



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

TSONEVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Brown, UNHCR

Introduction

1. By application filed on 29 December 2014 via email, and on 23 January 2015 via the Tribunal's eFiling portal, the Applicant, a staff member of the United Nations High Commissioner for Refugees ("UNHCR"), contests her non-selection to four posts advertised in the September 2013 and March 2014 Compendium of Vacant Positions, namely:

- a. Chief of Section (Procurement of Services) in Budapest, Hungary (P-5) (Job Opening ("JO") 9324 (Expert), Position No. 10018754) ("Position 1");
- b. Senior Protection Officer in Kabul, Afghanistan (P-4) (JO 9508, Position No. 10014285) ("Position 2");
- c. Senior Protection Officer (Internally Displaced Persons (IDPs)) in Kabul, Afghanistan (P-4) (JO 9353, Position No. 10020892) ("Position 3");
and
- d. Senior Protection Officer in Quetta, Pakistan (P-4) (JO 8647, Position No. 10018015) ("Position 4").

Facts

2. The Applicant joined UNHCR in September 2000 as Protection Officer at the P-3 level in Tbilisi, Georgia, and was granted an indefinite appointment under the 100 series of the former Staff Rules. In January 2004, she was appointed to the position of Supply Officer (P-3) at the Contracts Unit, Supply Management Services, in Geneva, and, in December 2007, she was appointed as Senior Contracts Officer (P-4) within the same unit. In November 2009, she was promoted to the P-4 level.

3. In August 2012, the Applicant's position as Senior Contracts Officer was discontinued and, from that time, she was placed on various temporary assignments in Geneva. More specifically, in August 2012, she was temporarily

assigned as Senior Contracts Officer to the Regional Bureau for Asia and the Pacific and, in March 2014, she was temporarily assigned as Senior Legal Officer to the Staff Council. Since 1 January 2015, she has been temporarily assigned as Senior Policy Officer with the Division of Human Resources Management (“DHRM”).

Position 1: Chief of Section (Procurement of Services) (P-5) in Budapest

4. Position 1 was advertised as an “expert position” internally on 15 April 2014 in the March 2014 Compendium of Vacant Positions up to December 2014 (“March 2014 Compendium”), as well as externally. It required, *inter alia*, solid experience in coordinating, managing and supporting procurement services, as well as in developing technical specifications for procurement services and in developing technically and legally complex service contracts.

5. After having received her application, DHRM placed the Applicant on the short-list of candidates submitted to the manager’s review, but the latter found her not suitable for the position, on the ground that “[she had] presented for a similar post as Chief of Section (Procurement of Goods) and did not impress the panel in interview” and “was consequently not shortlisted for further consideration”.

6. Based on the manager’s assessment, DHRM did not recommend the Applicant for Position 1 as she did not “possess the required background or relevant experience for this position”, and recommended another internal candidate at the P-4 level for selection.

7. DHRM’s recommendation was endorsed by the Joint Review Board (“JRB”) at its meeting between 25 to 29 August 2014.

8. On 26 September 2014, the High Commissioner announced his decision on the selection for Position 1 in his Summary of Decisions on Assignments, and appointed the candidate recommended by DHRM to Position 1.

Position 2: Senior Protection Officer (P-4) in Kabul

9. Position 2 was advertised internally on 15 April 2014 in the March 2014 Compendium. It required, *inter alia*, a strong protection background, as well as experience in protection matters relating to the reintegration of returning refugees and protection needs of IDPs, in addition to good management, coordination and diplomatic skills.

10. DHRM placed the Applicant, who had applied to this position, on the short-list of candidates for Position 2 and sought “functional clearance” from the Division of International Protection.

11. The Division of International Protection did not functionally clear the Applicant for Position 2 as she “ha[d] not held a protection or related function since 2003”.

12. The concerned manager found that since the Applicant was not functionally cleared due to her lack of involvement in the last decade in protection issues, she was “not acceptable also for the office in Kabul”.

