009. This trend is reflected in all regions and at Headquarters, which points to a positive tendency to improved validation and calibration of ratings". The DHRM reiterated its commitment to ensure quality of the 2010 performance appraisals and stressed that "Guidelines on preparing a good performance evaluation" were available on the intranet.

70. At the outset, the Tribunal notes that the ratings, although they appear to have been considered as presenting some problems of consistency from the early years of the application of the PAMS, continued to be at the core of the appraisal system for the five years under review during the 2013 Promotions Session. The PAMS was not modified during that period, rather it was decided to work with the managers to ensure consistency. Managers continued to be asked and expected to evaluate their supervisees by providing them a rating, together with comments. Irrespective of the DHRM's assessment of the ratings' value, they were an integral part of the staff members' e-PADs from 2009 to 2013 and formally part of the UNHCR's legal framework. Any reference to an e-PAD during that period included both the narrative and the ratings contained in the performance appraisal document, irrespective of the fact that only the comments were reproduced in the staff members' fact sheet. For the current Promotions Session, the Promotions Policy must be read in the light of the PAMS, which was the applicable administrative issuance regarding performance appraisal at the relevant period.

71. The Promotions Policy, at sec. 5.9.1(i) and (ii), explicitly refers to both the candidates' fact sheet and e-PADs for consideration by the Panel in the Second Round. The reference to two separate documents clearly indicates that both were to be provided, otherwise the mention of PAR/e-PAD would be meaningless.

72. In particular, sec. 5.9.1(i) provides that the Panel shall assess a staff member's "ability and readiness to perform at a higher level as reflected in the narrative of the performance appraisal in the PAR/e-PAD and the Fact Sheet". This provision also contains a footnote referring directly to the ratings contained in the e-PADs, stating that "[p]erformance appraisal ratings may change during the validity of this Policy" and that "[g]uidance will be provided in assessing equivalencies".

73. In turn, sec. 5.9.1(ii) states that "[m]anagerial achievements shall be demonstrated by their reflection in the PAR/e-PAD performance evaluations and Fact Sheet narrative". The performance evaluation is without any doubt the one found in the e-PAD, which consists not only of the narrative, but also of the ratings of work objectives and competencies. The Tribunal notes that the structure

of the obligation under sec. 5.9.1(ii) to consider material is different from that in sec. 5.9.1(i). Rather than referring to the consideration of the narrative in both the e-PAD and the fact sheet, sec. 5.9.1(ii) contains a clear distinction between that which is reflected in the PAR/e-PAD performance evaluations and that reflected in fact sheet narrative. The words "performance evaluation" attach to the PAR and the e-PAD, while the word "narrative" attaches to the fact sheet. Clearly, in light of the unambiguous wording of this provision, it is from both the e-PAD performance evaluations and the fact sheet narrative that the assessment had to be made in respect of the "managerial achievements".

74. The Respondent's argument that sec. 5.9.1 should be interpreted in such a way that the e-PAD and the fact sheet refer to the same document, namely the fact sheet alone, must be rejected as it has been clearly established that the fact sheet does not entirely reflect the e-PADs because it does not reproduce the ratings contained in the latter. If it had been intended to refer only to the narrative, then the Promotions Policy had to be drafted to so specify this. It is also clear from the Promotions Policy that the information contained in the e-PADs, including the ratings, was directly relevant to the Panel members' assessment during the Second Round.

75. Firstly, sec. 5.9.1(i) required the Panel members to assess whether the staff member's performance met the minimum threshold of "Achieved" or its equivalent for overall work objectives, and "Proficient" or its equivalent for overall competencies. These performance thresholds directly refer to the ratings reflected in the e-PADs, as per the PAMS. Without being provided such ratings, the Panel members were not in a position to verify if the minimum requirements set forth in sec. 5.9.1(i) were met.

76. The Respondent sought to provide explanations during the hearing as to how satisfaction of these performance requirements was verified. Two witnesses from the DHRM provided vague and ambiguous testimonies suggesting that the DHRM undertook a review of the eligible candidates to identify if any of these did not meet the minimum performance standard prior to the review of eligible candidates for promotion to all levels by the respective two panels. The evidence

ultimately established that it was following "queries about performance" raised by the Senior Promotions Panel during its Second Round review of candidates for promotion to the P-5 and D-1 levels, which took place just before the review of candidates for promotion to the P-4 level by the Panel, that the Secretary of the Senior Promotions Panel took action in this respect.

77. The documentary evidence shows that on 1 July 2014 the Secretary of the Senior Promotions Panel asked the Performance Management Unit, DHRM, UNHCR, to identify among the eligible candidates for promotion to the P-5 and D-1 levels those who "received at least one 'Not/Partially Achieved' and/or 'Not/Partially Proficient' rating on their e-PADs covering the period from 1 January 2009 to 31 December 2013", and to indicate by an asterisk if those ratings had been provided more than once. He also added that a similar list would be needed for the Panel, who would be in charge of reviewing candidates for promotions to the P-4 level, but that this request was less time-sensitive.

78. A Performance Management Associate in the Performance Management Unit then generated a report from the UNHCR's Enterprise Resource Planning System, and identified "those e-PADs in which the rating for overall objectives and/or the rating for overall competencies for at least one e-PAD during the period 2009-2013 was below 5.1, which was the lowest possible 'Achieved'/'Proficient' rating under [the PAMS]". He identified four candidates for promotion to the P-4 level who had received at least one overall rating of less than "Achieved" or "Proficient", and conveyed this information to the Secretary of the Senior Promotions Panel by email. The Tribunal is not entirely sure how this information was ultimately conveyed to the Panel, but it seems to have been done orally.

79. It is apparent from the consolidated tables of rankings of candidates for promotion to the P-4 level that two of the four staff members identified by the Performance Management Associate as not having met the required level of performance during a mission or reflected in a short e-PAD were nevertheless ranked among the top 120 female candidates and advanced to the Third Round.

80. Indeed, one staff member who had not met the minimal requirement of "Achieved" for overall objectives in a "mission/short term ePAD for the period 01/10/2010-31/12/2010" was ranked 49th. Another candidate who did not meet the minimal requirement of "Achieved" for overall objectives and "Proficient" for overall competencies in a "mission/short term ePAD for the period 01/01/2011-30/04/2011" was ranked 57th. Most surprisingly, given the faith that had been placed in the consideration of the narrative in the fact sheets by the DHRM, each of these two candidates had been ranked number one by a Panel member.

81. The Tribunal considers that this whole process to verify compliance of the minimum performance requirements as devised by the DHRM, and the results reached by the Panel members, was fundamentally procedurally flawed.

82. Firstly, it appears that it was not anticipated, prior to the Promotions Session, that a review of the candidates' e-PADs was necessary to, *inter alia*, verify if the performance standard was met. This, in turn, raises doubts about how the DHRM envisaged undertaking the assessment of the evaluation criterion set forth in sec. 5.9.1(i), which is certainly one of the most determinative criterion of the entire process.

83. Secondly, it seems that the Performance Management Associate who did the verification exercise used the wrong indicator by identifying those who had an overall score below 5.1 for competencies and objectives. In this respect, the PAMS established a scale where "Achieved" and "Proficient" corresponded to a score of 6 to 9 (see paras. 63 and 64 above), which technically means that a staff member must have a score of at least 6 to minimally meet these standards. In turn, Annex 2 to the PAMS entitled "Background and overview of the PAMS Process" provides in its sec. 16 that "Achieved" and "Proficient" correspond to a rating between 5.1 and 8.0, which also seems to be the position adopted by the DHRM, as per the broadcast sent on 18 May 2011 (see para. 69 above). The Tribunal cannot reconcile these two apparently contradictory provisions of the PAMS and, given that it is not determinative of the present application, will limit itself to recommending the Administration to look into the matter. As a result, it is well

possible that staff members who did not even meet the minimum performance threshold were not identified by the DHRM and may have advanced to the Third Round.

84. Thirdly, and most importantly, it turned out that it was the DHRM that assessed part of the performance criterion under sec. 5.9.1(i), instead of the Panel, in contravention with the explicit terms of the Promotions Policy, under which the authority to make that assessment clearly falls on the Panel. In this respect, the information provided by the DHRM to the Panel was not sufficient to conclude that the Panel members ultimately made their individual assessment of the evaluation criterion as per the terms of sec. 5.9.1(i). The apparent decision of the DHRM to keep the ratings from the Panel meant that its members were, thus, not personally able to ascertain the correctness or otherwise of the information in the considerations under sec. 5.9.1(i) of the Policy even though the Policy required that they had to be personally satisfied that the criterion had been met.

85. Finally, two staff members who did not meet the minimum performance requirement nevertheless advanced to the Third Round. Although their performance appraisals that were below standard only covered a short period of time, the two concerned staff members did not meet the requirement under sec. 5.9.1(i) for their performance to be, "during the past five years", at the minimum "Achieved", or its equivalent, for overall work objectives and "Proficient", or its equivalent, for overall competencies. These two candidates ought to have been eliminated from the review process.

86. The selection by the Panel members of two candidates who did not meet the minimum threshold criterion in sec. 5.9.1(i) of the Promotions Policy to advance to the Third Round evaluation constitutes a procedural error in the implementation of the Promotions Policy that impacted on all the eligible candidates as it deprived two of them of the possibility to advance to the Third Round. This matter also raises more fundamental questions as to the whole process.

87. How is it possible that among a pool of 187 female eligible candidates, two candidates who did not even meet the minimum requirement were selected to advance to the Third Round and even considered to be the best ones by two Panel members? Was the information collected by the Performance Management Associate duly conveyed to the Panel members? Is it due to the fact that the Panel members were not able to verify compliance with the requirement themselves, as they were not provided the e-PADs? Is it that the requirement set out in 5.9.1(i) was totally ignored or misinterpreted? Were the Panel members reckless in their review and ranking of the candidates? Did the narrative in the fact sheet, upon which the Head of the Human Resources Policy and Planning Service placed so much reliance, not reflect the poor rating? If it did, was it not read, or not read properly, by Panel members when making their assessment?