13. Consequently, DHRM did not recommend the Applicant for Position 2 and recommended another internal candidate.

14. DHRM’s recommendation was endorsed by the JRB at its meeting between 25 to 29 August 2014.

15. On 26 September 2014, the High Commissioner announced his decision on the selection for Position 2 in his Summary of Decisions on Assignments, and appointed the candidate recommended by DHRM.

Position 3: Senior Protection Officer (IDPs) (P-4) in Kabul

16. Position 3 was advertised internally on 15 April 2014 in the March 2014 Compendium, as well as externally. Position 3 required, *inter alia*, a strategic protection background and supervisory experience, as well as experience with protection standards, operational procedures and protection delivery at the country level for matters relating to IDPs.

17. DHRM placed the Applicant, who had also applied to this position, on the short-list of candidates and sought “functional clearance” from the Division of International Protection.

18. The Division of International Protection did not functionally clear the Applicant for Position 3 as she “ha[d] not held a protection or related function since 2003”.

19. The concerned manager did not provide any comment on the Applicant’s application.

20. DHRM did not recommend the Applicant for Position 3, based on the fact that she had not been functionally cleared, and recommended another internal candidate.

21. DHRM’s recommendation was endorsed by the JRB at its meeting between 25 to 29 August 2014.

22. On 26 September 2014, the High Commissioner announced his decision on the selection for Position 3 in his Summary of Decisions on Assignments, and appointed the candidate recommended by DHRM.

Position 4: Senior Protection Officer (P-4) in Quetta

23. Position 4 was advertised internally on 7 October 2013 in the September 2013 Compendium of Vacant Positions up to June 2014, as well as externally. It required, *inter alia*, managerial skills in relation to Protection Units, Community Services Units and Field Teams, and ability to supervise more than 32 staff and to collaborate closely with government authorities, NGOs and other UN agencies.

24. Based on her application to this position, DHRM placed the Applicant on the short-list of candidates and sought “functional clearance” from the Division of International Protection.

25. The Division of International Protection did not functionally clear the Applicant for Position 4.

26. The manager did not endorse the Applicant for Position 4 as she “lack[ed] experience in Protection, RSD [Refugee Status Determination], Resettlement and Field Protection that are required for this demanding post”, as well as field experience.

27. DHRM did not recommend the Applicant for Position 4 and recommended another internal candidate.

28. DHRM’s recommendation was endorsed by the JRB at its meeting between 22 to 28 March 2014.

29. On 25 April 2014, the High Commissioner announced his decision on the selection for Position 4 in his Summary of Decisions on Assignments, and appointed the candidate recommended by DHRM.

30. On 5 November 2014, the Applicant filed a request for management evaluation challenging her non-selection for Positions 1, 2, 3 and 4.

31. On 29 December 2014, the Applicant filed her application before the Dispute Tribunal via email and, on 23 January 2015, she submitted it through the Tribunal’s eFiling portal.

32. The application was served on the Respondent, who filed his reply on 11 March 2015.

33. On 24 March 2015, the Applicant filed observations to the Respondent’s reply without leave from the Tribunal.

34. On 11 November 2015, the Tribunal held a case management discussion.

35. By Order No. 235 (GVA/2015) of 16 November 2015, the case was referred to mediation by officials of the Mediation Division in the United Nations Ombudsman and Mediation Services, and the proceedings were suspended.

36. By email of 15 February 2016, the Regional Ombudsman for Geneva informed the Tribunal that the parties had not been able to reach an agreement, and that the mediation was not successful.

37. Both parties agreed that the present case be decided on the papers.

Parties' submissions

38. The Applicant's principal contentions are:

- a. She was not consulted by DHRM to ensure that she had access to all relevant information and was given the chance to be considered for a wide range of opportunities, as required by the UNHCR Policy and Procedures on Assignments and Promotions (IOM/FOM/033/2010) of 14 June 2010 ("PPAP");
- b. The "matching criteria" were not set out and considered, as required by secs. 79 and 91 of the PPAP;
- c. No minutes were taken of the JRB session, in contravention with sec. 104 of the PPAP, and the minutes of the suitability assessments do not comply with sec. 81(4) of the PPAP;
- d. The Administration failed to consider her situation as staff in between assignment, as required by the UNHCR Policy on Resolving situations of staff members in between assignments (UNHCR/HCP/2014/3) of 10 June 2014 ("SIBA Policy");
- e. No consideration has been given to the fact that she was prejudiced by a previous administrative decision, *i.e.* the discontinuation of her expert position, in contravention with sec. 91 of the PPAP;
- f. The manager's view in respect of her candidacy for Position 1 displays a "lack of objectivity and fair judgment";
- g. The functional clearance for Positions 2, 3 and 4 was not conducted pursuant to established criteria and in a transparent manner;
- h. Positions 3 and 4 were given to external candidates without the requirements of secs. 15 and 16 of the PPAP being met;

- i. Consequently, the Applicant requests the Tribunal to:
 - i. “[R]eview the contested administrative decision for both procedure and substance”;
 - ii. Award her compensation of up to six months net salary “for procedural irregularities and merits”; and
 - iii. Award her compensation “although difficult to assess” for moral damages.

39. The Respondent’s principal contentions are:

Receivability

- a. The application is irreceivable insofar as Position 4 is concerned as the Applicant did not submit a request for management evaluation within the prescribed deadline;

Merits

- b. The selection process in respect of Positions 2, 3 and 4 was carried out in accordance with the relevant provisions of the PPAP, and the Applicant was given full and fair consideration for these positions, as demonstrated by the review of her candidacy by DHRM, the functional unit, the respective managers and the JRB;
- c. The Applicant’s grievances in respect of the selection process for Positions 2, 3 and 4 are ill-founded as:
 - i. Positions 3 and 4 were advertised simultaneously internally and externally, in accordance with sec. 2.d of the Simplification Measures of 1 April 2011 (IOM/025/2011/FOM/026/2011) (“Simplification Measures”); in any event, these positions were ultimately offered to internal candidates;

ii. The PPAP does not provide for DHRM to disclose information arising from the selection process to affected staff members and this would contravene DHRM's obligation of confidentiality;

iii. The Applicant's functional clearance was conducted in compliance with the criteria and methodology set out in the "Methodology for Functional Assessments by the Relevant Functional Unit (September 2013)" as issued under IOM/FOM/064/2013 on "The September 2013 Compendium of Vacant Positions up to June 2014" ("Methodology for Functional Assessments"); due to her lack of protection-related experience since 2003, the Applicant could not be functionally cleared for Positions 2, 3 and 4;

iv. The managers' view in respect of the Applicant's candidacy for Positions 2 and 4 confirmed that her lack of technical protection skills and experience rendered her not suitable for these posts; in turn, the lack of manager's comments in respect of the Applicant's candidacy for Position 3 had no impact on her consideration for that post given that she had not been endorsed by the functional unit; and

v. The matching process for Positions 2, 3 and 4 was properly followed; as the Applicant was not functionally endorsed by the Division of International Protection, she could not be retained for these posts given their key requirements and operational context;

d. As to Position 1, it was not unreasonable for the manager not to consider the Applicant for this position given that in a previous interview related to a similar position eight months before, this manager found that there were fundamental shortcomings in the Applicant's technical procurement abilities and skills; furthermore, although the minutes of DHRM's final recommendation meeting incorrectly state that the successful candidate was interviewed, this procedural flaw had no impact on the Applicant's consideration for this position as she had no reasonable chance of being selected in light of her earlier consideration for a similar position;

- e. The Applicant's status as a staff member in between assignments did not require particular consideration as the SIBA Policy does not apply to regular assignments under the PPAP, and the latter does not provide for priority consideration for staff members who are in between assignments;
- f. Likewise, the Applicant did not submit any evidence to suggest that a prejudice arising from an earlier administrative decision commended that she be given special consideration for any of the four positions;
- g. The JRB, which constitutes UNHCR's central review body for the selection of international professional staff up to the D-1 level, reviewed the propriety of the process for the selection of candidates for the four positions, as directed by the PPAP, and concluded that the DHRM's recommendations could be endorsed; furthermore, the minutes of the JRB meetings were taken in accordance with sec. 121 and 140 of the PPAP;
- h. Lastly, the Applicant was provided with adequate information by DHRM, in compliance with sec. 139 of the PPAP;
- i. Consequently, the Respondent requests the Tribunal to reject the application as without merit.