88. The Respondent did not provide any explanation and, indeed, appears not to have been aware of the issue. The Head of the Human Resources Policy and Planning Service simply stated during his testimony that the requirement of sec. 5.9.1(i) set out above is a "threshold criteria", and that he would be surprised if staff members who did not meet this threshold would have been recommended. No thought appears to have been given to the treatment of those candidates who have been found not to meet the performance threshold.

89. Additionally, the ratings given to the candidates by their supervisors in respect of the achievement of their work objectives and their level of competencies was certainly a useful, if not necessary, indicator to compare the various candidates' performance and managerial achievements. It provided a quantitative measure that would have possibly allowed the Panel members to identify strengths and weaknesses in the various staff members' candidacy, and compare them against one another.

90. For instance, ratings of "Exceptionally Achieved" or "Exceptionally Proficient" were most certainly relevant to the Panel's consideration of, *inter alia*, whether candidates had "consistently demonstrated exceptional performance and documented exemplary service", as per sec. 5.9.1(i) of the Promotions Policy. As the Respondent acknowledged in his reply, the expression "exceptional

performance" refers directly to the PAMS, in which the best level of performance was rated as "Exceptionally Achieved" or "Exceptionally Proficient". If the Panel members had been provided with the e-PADs, they could have possibly identified outstanding candidates by their ratings, with the assistance of the comments provided by the supervisor. Although there may be some concerns as to the reliability of the ratings, they nevertheless constituted the essence of the appraisal system at the relevant period, and provided quantitative values possibly useful to distinguish candidates in a pool of 187.

91. Furthermore, the Tribunal is of the view that while the Administration may have found it more appropriate not to disclose the candidates' performance ratings to the Panel due to the so-called "rating inflation", providing the Panel only part of the candidates' performance appraisal presented more important intrinsic dangers.

92. Under the PAMS, staff members were essentially evaluated based on a scoring system, for which the policy provided strict and specific guidance (see, for example, secs. 10, 23, 25, 30-45, 50 of the PAMS). Amongst others, sec. 52 of the PAMS stated that the Reviewing Officer had to provide "substantive comments for extreme ratings", thereby putting in place a review mechanism to avoid unjustified high rankings. Whereas comments were also part of the evaluation, they were meant to support/complement the score given. No guidance was provided for the narrative part of the appraisal. As the Head of the Human Resources Policy and Planning Service testified, narratives varied depending on the commitment of each supervisor.

93. The fact that two staff members were selected to advance to the Third Round albeit that they did not even meet the minimum performance requirement provides a concrete indication that a sub-standard performance would not necessarily be reflected in "narrative" or comments. Most certainly, the e-PADs were not completed during the relevant period with a view that only the comments, or "narrative", provided thereto would be taken into account. In other words, the scoring and the comments constituted a whole under the relevant appraisal process. Thus, providing only the narrative part of the e-PAD to the

Panel members gave them an incomplete picture of the candidates' performance evaluation.

94. The Tribunal cannot emphasise enough the importance of the Promotions Policy being in perfect alignment with the performance appraisal policy at the time under review in the context of the UNHCR's current promotion mechanism, due to the fact that promotion is essentially based on performance appraisals during the five preceding years. Whilst the Head of the Human Resources Policy and Planning Service attempted to explain the decision not to disclose the ratings by reference to flaws in the PAMS and the then proposed adoption of a new appraisal policy, the Tribunal finds no support in the wording of the Promotions Policy itself for such contention.

95. It goes without saying that any change in the appraisal policy, as appears to have happened as of 10 November 2014 with the entry into force of the new "Policy on Performance Management" (UNHCR/HCP/2014/12), does not and cannot impact upon prior performance appraisals and, as such, cannot be taken into account when making a comparative assessment of the performance of candidates for promotion under the current Promotions Policy when years prior to 2015 are under review. If the e-PADs produced in application of the PAMS were found to be not representative of the staff members' performance, the Promotions Policy should not have been drawn in such a way that they are made the centrepiece of the promotions exercise. Also, if the intent was that the new Promotions Policy was to be applied in conjunction with a new appraisal policy, then transitional measures should have been foreseen and implemented.

96. Lastly, the Tribunal notes with surprise that the Panel members were presented, for their signature, with a copy of the consolidated list of candidates under review during the Second Round. This was prepared by the DHRM and contains the following certification: "I herewith confirm that I have reviewed the fact sheets and performance appraisals of the staff members contained in the above ranking, which reflects my comparative assessment of them in line with paragraph 5.9.1 of the [Promotions Policy]". Inexplicably, the Panel members all signed this document despite not having been provided the e-PADs. The Tribunal

finds that this apparently incorrect confirmation created an appearance of compliance with the Promotions Policy.

97. In view of the foregoing, the Tribunal finds that the exclusion of the e-PADs from the Panel members' comparative assessment of the candidates during the Second Round constitutes another fundamental procedural error in the implementation of the Promotions Policy. The exclusion of the candidates' numeric ratings, which were central to the appraisal system from 2009 to 2013, deprived the Panel members of essential information for their consideration of the performance and managerial achievements criteria under sec. 5.9.1 of the Promotions Policy. It also prevented them from personally assessing whether the minimum performance standard set forth in sec. 5.9.1(i) was met, as they were required to do. Again, it appears that the DHRM sought to apply the Promotions Policy in the way it thought it was intended to be and, as such, it contravened its actual plain wording. Furthermore, the inclusion of candidates who did not meet the minimum performance requirement among those who advanced to the Third Round constitutes, in itself, another error in the implementation of the Promotions Policy.

Establishment of an additional evaluation criterion

98. The Applicant submits that the DHRM introduced an additional evaluation criterion by inviting the Panel members to take into account the candidates' suitability for placement in higher level positions as the deciding factor in the ranking they provided. The Respondent argues that the DHRM did not introduce a new criterion but rather sought to illustrate the rationale of the Promotions Policy.

99. It has been established that on 4 July 2014, the DHRM held a briefing session by video conference with the Panel members about the Second and Third Rounds' evaluation process. During this briefing, the then Deputy Director of DHRM and the Chief of Assignments and Promotions Section advised the Panel members as follows, as recorded in a document entitled "Talking Points" produced by the Respondent:

> At every stage, refer back to what you are doing—recommending those who have a proven ability to contribute at a higher level of responsibility, in effect the "Rationale" of the policy (para. 3). The ones you recommend should be easily place-able [sic] at the higher level. Ask yourselves if you (as a senior manager) would, based on the documentation and from what you know, give him/her a position/function in your area of responsibility. One negative, often criticised, outcome of the previous exercise was that it was too mathematical and yielded results that the Organization was not able to subsequently handle.

100. The Head of the Human Resources Policy and Planning Service testified that this excerpt of the notes, used to brief the Panel, reflects so much his idea that he may well have written it. As the designer of the Promotions Policy, he explained that the new Policy sought to depart from the mathematical exercise conducted under the previous one, and shift towards a subjective review by the most senior managers, who are in a position to assess whether candidates could ultimately be placed in positions at a higher level. He impressed upon the subjective character of the Second Round evaluation, and on the fact that the Panel members were expected to consider if the candidates were suitable for placement at a higher post "in light of their life and personal experience".

101. It is not entirely clear to the Tribunal how the Panel members received the advice or instruction as the Respondent did not call any as witnesses to provide an explanation. The testimonies of those staff members from the DHRM who participated in the briefing and the Promotions Session suggest that the Panel members did not raise any particular concern or opposition in this respect. What is certain, however, is that the DHRM conveyed a clear and consistent message to the Panel members that they should consider this factor in their comparative assessment of the candidates, including in the Second Round.

102. The Tribunal recalls that the two evaluation criteria for the Second Round are clearly set out in sec. 5.9.1 of the Promotions Policy, and are limited to an assessment of the candidates' performance and managerial qualities. These criteria all refer to the merits of the candidates. There is no reference to considerations relating to suitability for placement in a specific post in the Second Round. Rather, the Promotions Policy is built in such a way that this placement

factor plays a role at a later stage of the process. In this respect, sec. 5.12.1 provides:

> Promotion to the P-4 level and above will be subject to the staff member obtaining a position at these levels. Staff members will be considered for positions at the higher grade level in the compendium following the announcement of the relevant promotions session results, whilst respecting all other eligibility conditions.

103. Secs. 5.12.2 to 5.12.6 then go on to set the effective date of promotion, depending on whether a staff member was already serving at the higher level or not, serving on an expert post or was within two years from retirement.

104. The Tribunal finds that suitability for placement in a specific post at a higher level was not a relevant evaluation criterion during the Second Round pursuant to the Promotions Policy. Although it is acknowledged that the Promotions Policy calls for an element of subjectivity in the comparative assessment of candidates in the Second Round, there is a significant difference between comparing the candidates' individual ability to perform at a higher level, and the Organization's capacity to place them in such a higher level, in this case at the P-4 level. Whilst the former purely depends on the candidates' working history and performance record, the latter essentially depends on the Organization's operational needs at a specific point in time.

105. The advice provided by the DHRM went further by asking the Panel members to consider to whom they would give a position in their "area of responsibility", hence making the assessment subject to the particular needs of the section in which the Panel members were working, at that point in time. Depending on whether a candidate fitted with the specific needs of a Panel member's section, he would have, or not, a better chance of receiving a high ranking. In this respect, it is further noted that four Panel members were selected by the Administration and four by the staff members. Although these were senior staff members and were most probably generally aware of the operational requirements of the Organization, there is no indication that, among the eight, they covered all the various areas of work of the UNHCR, nor that they had a

specific knowledge of the Organization's needs at the P-4 level at that particular time and within the Organization as a whole.

106. The Tribunal does not question the appropriateness of taking into account organizational requirements in the grant of promotions. However, it stresses that the Promotions Policy sets in place a process whereby, in the context of the UNHCR's rank in person system, staff members are awarded conditional promotions purely based on merits, and then effectively promoted when their profile corresponds to a particular need of the Organization. This is evidenced from the fact that the High Commissioner is bound to set a quantitative number of promotion slots, without any reference to specific areas of expertise, and from the evaluation criteria for each of the three rounds of evaluation, which solely relate to the candidates' personnel records. As abstract as the comparison of candidates may be without reference to any specific post, it is clear that the Promotions Policy does not envisage a matching exercise until the very end of the process, which is the effective grant of promotion upon the promoted staff's actual appointment to a specific post at the higher level (secs. 5.12.1, 5.12.2 and 5.12.3).

107. In view of the foregoing, the Tribunal finds that in advising the Panel members to take into account the suitability of the candidates for appointment in positions at a higher level, the DHRM introduced an extraneous criterion for consideration during the Second Round which had the potential to subvert the whole promotion exercise, shifting from a merit-based consideration to an operational one. Given the DHRM's role in providing "technical advice and guidance on rules, regulations, policy and methodology" to the Panel (see sec. 4.2.5 of the Promotions Policy), the mere provision of its advice to the Panel constitutes an error in the implementation of the Promotions Policy, irrespective of whether or not the Panel members did actually consider this criterion in their comparative assessment of the candidates. The presumption of regularity attached to the acts of the Administration has been rebutted, and it was for the Respondent to adduce evidence that the Panel members did not take into account this irrelevant evaluation criterion. Not only the Respondent did not adduce evidence

in this respect, but he rather insisted that this was a proper factor for consideration.

Use of personal knowledge

108. The Applicant takes issue with the fact that the DHRM invited the Panel members to take into consideration their personal knowledge of the candidates rather than strictly relying upon the documentation before them. The Respondent claims that it is clear that the Panel members were directed to refer to the candidates' fact sheet, as per sec. 5.9.1 of the Promotions Policy.

109. The evidence shows that the Panel members were invited by the then Deputy Director of DHRM, UNHCR, to inform their ranking with their personal knowledge of the candidates. The Talking Points used for the teleconference with the Panel members invited them to "[l]ook for proof where available (fact sheets, assignment records and performance records) and ask for proof where you may know of facts that are not borne out in the documentation. You may need this for Round 3." The Chief of Assignments and Promotions who participated in the drafting of these Talking Points, explained in her testimony that if Panel members knew information about staff members as a result of having worked with them or supervised them, they were encouraged to inquire with the DHRM if said information was reported "somewhere", for example in a current performance report. She added that the DHRM was at the Panel's disposal to provide them with information; however, she said that none of the Panel members made any query. The Secretary of the Senior Promotions Panel, who conveyed the DHRM's view on the whole process for both the Senior Promotions Panel and the Panel, further confirmed that it was expected that the Panel members' rankings would be informed by their personal knowledge of various candidates, in both a positive and a negative way.

110. Again, the Tribunal is not in a position to ascertain how the advice given by the DHRM influenced the Panel members' assessment of the candidates.

111. The Promotions Policy explicitly states, at sec. 5.9(i) and (ii), that the Panel members must base their comparative assessment of the candidates on the latter's fact sheets and e-PADs. In turn, sec. 4.7 states that "[t]he Panels shall ensure that conclusions are not influenced by any unsubstantiated information provided orally or in writing by any person or authority external or internal to the UNHCR, including by, or on behalf of, staff members whose cases are under review", thereby specifically preventing the taking into consideration of information not reflected in the documents provided to the whole Panel. Likewise, the Promotions Policy does not envisage any role for the DHRM to provide additional information to Panel members but solely to provide technical advice and guidance on the applicable rules (see sec. 4.2.5).

112. The Tribunal finds that there is no room in the Promotions Policy for the Panel members to inform their rankings with additional information they may know about but that is not reflected in the documents subject to their review. Otherwise, candidates may be advantaged or disadvantaged based on the fact that they are known to some of the Panel members, opening the door to nepotism and bias. The Tribunal acknowledges that Panel members may have known some of the candidates, for having previously worked with them or supervised them and, to some extent, may be influenced by their personal knowledge of the candidates' performance. This is unavoidable and, indeed, implicitly allowed by the Promotions Policy which did not preclude Panel members to assess candidates they may know, unless if they were their current supervisor. That said, there is a difference between being influenced by some personal knowledge of the candidates, and engaging in an inquiry to bring in information that was not contained in the documents under review. As part of a fair and transparent process, and in compliance with the Promotions Policy, any information that is not included in the documents before the Panel must be considered as irrelevant for the purpose of the candidates' comparative assessment.

113. In view of the foregoing, the Tribunal concludes that, irrespective of whether or not the Panel members actually used information that was not reflected in the candidates' fact sheet, the DHRM's advice to take into account information not reflected in the documents submitted to the collegial review of the Panel was improper and constitutes a procedural irregularity in the implementation of the Promotions Policy.

Ranking methodology

114. The Applicant has highlighted significant issues with the ranking methodology proposed by the DHRM, the individual rankings provided by the eight Panel members and their treatment by the DHRM when it "crunched the data", as one witness stated. The Respondent argues that the methodology used was proper but acknowledges that there have been some mistakes committed by the Panel members in applying the suggested methodology. He argues, however, that these had no impact on the Applicant's candidacy as a corrected grid shows that she would not have advanced to the Third Round in any event.

115. It has been established that the DHRM advised the Panel members that "[a]t times, two or more fact sheets may be indistinguishable", in which case they could "rank them the same". The DHRM explained the methodology for ranking in this scenario by way of examples. For instance, if the first three candidates of a list had indistinguishable fact sheets, they were all three to be ranked number one, and the candidate after them was to be ranked number four.

116. The consolidated table of rankings for female candidates for promotion to the P-4 level shows that all eight Panel members gave the same ranking to one or more candidates at some point. Whereas one Panel member gave the same ranking to more than one candidate only in a few occasions, all the other seven did it systematically, *de facto* engaging in a grouping exercise. Most of the Panel members ranked the candidates by groups of 10 people or thereabout. Errors in following the suggested methodology were identified in the course of the present proceedings by the DHRM, the Applicant and the Tribunal in the rankings provided by each of the eight Panel members, some being of very serious concern.

One Panel member even appears to have been influenced by the alphabetical order in which the candidates were presented on the list.

117. For example, one Panel member appears to have engaged in a pure grouping exercise, by ranking 10 candidates number 1, 9 candidates number 11, 10 candidates number 11, 10 candidates number 31, 10 candidates number 41, 10 candidates number 51, 11 candidates number 61, 10 candidates number 71, 9 candidates number 81, 10 candidates number 91, 6 candidates number 101, 12 candidates number 107, 10 candidates number 119, 10 candidates number 130, 9 candidates number 141, 3 candidates number 151, 11 candidates number 154, 10 candidates number 165, 8 candidates number 176 and 8 candidates number 184. He ranked all candidates within a group of approximately 10 people, which causes the Tribunal to wonder what exact criteria this Panel member was applying. Also, this Panel member committed errors in applying the methodology suggested by the DHRM, notably by ranking 9 candidates number 11 and then assigning the next candidate the ranking number 21, while it should have been number 20 in application of the DHRM's suggested methodology.

118. Another Panel member engaged in a similar grouping exercise, by ranking 3 candidates number 1, 10 candidates number 4, 11 candidates number 14, 9 candidates number 25, 22 candidates number 35, 11 candidates number 45, 12 candidates number 55, 2 candidates number 68, 1 candidate number 69, 12 candidates number 70, 10 candidates number 81, 5 candidates number 91, 10 candidates number 97, 12 candidates number 107, 12 candidates number 119, 10 candidates number 131, 4 candidates number 141, 9 candidates number 145, 10 candidates number 164 and 10 candidates number 175. He committed in this process several errors in applying the methodology suggested by the DHRM, notably by ranking 22 candidates number 35 and then assigning the next 11 candidates ranking number 45, instead of 58.

119. A third Panel member also systematically ranked candidates within a group and indeed assigned the same ranking to up to 25 candidates. He ranked 10 candidates number 1, 11 candidates number 11, 11 candidates number 22, 8 candidates number 33, 10 candidates number 41, 10 candidates number 51,

9 candidates number 61, 14 candidates number 70, 22 candidates number 84, 15 candidates number 105, 25 candidates number 118, 1 candidate number 139, 22 candidates number 141 and 20 candidates number 162. He also committed errors in assigning the next ranking following a grouping, for instance, by ranking 25 candidates number 118 and then assigning the next candidate number 139, instead of number 143. Also, this Panel member did not assign a ranking higher than 162 to any candidate. By not assigning the last rankings to any candidates, this Panel member necessarily had a different impact on the candidates' average.

120. A fourth Panel member also ranked almost all candidates in a group of 10. In particular, this Panel member ranked 11 candidates number 1, 10 candidates number 11, 5 candidates number 21, 10 candidates number 27, 11 candidates number 37, 10 candidates number 48, 10 candidates number 49, 10 candidates number 59, 6 candidates number 69, 6 candidates number 75, 10 candidates number 81, 16 candidates number 91, 10 candidates number 107, 14 candidates number 117, 10 candidates number 131, 8 candidates number 141, 2 candidates number 149, 10 candidates number 152 and 16 candidates number 162. In this process, he committed several errors in the application of the suggested methodology, by not assigning correctly the next ranking. Amongst others, he ranked 10 candidates number 48 and the next ten candidates number 49, although they should have been ranked number 58. Most significantly, this Panel member ranked 148 candidates below 120, which is the threshold to advance to the Third Round. He gave this benefit to more candidates that the Policy allowed him to do. Like the previous Panel member, he ranked no candidate higher than 162.