Consideration

Receivability

40. Regarding receivability, the provisions of staff rule 11.2(a) and (c) read as follows:

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

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

41. Furthermore, art. 8.1.(c) of the Tribunal's Statute provides that "[a]n application shall be receivable if [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

42. It is also established that art. 8.3 of the Tribunal's Statute prevents the Tribunal from extending the deadline for filing a request for management evaluation with the Secretary-General (see, e.g., *Costa* 2010-UNAT-036, *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Adjini et al.* 2011-UNAT-108). Consequently, an application before the Dispute Tribunal is not receivable if the underlying request for management evaluation was itself time-barred.

43. In the present case, the High Commissioner's decision in respect of Position 4 was announced on 25 April 2014. The Applicant requested management evaluation of such decision only on 5 November 2014. By that time, the 60 calendar days time limit set forth in staff rule 11.2(c) to submit a request for management evaluation had obviously expired, so the Applicant's request was time-barred.

44. Therefore, the application is irreceivable *ratione materiae* (*Egglestfiled* 2014-UNAT-402) insofar as Position 4 is concerned.

45. Regarding Positions 1, 2 and 3 the High Commissioner's decisions were announced on 26 September 2014. Therefore, the Applicant's requests for management evaluation of 5 November 2014 were submitted timely.

Merits

46. It is well established that the Secretary-General has broad discretion in matters of appointment. 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).

47. The Appeals Tribunal ruled in *Rolland* 2011-UNAT-122, para. 26, that official acts are presumed to have been regularly performed; accordingly, in a recruitment procedure, if the management is able to even minimally show that the staff member’s candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must be able to show through clear and convincing evidence that she or he was denied a fair chance.

48. The Tribunal will examine, in turn, the recruitment processes for Positions 1, 2 and 3, in light of this standard. Beforehand, the Tribunal deems it appropriate to briefly recall the applicable procedure for assignment to these positions, which is detailed in the PPAP, as complemented by the SIBA Policy.

Assignment Procedure

49. At UNHCR, all professional positions from levels P-1 to D-1 expected to become vacant are advertised in Bi-annual Compendia in March and September, with two planned Addenda to each Compendia to advertise positions that fall outside the timing of these compendia (sec. 13 of the PPAP).

50. Staff members should apply for positions which match their skills, experience, and competencies, an according to the rotation framework (sec. 38 of the PPAP). Staff members whose position is scheduled for discontinuation or whose standard assignment length has expired, amongst others, must apply for suitable positions at their personal grade level and may also apply for positions one level above (secs. 40 and 43 of the PPAP). Additionally, they are to maintain a minimum of three active applications for suitable positions at their own personal grade until assigned (sec. 44 of the PPAP).

51. Upon expiration of the deadline stipulated in the vacancy notice, DHRM undertakes a “comprehensive matching exercise” of eligible applications to vacant positions, which is aimed at identifying the most suitable candidates for positions by comparing applicants to each other and to the requirements of the positions (secs. 78, 79 and 85 of the PPAP). This process involves:

- a. Establishing eligibility for all applicants (sec. 81(c) of the PPAP);
- b. Matching applicants to positions, in accordance with the defined criteria—namely grade, competencies, performance, languages, educational background, internal or external training, rotation history, operational context, diversity, special/medical constraints and special consideration—and arriving at a short-list (secs. 81(e), 87-94 of the PPAP);
- c. Providing the short-list to the concerned manager for his or her views within 10 days (sec. 81(f) of the PPAP);
- d. Seeking relevant functional clearances for short-listed applicants (sec. 81(g) of the PPAP); and
- e. Considering the manager’s views to make a final selection (sec. 81(h) of the PPAP).