121. A fifth Panel member also ranked candidates in groups of a minimum of two people, grouping up to 33 people together. In this process, he also committed a number of errors in assigning the next rank following a grouping. Furthermore, he ended up ranking 19 people above number 173, instead of only 15.

122. A sixth Panel member appears to have engaged in the most unusual, worrisome grouping exercise. Not only did he rank all candidates in a group of 10 or so, but most unusually, he assigned all rankings above 111 in alphabetical order, to those who he had not assigned a better ranking. More specifically, he assigned ranking number 111 exclusively to 10 candidates whose names commenced by the letters a or b, and who had not received a better ranking. He similarly assigned the ranking number 121 to 11 candidates whose name commenced by the letters b, c or d, the ranking number 131 to 10 candidates whose name commenced by the letters d, e, f or g, the ranking number 141 to 10 candidates whose name commenced by the letters g, h, i and j, the ranking number 151 to 10 candidates whose name commenced by the letters j, k and l, the ranking number 161 to 9 candidates whose name commenced by the letters l and m, the ranking number 171 to 9 candidates whose name commenced by the letters m, n, p and r, and the ranking number 181 to 8 candidates whose name commenced by the letters s, w and z. Clearly, candidates were disadvantaged if their name was towards the end of the alphabetical order. Also, candidates of a score below 111 whose names were consecutive on the list were frequently ranked within the same group. For example, four candidates appearing in alphabetical order in the list were ranked number 81. Three were similarly ranked number 31. This Panel member also ranked one candidate number 191, which is an impossibility as there were only 187 candidates. The Tribunal is highly concerned with the rankings provided by this Panel member, which appear to a large extent to be based on the alphabetical order of the list of candidates, therefore being totally arbitrary. The random action undertaken by this Panel member had a significant impact on the average of several candidates, who were disadvantaged by their name.

123. None of these errors were detected prior to the present proceedings. The evidence shows that the DHRM collected the individual rankings from each Panel member, an Administrative Assistant reproduced these in a consolidated list, and calculated the average ranking of each candidate. It was uncovered during the hearing that when the DHRM "crunched the data" and converted the eight individual rankings into an arithmetic mean, to then establish the list of consolidated ranking, it used the wrong dividing factor. Instead of making an

addition of the eight rankings of each candidate and dividing the total by eight, it divided it by six. This entailed that a number of candidates received a consolidated ranking higher than 187, which is an impossibility given that there were 187 candidates. Then, the Panel members were asked to sign the consolidated ranking table, which they apparently did without any further questioning.

124. The Tribunal is deeply concerned with the methodology used by the Panel members to rank the candidates, and the errors they committed in this process, which remained undetected by the DHRM. At the outset, the systematic grouping of candidates by all Panel members appears to be indicative of difficulties in differentiating candidates based on the criteria set forth in the Promotions Policy and with the information provided to them, an issue which the Tribunal will more fully address below. It may well be that a large number of candidates were, indeed, "undistinguishable" and that any attempt to rank them one after the other, as envisaged in the Promotions Policy, was not possible, especially given the large number of candidates and the limited scope of evaluation criteria on the Second Round.

125. The above being said, the Tribunal recalls that the Promotions Policy provides for a "comparative assessment and ranking" of the candidates. The plain meaning of such expression is that candidates must be compared to one another and given a consecutive ranking, from the first to the last. There is no provision for the giving of the same ranking to more than one candidate, let alone to engage in a grouping exercise. The Tribunal notes that the impact on the consolidated ranking of a Panel member attributing the same ranking to more than one candidate, for instance by giving the privilege of the best ranking to ten candidates, is different from that of a Panel member ranking candidates individually and consecutively. Surprisingly, it appears that the DHRM did not consider how its suggested methodology could distort the candidates' consolidated ranking, neither at the time of proposing their methodology nor when it "crunched the data". No statistician was consulted, although it appears

necessary to get professional advice given the potential impact of the proposed methodology on the candidates' overall ranking.

126. The Tribunal cannot but wonder how and why seven of the eight Panel members ended up grouping almost all candidates within a group of 10 or thereabout. Was it agreed upon? If not, what were the criteria used to divide the candidates into such groups? There is a difference between assigning the same ranking to two or more candidates who are "undistinguishable", as suggested by the DHRM, and engaging in a grouping exercise. The ranking process that most of the Panel members undertook suggests that they applied additional criteria or a different methodology, which remain unknown and unexplained, thereby leading to a lack of transparency of the ranking process. While it is arguably not excluded that Panel members could rank one or more candidate the same without violating the spirit of the Promotions Policy, such methodology could not be reasonably introduced without an administrative issuance that defines its parameters, and after due consideration of its potential statistical impact on the consolidated ranking of candidates.

127. Equally worrisome is the fact that the DHRM developed the consolidated list of candidates who advanced to the Third Round based on the numbers provided by the Panel members, which displayed, on their face, blatant errors, and itself committed errors in using the wrong dividing factor. Amongst others, the systematic grouping of candidates by seven Panel members should have reasonably caused concern as to the procedures adopted, as should have the impossible rank of 191 given by one Panel member.

128. Most significantly, the DHRM should have been alerted to a possible arbitrary exercise in the face of rankings attributed by alphabetical order. These should reasonably have caused some concern to the DHRM and lead to further enquiries. In this respect, the Tribunal notes that sec. 6 of the Promotions Policy provides that "compliance with this policy will be monitored by the Director of DHRM, as appropriate". Most surprisingly, the evidence before the Tribunal discloses that no one from the DHRM made any review of the consolidated table.

If such a review was in fact made, it certainly did not result in any action being taken.

129. The Respondent submitted that the Tribunal should not be concerned by the errors in rankings as they had no impact on the Applicant's chances to advance to the Third Round. The DHRM prepared a corrected consolidated ranking table, where, it asserts, it correctly applied its suggested methodology for the ranking of "undistinguishable" candidates. These corrected tables were prepared for the purpose of the present proceedings and are not signed by the Panel members. They show slight variations in the consolidated ranking of a number of candidates, which would not affect their passing or not to the Third Round, except for one candidate, who was previously ranked 121st and ended up being ranked 120th upon correction. This staff member, who did not advance to the Third Round, should have, pursuant to the DHRM's suggested approach. Conversely, one staff member who was initially ranked 119th was ranked 121th upon correction, so she should not have advanced to the Third Round, according to the DHRM corrected table.

130. The individual who actually undertook this correction process was not produced as a witness. The precise manner in which the recalculation was undertaken is thus unclear. Most surprisingly, the Respondent called as a witness to explain the correction grid the current Head of Assignments and Career Management Service (D-1) although she was not involved in the 2013 Promotions Session and did not prepare the correction grid herself. In her written statement, she stated:

> I have reviewed the aggregate table of the female candidates for promotion to the P-4 level that was prepared by the Panel Secretariat during the Second Round of the 2013 Promotions Session. I found that there were a number of divergences from the instructions on ranking in cases in which a Promotions Panel member awarded identical individual rankings to more than one candidate. For example, one Panel member awarded nine candidates the ranking of 11, and then awarded the next ten strongest candidates the ranking of 21. Pursuant to the instructions, the next ten candidates should have been ranked 20, rather than 21.

131. She was unable to provide any further explanation during her testimony before the Tribunal.

132. The problem with this correction exercise is that it assumes that the methodology for ranking "undistinguishable" candidates suggested by the DHRM was binding or, at best, that the Panel members intended to follow it. Firstly, as these "instructions" were not the subject of an administrative issuance, they cannot be considered as binding upon the Panel members. One witness, indeed, referred to the methodological suggestion as in fact being no more than that, a suggestion, as it could not be more. Secondly, absent any evidence from the Panel members, who were not involved in the correction exercise, it cannot be presumed that they intended to follow the DHRM's suggested approach. Indeed, most of them did not, notably when they elected to proceed by grouping. In these circumstances, the Respondent's *post factum* reconstruction is purely speculative and of no assistance. The Tribunal is therefore not in a position to assess the impact of the numerous errors and dubious methodology adopted by some Panel members on the Applicant's chances for promotion.

133. In view of the foregoing, the Tribunal concludes that the random application of a grouping methodology by the Panel members, upon suggestion from the DHRM, had no basis in the Promotions Policy and constitutes a procedural error in its implementation. Such methodology could not be reasonably introduced without an administrative issuance, and after due consideration of its potential impact on the consolidated ranking of candidates. Furthermore, the numerous and significant errors in the rankings provided by Panel members raises serious concerns as to their reliability and questions as to the methodology that some Panel members adopted, which remained unquestioned and unexplained by the DHRM.

Whether the Applicant was given fair and adequate consideration for promotion

Arbitrary process

134. The Applicant argues that the whole process was arbitrary due, *inter alia*, to the lack of objective evaluation criteria and the scale of the task the Panel members were asked to accomplish within a short amount of time. She highlights important disparities between rankings provided by different Panel members to the same candidate and asserts that these are indicative of an arbitrary decision-making process and, in some instances, bias. The Respondent submits that the Tribunal may recommend changes to the Promotions Policy if it is contrary to the Staff Rules and Regulations, but cannot order them. He submits that he has "minimally demonstrated" that the Applicant was given full and fair consideration for promotion as her fact sheet has been reviewed by the Panel members and evaluated against others pursuant to the criteria set forth in the Promotions Policy. He argues that these evaluation criteria were sufficiently defined and in line with the PAMS to allow for a comparative assessment of the candidates. The Respondent asserts that disparities in rankings were expected and intrinsic to the nature of the process, which involved a subjective review by the various Panel members.

135. At the outset, the Tribunal agrees with the Applicant that the consolidated table of ranking for female candidates for promotion to the P-4 level displays significant divergences in the ranking provided by different Panel members to the same candidate. One candidate was ranked first by one Panel member and 181 by another, thereby being ranked at almost the two extremities of the spectrum in a wide pool of 187 candidates. Extreme variations between Panel members' rankings for the same candidate are demonstrated throughout the table. For instance, one candidate was ranked number 3 and number 165. Another one was ranked number 1 and number 152. The table displays, at times, a total disagreement in respect of some candidates amongst the eight Panel members. For instance, one candidate was ranked numbers 1, 11, 70, 80, 83, 101, 173 and 175. Another one was ranked 15, 41, 59, 107, 131, 162, 176 and 184. A third one was ranked number 1, 22, 70, 107, 121, 141, 143 and 152.

136. At other times, the table points towards some consensus but with significant outliers. For instance, one candidate was ranked below 27 by seven Panel members, but number 141 by the eighth Panel member. Another candidate was ranked below number 16 by seven Panel members but number 119 by the eighth Panel member. A third candidate was ranked above 121 by seven Panel members but number 35 by the eighth Panel member.

137. The Tribunal considers that the discrepancies in the ranking table deserved some explanations. It is beyond understanding that applying the same criteria, which all refer to the candidates' own personnel record and supposedly reviewing the same information, two Panel members would disagree to such an extent as to rank one candidate at almost the two extremities of the spectrum in a wide pool of 187 candidates. While there is no doubt that the exercise involves an element of subjectivity, it is reasonable to assume that there would be at least some consensus within the group as to whether a candidate is outstanding or whether he or she would rank among the less meritorious.

138. The Tribunal finds that the variations are such as to raise serious concerns as to the whole process. However, no query was made by those administering the process. It seems particularly incongruous that the DHRM, which was so concerned about an unevenness in respect of appraisal scoring in the e-PADs, found that such variations of assessment in the rankings by the Panel members were entirely acceptable and could proceed without comment.

139. Instead of questioning the methodology and being concerned with the actual validity of the comparative assessment made by the Panel, the Respondent sought to argue before the Tribunal that the divergence of rankings, even if extreme, was expected and, indeed, part of the review exercise. In this respect, the Head of the Human Resources Policy and Planning Service stated in his witness statement:

> 11. In order to fulfil this aim [of identifying staff members who have a proven ability to contribute to the work of UNHCR at a higher level of responsibility], a comparative assessment of the candidates by senior staff members in whose divisions the candidates could work in the future was made the centrepiece of the Second and Third Round of evaluation. The eight senior staff members on the Promotions Panel during the 2013 Promotions Session were at the P-5 and D-1 levels. Half were nominated by DHRM and half were nominated by the Staff Council.
>
> 12. In addition, the Promotions Policy allows for each of the Panel members to have a different perception of a candidate's ability to contribute to the work of UNHCR at a higher level of responsibility. This can be based on the different professional experiences of each of the Panel members. For example, it is possible that one Panel member might accord greater weight to the performance of a candidate during an emergency than would another Panel member.
>
> 13. The differences between the Panel members become apparent during the Second Round in which they individually conduct their comparative assessments and rankings of the candidates for promotion. A purpose of having the Panel members individually conduct their comparative assessment and rankings during the Second Round was to allow each Panel member to retain independence and to bring forth these differences.

140. This line of explanation appears to reflect the Head of the Human Resources Policy and Planning Service's misconception that the Panel members could take into account the candidates' suitability for placement at the higher level with reference to actual placement opportunities. If this explanation for the lack of consensus is indeed accurate, it would appear that not only the DHRM but also the Panel members misconstrued the review exercise as being one involving the Panel members picking those among the group that they considered would be most needed at the P-4 level, or perhaps even in their own area of work, rather than comparing the candidates on their own merits, as required by the Promotions Policy. This may be a possibility, which would then lead to the conclusion that the procedural error identified above concretely distorted the candidates' rankings.

141. The Applicant also alluded to other possibilities, more specifically to the Panel members taking into consideration their personal knowledge of candidates, to a failure to sufficiently define the evaluation criteria and to the scale of the task. The Tribunal has already addressed the first factor, which indeed could possibly explain some outlier rankings and demonstrate that this advice by the DHRM generated tangible problems. The Tribunal will now examine the two additional suggested factors in turn.

142. As recalled above, it is not the Tribunal's role to engage in a review of the Promotions Policy unless it is alleged that it does not comply with a higher norm. This is not the case in the instant application. The two evaluation criteria for the Second Round, namely performance and managerial achievements, are in line with staff regulation 1.1(d), which provides that "[t]he 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". The Promotions Policy provides further particulars for each criterion, which are also in line with staff regulation 1.1(d).

143. Regarding performance, it provides for a minimum standard "indicating the staff member's ability and readiness to perform at a higher level" and for consideration of "consistently demonstrated exceptional performance and documented exemplary service, including in emergency operation" and of "service at the higher grade level for one year or longer … recognized through the receipt of a[n] SPA or RALP" (see sec. 5.9.1(i)).

144. Regarding managerial accountability, it provides that "a staff member must have demonstrated a high level of competence and professionalism in the management of human, financial, material resources, programmes or operations" (see sec. 5.9.1(ii)).

145. Given the discretion vested in the Administration for the establishment of its policies and procedures, it is not for the Tribunal to go any further and examine whether the evaluation criteria were fit for purpose or otherwise sufficiently

defined. That being said, the Tribunal, which has by now examined the Second Round review undertaken by the Senior Promotions Panel (see, e.g., *Rodriguez-Viquez* for male candidates for promotion to the P-5 level; *Spannuth Verma* UNDT/2016/043 for female candidates for promotion to the P-5 level), and, with this case, that by the Panel, is highly concerned that it may be simply impossible, in practice, to fairly and adequately compare and rank the P-3 candidates against these criteria, given the number of candidates and the information available.

146. Turning more specifically to the task that the Panel members were asked to undertake, the Tribunal notes that there is little guidance, if any, in the Promotions Policy about the procedure or methodology to be used to fulfil the highly complex exercise that the Second Round evaluation involves. No administrative issuance was provided either. Instead, the DHRM attempted to devise the methodology to be followed.

147. It has been established that on 26 June 2014, the DHRM convened the Panel to the Promotions Session to be held in Geneva from 21 July 2014 to 1 August 2014, for consideration of all eligible candidates for promotion to the P-4 level, male and female. There were 187 female and 234 ma1e eligible candidates for promotion to the P-4 level. The Panel members were, at that time, given access to all the candidates' fact sheets. From 21 July to 25 July 2014, the Panel members gathered in Geneva to conduct their individual assessment of all the candidates, in a controlled environment, away from any distraction. Upon arrival, the Panel members were provided with a computer, a hard copy of all the fact sheets, divided by gender and grade level, and the four lists of candidates to use as a template for their ranking.

148. The DHRM provided the Panel members with another briefing, where it was suggested that they divide the candidates in three boxes: "a) [their] most definite (a number not exceeding the number of slots); b) the not-at-all (not yet) list; and c) don't know (maybe) list." They were further advised as follows: "Ranking is not scoring. Ranking is a comparative exercise. If A is better than B, then A gets a higher rank. You will have to play with the order in each pile until you come to a definitive place for each."

149. The Panel members were also encouraged to "annotate any observations that highlight the merits of the staff member on the template provided to facilitate the ranking" as "[t]hese observations may prove useful for future reference, either when determining the final individual ranking of staff members or during the 3rd round review". Most surprisingly, the Panel members were also advised, based on the lessons learned from the Senior Promotions Session, to "[d]ecide on criteria before starting the review." The Panel members, who were initially allocated three days for their overall review plus an additional one if needed, appear to have completed their review within five days. The fifth day was initially reserved for the DHRM to consolidate the data, so the Third Round could proceed the following week, but the data processing appears to have been done during the weekend.

150. There is no doubt that the Panel members' task was enormous and highly complex, considering the large number of candidates that had to be assessed in a comparative fashion and the documents at their disposal. Comparing and ranking 187 candidates, which should in fact have been 421, based on their performance and managerial skills was, by nature, a highly complex exercise. The Applicant's fact sheet, for instance, contains 24 pages of densely condensed information about her languages skills, academic background, employment record, performance evaluations, and development and learning events.

151. The Tribunal recalls that the fact sheet contains no quantitative value such as performance ratings by a supervisor. For the relevant period, the fact sheet merely contains, in the "Performance Evaluations" section, the staff member's work objectives and the comments of his or her supervisor divided as follows:

a. "Manager Comments on Values, Core Competencies, and Managerial Competencies;

b. "Manager Comments on Cross-Functional and Functional Competencies"; and

c. "Manager Overall Competencies Comments".

152. These rubrics are very general and there are no specific comments, for instance, on managerial achievements. The comments, which were not meant to serve as a specific appraisal of the candidates' capacity to perform at the P-4 level, are either very general or, at times, focus on particular projects that are not directly relevant for the present exercise. The Panel members were required to compare 187 fact sheets within a day or two, and to do the same for the 234 male candidates to the P-4 level The whole review of the 421 candidates was completed within five days.

153. Having reviewed the Applicant's fact sheet and some others in similar applications before it, the Tribunal cannot but wonder how the Panel members could possibly fairly and adequately consider and compare the 187 female candidates' performance and managerial achievements in the face of the information displayed in their fact sheet alone, and undertake the same task for the 234 male candidates in such a short period and without any further guidance.