52. For expert positions, such as Position 1, the applications reviewing process is slightly different, in that sec. 83 of the PPAP provides that the Recruitment and Postings Section will determine eligibility, short-list candidates together with the Career Management Section and submit the short-list to the manager for his or her views.

53. Pursuant to sec. 86 of the PPAP, “[m]inutes of the matching sessions shall record the process of the suitability assessment of all eligible applicants for a particular position resulting in a short list and a final selection by DHRM. The minutes shall contain any and all information on a staff member considered in the process.”

54. The JRB reviews the process to ensure that the PPAP has been complied with, and either endorses the recommendations made by DHRM or makes alternative recommendations if it disagrees (secs. 117-121). Minutes of the conclusions and any points of dissent shall be taken (sec. 140).

55. Recommendations are sent to the High Commissioner for his final decision, which is then announced in his “Summary Decisions on Appointments” (secs. 141-142 of the PPAP).

56. In addition, the SIBA Policy, which applies to all UNHCR staff members who are in between assignments or serving on temporary assignments (sec. 2), provides in its sec. 4.2(i) that “DHRM may shortlist, for any suitable job opening, staff members who are in between assignments” when “the matching process for his/her pending applications at his or her personal grade has been completed and s/he has not been recommended for any of the job openings” amongst others.

57. Sec. 4.4 of the SIBA Policy further provides that:

Staff members will be informed in writing by DHRM for which additional job openings they are being considered as shortlisted applicants. Recalling paragraph 90 of the PPA, during the matching process, staff members holding an indefinite appointment, in particular staff members who are in between assignments ... including staff members serving on a temporary assignment, will be given preference among the substantially equally suitable candidates.

Position 1: Chief of Section (Procurement of Services) (P-5) in Budapest

58. As recalled above, the Applicant was short-listed by DHRM for Position 1 but was found not suitable by the concerned manager, *i.e.* the Head of the Procurement Management and Contracting Service, on the basis of her performance in a previous interview for another position.

59. Pursuant to sec. 91 of the PPAP, the matching and selection process shall be done on the basis of the applicants’ fact sheets and, if necessary, their performance evaluations. The PPAP does not provide for an interview for the selection of applicants to expert positions, unless no internal candidate was found

suitable (sec. 83). In the instant case, it has been established that the eligible candidates for Position 1 were not interviewed.

60. In this respect, the Tribunal notes that DHRM Shortlisting Matrix for Position 1 states that one candidate “did not perform well during the interview” while the successful candidate “has been highly rated during the interview”. The Respondent confirmed in his reply that these statements are “inaccurate” as there were no interviews for Position 1. This false information was nevertheless conveyed to the JRB for its review of the assignment procedure as per the PPAP.

61. The Tribunal finds that the provision of inaccurate information about the selection process for Position 1, and the reasons for the selection or non-selection of candidates, which are essential to the JRB’s review of compliance with the PPAP, constitutes a procedural flaw in the assignment procedure for Position 1. It lead the JRB to endorse the recommendation made by DHRM on the basis of false and incorrect information, therefore invalidating its endorsement of the selection.

62. As to the assessment of the Applicant’s own candidacy for Position 1, there is no indication that her fact sheet was considered by the manager for assessing her suitability for the post in light of the criteria set out in sec. 91 of the PPAP, including her “work experience relevant to the position, inside and outside UNHCR, as described in the Fact Sheet”. In examining the Applicant’s competencies for the post, the manager relied exclusively on the Applicant’s performance in a previous interview rather than on her fact sheet, hence not complying with sec. 91 of the PPAP. This constitutes a procedural flaw in the consideration of the Applicant’s candidacy for Position 1 resulting in unfair treatment of her candidacy as she was assessed based on a performance in an interview while others were considered based on their fact sheet.

63. Furthermore, the Tribunal finds that the Applicant’s performance in a previous interview held on 27 June 2013 for the position of Chief of Section (Procurement of Goods) was not determinative of her suitability for Position 1, which involves procurement of services.