154. The difficulty is particularly acute given that the candidates are not competing for a specific post where particular experience or competencies may be of significant import, but compared on the basis of their ability to perform at a higher level in their respective area of expertise. Furthermore, P-3 staff members, by nature, have a more limited working experience than those in higher categories, which makes it even more difficult to distinguish them. Also, the evaluation criteria are more limited than those provided in the Promotions Policy for candidates at the P-5 and D-1 levels, which have an additional criterion of leadership qualities.

155. In the Tribunal's view, the ratings contained in e-PADs, which were required to be disclosed to the Panel by the Policy, would have at least given the Panel members some comparative measures. The comments provided by the supervisors do not provide enough information to constitute the basis of the envisaged comparative exercise and, in any event, were not designed or intended to provide it.

156. The Tribunal has serious doubts that even with the e-PADs, it may not have been feasible for the Panel members to undertake the *qualitative* comparative assessment envisaged in the Promotions Policy when faced with hundreds of candidates, in such a way that each of them would be given "fair and adequate consideration" for promotion (*Abbassi* 2011-UNAT-110, para. 23; see also *Majbri* 2012-UNAT-200, para. 35; *Ljungdell* 2012-UNAT-265, para. 30). Certainly, the comparative review in this case was a consummate procedural failure. It was neither fair, nor adequate in its consideration of the candidates.

157. In view of the foregoing, the Tribunal finds that the Respondent failed to demonstrate, even minimally, that the Applicant was fully and fairly considered for promotion. The consolidated table of rankings displays significant divergences in the rankings given to the same candidate by different Panel members, which cannot be simply explained by reference to the fact that this review exercise entailed an element of subjectivity. Not only did the Respondent fail to provide any satisfactory explanation for these divergences, but he also failed to demonstrate that the Applicant's candidacy for promotion was, indeed, properly compared with that of the 186 other female candidates by the eight Panel members based on the established evaluation criteria.

158. Given the failure to provide the Panel members the e-PADs' ratings, which were necessary to compare the candidates in light of the evaluation criteria, the invitation to take into account operational requirements as well as personal knowledge of candidates, and the way the review was conducted, the Tribunal finds that the presumption of regularity has been rebutted, and that there are strong indicators that the Second Round review was carried out in an arbitrary manner. By implementing the Promotions Policy in such a flawed way during the Second Round, without duly considering the impact of the recommendations it made on the overall fairness of the process and exercising the requisite level of supervision, the Administration's conduct boarders on a breach of its duty of care towards its employees, whose only chance to advance their career within the UNHCR is through this Promotions Procedure.

Safeguards embedded in the process

159. When issues with rankings were addressed with the witnesses called by the Respondent, they repeatedly answered that any imperfections in the process were cured by the fact that the number of candidates who proceeded to the Third Round was equivalent to 150% of the number of available slots for promotion, so the Third Round offered the Panel members an opportunity to collectively probe their individual assessment. Furthermore, they asserted that averaging the individual Panel members' rankings smoothed out individual errors or inconsistencies and diluted outliers rankings. The Applicant argued that the presence of a Third Round review can only cure errors in respect of candidates who advance to this stage. She further submitted that the averaging of the Panel members' rankings is similarly insufficient to smooth out the issues identified.

160. Firstly, the Respondent's argument that the Third Round constitutes a safeguard mechanism does not withstand judicial scrutiny, and this misconception seems to have caused the Administration to unjustifiably take a lax approach during the Second Round. It goes without saying that errors in rankings or any other procedural errors in the implementation of the Promotions Policy committed during the Second Round evaluation cannot be cured during the Third Round in respect of those staff members, such as the Applicant, who did not advance to that stage. The constitution, in the Second Round, of a larger pool of candidates than the actual available promotion slots is meant to allow the Panel to collectively select the top 158 among the "substantially equally meritorious candidates", not to cure procedural defects committed earlier. If some candidates were included in the pool by mistake and others excluded, the Panel members were no longer comparing "substantially equally meritorious candidates".

161. Secondly, the Tribunal notes that there is no provision in the Promotions Policy in respect of the methodology for consolidating the individual rankings provided by each of the eight Panel members. The evidence shows that the DHRM elected to take an arithmetic mean of the individual rankings provided by each Panel member. By taking an arithmetic mean, the candidates' rankings were *de facto* converted into numerical values, which were then ranked from the lowest

to the highest. None of the witnesses presented by the Respondent could provide any cogent explanation as to why this methodology was chosen. The evidence disclosed that no statistical advice was sought or obtained in respect of the appropriate methodology to be used.

162. The Tribunal recalls that the new version of the Promotions Policy, applied for the 2013 Promotions Session, is substantially different from the previous policy as it entails a ranking process rather than a scoring one. The consolidation process became even more complex with the allocation of the same ranking to various candidates, as explained above, and in the presence of extreme rankings. Whilst the methodology adopted may ultimately be an acceptable way to proceed, the Tribunal is concerned that no consideration appears to have been given to the impact of taking an arithmetic mean rather than, or in conjunction with, a median or a mode for instance. The possibility of excluding extreme rankings from the average also appears not to have been considered. Given the small number of Panel members, the impact of an outlier was potentially determinative of the final rank given to a candidate.

163. In these circumstances, the Tribunal is not convinced by the Respondent's argument that taking an arithmetic mean of the eight individual rankings cured all the significant problems in the rankings highlighted above. Rather, it appears that the complexity of the statistical exercise involved has been underestimated.

Failure to provide reasons for the decision

164. The Applicant argues that the lack of reasons provided to her for the contested decision also causes it to be illegal as she was prevented from meaningfully challenging it. The Respondent submits that the Applicant was provided with sufficient reasons as she had been informed that she was not ranked within the top 120 candidates who advanced to the Third Round.

165. As part of a comparative assessment, the decision not to promote a staff member automatically entails that he or she was not ranked among the top ones, without the need to provide any further reasons. It would be practically impossible for the Administration to explain to each and every unsuccessful candidate why he

or she was not ranked among the top candidates; the only justification that may possibly be provided is the individual and consolidated rankings obtained by a staff member. As the Promotions Policy does not provide for these to be disclosed to the candidates, doing so is therefore left to the discretion of the Administration.

166. In this respect, the Respondent states in his reply that "[i]ndividual and overall rankings were generally disclosed by the Promotions Secretariat upon request". The Tribunal notes that this statement is not entirely accurate; the evidence shows that among the seven cases related to the 2013 Promotions Session that were heard jointly, the Administration only disclosed to one candidate her overall ranking, following her request. In the six other cases, the Administration only disclosed the rankings to the candidates, although they requested them, in the course of management evaluations or the proceedings before the Tribunal.

167. In this case, it appears that the Applicant did not specifically request reasons for the contested decision or her individual rankings. Her request for information, dated 26 October 2014, was for "all the necessary documentation to submit the recourse including documentation submitted to and considered by the Panel". Her further request of 4 March 2015 was for the minutes of the Recourse Session. The Applicant was informed of her rankings through the Respondent's reply in the current proceedings, on 2 October 2015. The Tribunal notes with concern that contrary to other candidates who were informed of their rankings through the Deputy High Commissioner's response to their requests for management evaluation, the Applicant's request for management evaluation remained unanswered.

168. Given that the Applicant did not make any specific request to the Administration to be provided with reasons for the contested decision, that the Promotions Policy provides no positive obligation for the Administration to disclose the rankings, and that the Applicant was ultimately informed of her rankings in the course of the present proceedings, the Tribunal finds that the Respondent has satisfied its legal obligation to provide reasons for the contested decision as set out in the jurisprudence of the Appeals Tribunal.

169. In *Obdeijn* 2012-UNAT-201, the Appeals Tribunal stressed the obligation for the Administration to provide reasons for its decision when a request is made "as part of a formal review process", as "a failure by the Administration to respond would seriously hamper or preclude the staff member, the Management Evaluation Unit, and the Tribunals from reviewing administrative decisions affecting the contractual rights of staff members". However, the Appeals Tribunal did not create an independent, positive obligation for the Administration to disclose reasons for its decision beforehand unless otherwise specifically provided for in administrative issuances. Most certainly, the Applicant was ultimately not prevented from meaningfully challenging the contested decision.

170. The Tribunal observes that the Administration's lack of consistency in disclosing the rankings, coupled with the opacity in the procedures followed by the DHRM and the Panel, may have caused the Applicant not to fully understand the decision reached and the overall process. To alleviate this problem, the Tribunal strongly encourages the Administration to adopt clear and transparent procedures for the implementation of the Promotions Policy.

Conclusion in respect of the legality of the decision

171. The Tribunal has identified above several significant procedural errors in the implementation of the Promotions Policy during the 2013 Promotions Session, which may be summarised as follows:

a. The High Commissioner deciding in advance of the Promotions Session that an equal number of available slots for promotions would be allocated to female and male candidates, and thus limiting the slots awarded to women to 50%;

b. The DHRM separating the candidates by gender for the Second Round evaluation;

c. The DHRM failing to provide the Panel members with the e-PADs ratings;

d. The Panel members not assessing compliance with the minimum performance threshold under sec. 5.9.1(i) of the Promotions Policy;

e. The Panel members selecting for consideration in the Third Round two staff members who did not meet the minimum performance requirement;

f. The DHRM advising the Panel members to take into account, during their Second Round review, the candidates' suitability for placement in actual positions at the P-4 level;

g. The DHRM advising the Panel members to take into account their personal knowledge of the candidates;

h. The DHRM introducing a ranking methodology which permitted the allocation of the same rank to more than one candidate, without any administrative issuance and any consideration of the impact on the candidates' consolidated ranking;

i. The Panel members engaging in a *de facto* grouping exercise rather than a comparative one, without any consideration of the impact of such methodology on the candidates' overall ranking;

j. The significant errors in the rankings provided by the Panel members and the purely arbitrary process undertaken by one Panel member, coupled with a lack of diligence by DHRM in the consolidation of data, which puts into question the reliability of the rankings; and

k. The extreme divergences in the rankings provided by the various Panel members to the same candidates, for which no satisfactory answer has been provided, and which may suggest that the errors identified above concretely impacted on the results, or that the comparative and ranking exercise was simply impossible to accomplish given the large number of candidates, the information provided to the Panel members, which consisted only of the candidates' fact sheet, and the short time for conducting their review.

172. In light of all the foregoing, the Tribunal finds that the contested decision is unlawful.

173. The Tribunal notes that the Applicant was eligible for consideration for promotion in the 2014 Promotions Session, which it understands is in its final stage. By conducting an extensive review of the 2013 Promotions Exercise, addressing each and every procedural irregularity raised by the Applicant, and in line with the Appeals Tribunal's judgment in *Mebtouche* (see para. 43 above), the Tribunal hopes to have provided some guidance as to how the Promotions Policy ought to have been implemented in its current formulation and to have identified some areas of concern that may require further consideration by the UNHCR, should it decide to continue to use a similar procedure in future promotions exercises.

Remedies

174. The Tribunal shall consider the remedies sought by the Applicant, listed in para. 25.m above, in light of art. 10.5 of its Statute, which delineates its powers regarding the award of remedies.

Rescission of the contested decision

175. It is settled jurisprudence that in respect of the UNHCR's promotions sessions, the Tribunal can only rescind the decision not to grant a promotion if the procedural irregularities uncovered had deprived the applicant of a significant chance for promotion (see *Vangelova* 2011-UNAT-172; *Bofill* 2011-UNAT-174; *Dualeh* 2011-UNAT-175). The Tribunal shall therefore consider whether the Applicant would have had a significant chance of being promoted if the errors indicated above had not been committed.

176. The Applicant was eligible for consideration for promotion, and met the requirement allowing her to advance from the First to the Second Round of evaluations. As the Second and Third Round involved a comparative assessment of the candidates, rather than eliminatory criteria, the Applicant had a chance to be ultimately promoted. The actual probability of being promoted depended entirely on how she would have compared with the other candidates in the course of the Second and Third evaluation rounds.

177. In this respect, the creation of two separate pools of candidates, male and female, creates a first difficulty in assessing the Applicant's ultimate chance for promotion. Because female candidates (totalling 187) and male candidates (totalling 234) were never compared against each other, it is difficult to assess how the Applicant would have performed in a wider pool of 421 candidates, where only 240 were to advance to the Third Round, and 158 were ultimately to be selected.

178. The Respondent's suggestion that the Applicant would not have been selected given that she was ranked 142th out of 187 is purely speculative, as the candidates are not given a score but a rank. Moreover, because of the wide divergence of opinion among the Panel members in their assessment of candidates, the rankings that the Applicant received in a pool of 187 female candidates does not predicate the one she would have received in a larger pool of 421 candidates, nor the one she would have received if her candidacy had been collectively reviewed by the Panel members within a pool of 240 candidates in the Third Round.

179. Most importantly, the Tribunal is of the view that the Applicant's consolidated ranking as established by the DHRM, as well as the individual rankings provided by the Panel members, are so unreliable that they cannot serve as a basis for consideration of the Applicant's chance for promotion. How would the Applicant have been compared against the other candidates if the Panel members had been provided with her e-PADs, and if they had not been told to take into consideration information they may know about certain candidates and their suitability for placement in P-4 positions? What would her overall ranking

have been if the Panel members had not given the same rank to several candidates and had not committed mistakes in their rankings? What would be the result if one Panel member did not engage in a purely arbitrary exercise in undertaking the comparative assessment and ranking? How would the Applicant have compared with the top 240 candidates if she had advanced to the Third Round? It is impossible to tell, nor should the Tribunal speculate.

180. The errors in the implementation of the Promotions Policy are so significant that their impact on the Applicant's chance for promotion cannot be measured. Most certainly, the Applicant had a real chance for promotion.

181. Therefore, the Tribunal rescinds the decision.

Specific performance

182. The Applicant requests retroactive grant of promotion, with attendant payment of increased salary and benefits. Alternatively, she requests the Tribunal to remand her candidacy for further consideration, with strict guidance, as she considers that the Promotions Policy currently in place does not provide for reasonable consideration since it depends on the subjective view of a limited number of the UNHCR managers.

183. The Tribunal reiterates that the contested decision is discretionary in nature, and that it is not its role to exercise the discretionary authority vested on the Panel and the High Commissioner by substituting its own assessment for that of the competent official (see *Sanwidi* 2010-UNAT-084; *Abbassi* 2011-UNAT-110). It is part of the concept of discretion that its exercise may lawfully result in decisions that are different from those the Tribunal might have preferred. Therefore, where the judicial review concerns the exercise of discretion, the Tribunal can order specific performance, such as it has been requested in the present case, solely in the rare hypothesis where the result of the exercise of discretion can be narrowed down in such a way as to only have one legally correct outcome (see *Ademagic et al.* UNDT/2015/115). This is not the case in the application at hand.

184. The Tribunal has concluded that the Panel had not fairly and adequately considered the Applicant's candidacy for promotion to the P-4 level when comparing her with the other candidates. The High Commissioner, who is the competent decision-maker, has not received a proper and meaningful recommendation for making his decision as to whether or not to award one of the 158 available slots for promotion to the P-4 level to the Applicant. Until this exercise has been properly performed, its outcome remains open for the Applicant. If the Tribunal were to grant the Applicant a promotion, it would be tantamount to prejudging the outcome of the comparative assessment of all eligible candidates envisaged in the Promotions Policy, and substituting its assessment for that of the Panel and the High Commissioner, something that the Tribunal is neither allowed nor in a position to do.

185. As to the Applicant's alternative request for his candidacy to be remanded for further consideration with strict guidance, the Tribunal notes that it follows from its decision to rescind the contested decision that the Applicant's candidacy for promotion should be examined anew and compared against that of the other candidates, thus entailing to conduct the 2013 Promotions Session anew from the Second Round onwards.

186. However, the Tribunal reiterates that it does not have the authority to amend the Promotions Policy, and it is not its role to redesign it so as to depart from the system currently in place, as seems to be the Applicant's request. The Tribunal would not even be in a position to recommend any operational amendment to the Policy. Indeed, its implementation during the 2013 Promotions Session under review was so flawed that it is impossible to ascertain whether it would lead to a fair and adequate consideration of staff members' candidacy for promotion if properly implemented. As expressed above, the Tribunal has serious doubts in this respect.

187. Therefore, the Applicant's request for specific performance must be rejected.

Alternative compensation

188. Art. 10.5(a) of the Tribunal's Statute provides that "where the contested administrative decision concerns … promotion …, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered". The Applicant sought to argue that as she had been eliminated from the process prior to a final decision being made by the High Commissioner, the Tribunal is not required to set an alternative compensation to rescission.

189. The Tribunal considers that this argument is without merit. It is clear that the contested decision concerns a promotion irrespective of the moment when the Applicant's candidacy for promotion was turned down and, ultimately, rejected. The Tribunal shall therefore set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision, in accordance with 10.5(a) of its Statute.

190. In calculating the *quantum*, the Appeals Tribunal has stressed that the determination of the "compensation in lieu" must be done on a case-by-case basis and carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265). In respect of decisions denying promotions, it further held that "there is no set way for a trial court to set damages for loss of chance of promotion and that each case must turn on its facts" (*Sprauten* 2012-UNAT-219, para. 22; see also *Niedermayr* 2015-UNAT-603).

191. In similar cases involving rescission of decisions denying promotions under UNHCR previous promotions policies, the Tribunal set the amount of alternative payment to rescission to CHF8,000 (see *Tsoneva* UNDT/2010/178; *Mututa* UNDT/2009/044), CHF9,000 (see *Andrysek* 2010-UNAT-070) and CHF10,000 (see *Andersson* UNDT/2012/091), taking into account that the applicants would be eligible again to be considered for promotion the following year.

192. Along the same lines, the Appeals Tribunal recently awarded USD10,000 for loss of chance of promotion as compensation in lieu of rescission, in a case where it found that the particular circumstances rendered the assessment more complicated than usual. The Tribunal concluded that it "had to assess the matter in the round and arrive at a figure that [was] deemed by [it] to be fair and equitable, having regard to the number of imponderables" (*Niedermayr* 2015-UNAT-603).

193. Considering the extreme difficulties in ascertaining the Applicant's chances for promotion, the fact that she was eligible again for promotion in the 2014 session, and the previous determinations of the Appeals Tribunal as well as of this Tribunal on the matter, the Tribunal considers, on balance, that it is fair and appropriate to set the amount of compensation in lieu of rescission to CHF6,000.

Material damages

194. The Applicant asked, as an alternative to rescission and retroactive grant of promotion, to be compensated for the material damage resulting from the loss of the additional salary she would have received if she had been promoted to the P-4 level, for two years counted as of the time of the contested decision.

195. In previous cases concerning the UNHCR promotions sessions, the Tribunal rejected requests for material damages on the basis that its order to rescind the decision and to award compensation in lieu of rescission covered all material damages that an applicant may have incurred. The Tribunal reasoned that if the Respondent chose to rescind the contested decision and to take a new decision on an applicant's promotion, the applicant would be able to claim promotion retroactively if promoted, or to challenge the new decision on promotion if not promoted. Consequently, there would not have been a material damage. In turn, if the Respondent chose to pay compensation, the sum awarded must be considered as compensation for loss of salary due to the denial of promotion (see *Tsoneva* UNDT-2010-178, para. 44; *Mututa* UNDT-2009-044; *Andersson* UNDT-2012-091).