64. Firstly, although the two positions presented some similarities, they had different requirements. The position of Chief of Section (Procurement of Goods) had a more technical aspect than Position 1 and even required an advanced university degree in “mechanical engineering (machine elements) or equivalent”. The responsibilities for the position of Chief of Section (Procurement of Goods) also included, *inter alia*, to “evaluate, develop, improve and implement specifications especially for, but not limited to, engineering/technical commodities purchased by UNHCR on a global basis” and “[s]etting standards for technical specifications of item descriptions and quality requirements”. In his report on the selection for the position of Chief of Section (Procurement of Goods), the Head of the Procurement Management and Contracting Service stated that the Applicant did not possess the required educational background nor directly relevant professional experience for the position of Chief of Section (Procurement of Goods), but he nevertheless invited her for an interview as she was in between assignments.

65. Secondly, the reasons provided by the Head of the Procurement Management and Contracting Service for not selecting the Applicant for the position of Chief of Section (Procurement of Goods) are not indicative of her non-suitability for Position 1 in light of the criteria set out in sec. 91 of the PPAP. In his selection report for the position of Chief of Section (Procurement of Goods), the Head of the Procurement Management and Contracting Service did not assess the Applicant’s experience in procurement but focussed on her performance during the interview in answering specific questions for the concerned position. In particular, he stated that the Applicant did not advance to the next selection step, *i.e.* the written test, as she “ranked the lowest overall score and ranking (sic.) last or equal last with each of the three members of the panel” and her “[a]nswers were not developed and lacked clarity when summarizing”.

66. Thirdly, the interview was held more than eight months before the consideration of the Applicant’s candidacy for Position 1. Given that the Applicant was working in procurement at the time, her experience had most probably evolved since the time of the interview in question.

67. Considering that the Head of the Procurement Management and Contracting Service relied exclusively on irrelevant considerations to justify his finding that the Applicant was not suitable for Position 1 and that, in turn, DHRM relied upon the manager's assessment not to recommend the Applicant for the position, the Administration failed to demonstrate, even minimally, that the Applicant's candidacy was given fair and adequate consideration.

68. In view of the foregoing, the Tribunal finds that the selection decision for Position 1 is unlawful.

Position 2: Senior Protection Officer (P-4) in Kabul

69. As recalled above, the Applicant was not endorsed by the concerned manager nor recommended by DHRM for Position 2 on the basis that she did not receive "functional clearance" from the Division of International Protection.

70. Pursuant to the Methodology for Functional Assessments, the functional clearance involved an assessment of whether the Applicant possessed the required cumulative years of relevant experience, and the professional qualifications and training for the post, based on her fact sheet and previous assessments as well as the job description. This assessment had to be undertaken by a minimum of two persons, namely "[a] Senior Protection Officer, in consultations with Relevant Deputy Director".

71. In the case at hand, the Applicant was not functionally cleared for Position 2, and this was certainly a relevant element to take into consideration by DHRM in its final selection of candidates for the post to be recommended to the High Commissioner.

72. Turning to the functional clearance assessment by the Division of International Protection, the Tribunal finds no indication that it was not made in accordance with the established evaluation criteria as defined in the Methodology for Functional Assessments, nor that the conclusion reached was unreasonable in light of the documentation under review. Position 2 involved being responsible for country wide protection activities in Afghanistan, and required, *inter alia*, a

“strong protection background”. As the Applicant’s fact sheet shows, she worked only for three years in the area of protection, i.e. from 2000 to 2003; it was, therefore, not unreasonable to conclude that she did not have the required experience for the post.

73. Given that the Applicant was found not suitable for the post and, therefore, was not among the “substantially equally suitable candidates”, there was no requirement to take into account her situation as a staff in between assignments or on temporary assignment in the selection of the candidate for Position 2.