196. Whereas the Tribunal's holding that payment of the amount awarded for compensation in lieu of rescission applies to the present case, its finding that rescission may entail retroactive grant of promotion and compensate any loss of salary cannot be applied *mutatis mutandis*. Under the current Promotions Policy, the Applicant's promotion, even if it could theoretically be awarded retroactively, would not be effective from the time of the High Commissioner's initial decision on promotions, that is 20 October 2014, but only as of when the Applicant is appointed to a post at the higher level (secs. 5.12.1 and 5.12.3). The Applicant would not automatically receive retroactive payment of salary at the higher level from 20 October 2014, even if promoted and, as a result, rescission of the contested decision would not fully compensate a loss of salary. The Tribunal must therefore examine if this possible loss of salary, in case the Respondent does not elect to pay compensation in lieu of rescission, justifies awarding material damages to the Applicant.

197. As recalled above, even if the Applicant had been granted promotion on 20 October 2014, this promotion would not have been effective until she were appointed to a P-4 level position. In the meantime, she would have continued to receive her salary at the P-3 level. Therefore, any loss of salary would depend not only on whether the Applicant was indeed promoted, but also on when she would have been appointed to a P-4 position had she been promoted. The evidence shows that the Applicant had not been appointed to a P-4 position as of the date of the hearing. Whether, and if so when, she would have been appointed at that level had she been promoted on 20 October 2014 and considered in the next vacancies' compendium is speculative.

198. Considering that it is uncertain that the Applicant would have been granted promotion, that it is also uncertain that she would have been appointed to a post at the P-4 level in the next vacancies' compendiums, and that the appointment process would have, in any event, taken some time, the Tribunal finds that any possible loss of salary for the year following 20 October 2014 is too speculative to justify or permit the award of material damages.

Moral damages

199. Lastly, the Applicant asked compensation for moral injury in the amount of one month net base salary for grave breaches of staff rights and emotional distress.

200. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows:

> As part of its judgement, the Dispute Tribunal may *only* order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation *for harm, supported by evidence*, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision. (emphasis added)

201. The question arises as to whether the instant case is governed by this amended version of the Tribunal's Statute given that the High Commissioner's decision not to promote the Applicant predates the amendment, whereas his decision to reject the Applicant's recourse and the present application were issued and filed, respectively, after the amendment.

202. The Applicant argued that her right to claim compensation for moral damages accrued at the time of the fundamental breach of her substantive entitlements, which occurred when the High Commissioner decided not to promote her. The Applicant also submitted during the hearing that the challenged decision is the High Commissioner's decision of 20 October 2014 on promotions, and not the one of 3 March 2015 on promotions upon recourse, as the use of the

recourse mechanism did not alter the High Commissioner's original decision insofar as the Applicant is concerned. However, in her application, the Applicant stated that the contested decision was the "[d]ecision not to promote [her] to the P-4 level during the 2013 Promotions Review after recourse request" of which she was notified on 3 March 2015.

203. The Tribunal acknowledges that the particular mechanism set forth in the Promotions Policy, which allows for both recourse and administrative review of decisions on promotion, may create some confusion when it comes to identifying the contested decision in the context of the Organization's internal justice system. In this respect, sec. 5.13.1 of the Promotions Policy provides:

> Staff members have a right to full and fair consideration for promotion. Recourse may be sought on the basis that some documentation relating to the period under review that may have had an impact on the final recommendation was not available at the time of the review. Recourse is not an appeal as per the Staff Regulations and Rules; it is optional, and without prejudice to a staff member's right to formally contest the non-promotion decision in the context of the Internal Justice System.

204. It follows from this provision that when a staff member seeks recourse, the High Commissioner's decision on his or her promotion becomes final only after such recourse has been considered. Since the Applicant sought recourse, the High Commissioner's decision concerning her candidacy for promotion to the P-4 level was finalised only on 3 March 2015, even if he rejected the Applicant's recourse. This is indeed the decision that the Applicant submitted for management evaluation. Should the contested decision be considered as being the one announced on 20 October 2014, the request for management evaluation would have been time-barred (staff rule 11.2) and the instant application irreceivable *rationae materiae* (art. 8(1)(d)(i)(b) of the Tribunal's Statute; see *Costa* 2010-UNAT-036; *Samardzic* 2010-UNAT-072; *Trajanovska* 2010-UNAT-074; *Adjini et al.* 2011-UNAT-108).

205. Even if a fundamental breach of the Applicant's procedural or substantive rights had occurred earlier, the Applicant's moral damage, if any, did not crystallise until the decision on her candidacy for promotion had become final. Any right to compensation could not accrue before that time. As both the contested decision and the application were issued and filed after the entry into force of the amendment to the Tribunal's Statute, there is no doubt that the Applicant's request for moral damages must be determined pursuant to art. 10.5 of the UNDT Statute, as it stood amended on 18 December 2014.

206. The Applicant's request for moral damages is based on an asserted fundamental breach of her due process rights, which she claims does not need to be supported by evidence based on *Asariotis* 2013-UNAT-309, even if the Tribunal were to apply the amended version of art. 10.5 of its Statute.

207. In *Asariotis*, the Appeals Tribunal held that:

> 36. 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.
>
> (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

208. The Tribunal understands from this Appeals Tribunal's holding that a moral injury could be inferred from the fact that a staff member has sustained a fundamental breach of his or her substantive or due process entitlements. However, it was clear that it was ultimately necessary that a moral injury be established, by inference or direct evidence, for the Tribunal to award compensation for moral damages.

209. By requiring that harm be supported by evidence for the Tribunal to award damages, including moral damages, the amended version of the Statute prevents the Tribunal from drawing an inference of moral injury from the fundamental breach of entitlements or due process rights. Under the amended version of art. 10.5 of the Tribunal's Statute, the Tribunal may only award compensation for moral injury if the applicant sufficiently substantiates the moral harm suffered as a result of the contested decision. In this respect, the Tribunal emphasises that it is not compulsory for the Applicant to submit *viva voce* evidence of harm; such fact can be gathered and/or inferred from the pleadings and documents produced by a party (see *Dahan* UNDT/2015/053; *Gueben et al.* UNDT/2016/026). The Tribunal must therefore examine if the Applicant's claim for moral damages is substantiated by any evidence.

210. Despite being expressly invited by the Tribunal to adduce evidence of moral injury during the hearing, the Applicant did not do so, claiming that the fundamental breach of her entitlements in itself gave rise to a claim for moral injury. In view of the foregoing, this argument must be rejected.

211. The Tribunal has also carefully examined the pleadings and documents submitted by the Applicant but there is no allegation of moral harm. The only allegation in this respect is to be found in the conclusion of the application, where the Applicant claims compensation for "breach of staff rights and emotional distress, per 2013-UNAT-309 (*Asariotis*) at paras 36(i) or (ii)". This alone is not sufficient to substantiate a moral injury.

212. The Tribunal stresses that the requirement to adduce evidence of moral injury should not come as a surprise in the present case as it was amply debated at the hearing, and the Applicant was provided with ample opportunities to submit any evidence in this respect, had she wished to do so.

213. The Tribunal notes that it would reach the same conclusion even if it were to consider that the right to claim compensation for moral damages arose from the High Commissioner's initial decision on promotions of 20 October 2014, as it is of the view that applications filed after the publication date of the amendment to art. 10.5 of the Tribunal's Statute are governed by it.

214. The Tribunal is mindful of the well-settled principle that changes in law may not be retroactively applied (see *Robineau* 2014-UNAT-396; *Nogueira* 2014-UNAT-409; *Hunt-Matthes* 2014-UNAT-444). This principle has been applied by the Appeals Tribunal to avoid that substantive rights be affected by amendments to the rules. The situation is different here, as the amendment to art. 10.5 of the Statute does not affect the staff members' substantive right to remedy for moral injury, but merely requires them to substantiate it in the course of the proceedings before the Dispute Tribunal. In other words, the amendment modifies the rules of evidence in respect of a claim for moral injury.

215. Resolution 69/203, which introduced the amendment to art. 10.5 of the Tribunal's Statute, does not contain any provision as to the modalities of its entry into force or transitional measures. Likewise, neither the Tribunal's Statute nor its Rules of Procedure contain any provision governing the entry into force and applicability of changes to procedural rules before the Tribunal.

216. In this context, the Tribunal is of the view that proceedings before it are in principle governed by the procedural rules in force at the time of their institution, unless expressly otherwise provided. In this respect, the Tribunal notes that it is generally recognized that applying "the *tempus regit actum* principle to procedural laws" does not infringe upon the principle against non-retroactivity application of the law (see European Court of Human Rights, *Scoppola v. Italy* (No. 2), Application no. 10249/03, Judgment, 17 September 2008; Supreme Court of

Canada, *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, [2005] 2 R.C.S. 473; House of Lords, *Wilson and others v. Secretary for Trade and Industry*, [2003] UKHL 40, [2003] 3 WLR 435, per Lord Earlsferry; Court of Cassation (France), Chambre civile, No. 10-10223, 9 December 2010). Thus, applying the amended version of art. 10.5 of the Statute to proceedings introduced thereafter does not have a retroactive effect.

217. The Applicant's claim for moral damages must therefore be rejected.

Conclusion

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

a. The contested decision denying the Applicant a promotion to the P-4 level is hereby rescinded;

b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant CHF6,000;

c. The aforementioned compensation in lieu of rescission shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and

d. All other claims are rejected.

(*Signed*)
Judge Rowan Downing
Dated this 6th day of May 2016

Entered in the Register on this 6th day of May 2016
(*Signed*)
René M. Vargas M., Registrar, Geneva