74. Lastly, the Tribunal finds that the minutes of the matching exercise, as reflected in the DHRM Shortlisting Matrix, comply with the requirement of sec. 86 of the PPAP, and that the Applicant was provided sufficient reasons for the decision not to select her for Position 2. Given the Tribunal’s finding above, the Applicant’s grievances in respect of the minutes of the JRB session are not material to the determination of the matter at stake, hence the Tribunal does not find it necessary to address them (see, e.g., *Dualeh* 2011-UNAT-175, para. 17; *Bofill* 2011-UNAT-174, para. 26).

75. In view of the foregoing, the Tribunal finds that the presumption of regularity attached to the acts of the Administration stands satisfied in respect of Position 2. The Applicant has not demonstrated that the applicable procedure was not followed, nor that her candidacy did not receive fair and adequate consideration.

Position 3: Senior Protection Officer (IDPs) (P-4) in Kabul

76. Similar to Position 2, the Applicant was not functionally cleared for Position 3 by the Division of International Protection and, therefore, not recommended for selection by DHRM.

77. The Tribunal’s reasoning above in respect of Position 2 applies *mutadis mutandis* to Position 3. Given that Position 3 required a protection background, experience in large operations and in respect of internally displaced persons, it was not unreasonable for the Division of International Protection to conclude,

based on the Applicant's fact sheet, that she did not possess the required experience. The assessment of the Functional Unit was, in turn, a relevant element for DHRM to take into consideration in deciding not to recommend the Applicant for Position 3.

78. The Tribunal notes that the manager did not express his view on the Applicant's suitability for the position, nor about that of the six other unsuccessful candidates, as required by sec. 81(f) of the PPAP, which states that "DHMR shall provide the short list to the manager who shall give his or her views in respect of suitability in writing no later than 10 days after having received the short list". However, this failure to comply with sec. 81(f) of the PPAP does not vitiate the contested decision insofar as the Applicant is concerned, as it is for DHRM to make the selection for recommendation to the High Commissioner. The outcome of the functional assessment was sufficient for this purpose.

79. Likewise, the Applicant's grievance to the effect that Position 3 was advertised internally and externally, allegedly in violation of the PPAP, had no impact on the decision not to recommend her for Position 3. Indeed, it was established that an internal candidate was recommended and selected for the post and that, in turn, the Applicant was not recommended based on the fact that she had not been functionally cleared. Therefore, the Tribunal does not deem it necessary to examine whether the external advertisement of Position 3 complied with the PPAP and the Simplification Measures.

80. The Tribunal recalls that, pursuant to *Bofill* 2011-UNAT-174, "where the irregularity has no impact on the status of a staff member because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation". In view of the foregoing, the Tribunal finds that the Applicant did not demonstrate the existence of any procedural irregularity in respect of the selection process for Position 3 warranting rescission of the contested decision. In turn, the Respondent has shown, even more than minimally, that the Applicant's candidacy for this post received fair and adequate consideration.

Remedies

81. Art. 10.5 of its Statute delineates the Tribunal’s powers regarding the award of remedies, providing that:

As part of its judgement, the Dispute Tribunal may 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 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.

82. The Tribunal shall consider the remedies sought by the Applicant—listed in para. 38.i above—insofar as they relate to the selection decision for Position 1 in light of this provision.

Rescission and alternative compensation

83. The Applicant requests the Tribunal “to review the contested administrative decision for both procedure and substance” and “to take [a] decision that will provide the Administration with the opportunity to correct itself”. The Tribunal interprets this request as a request for rescission of the selection decision for Position 1 pursuant to art. 10.5(a) of its Statute.

84. Having found that the selection decision in respect of Position 1 was illegal, and considering that the Applicant had a significant chance to be assigned to it, as more amply discussed below, the Tribunal rescinds the decision.

85. Since the contested decision concerns a promotion/appointment, the Tribunal shall set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision, in accordance with art. 10.5(a) of its Statute.

86. As per the jurisprudence of the Appeals Tribunal, in determining the amount for compensation under art. 10.5(a) of its Statute in appointment or promotion cases, the Dispute Tribunal must take into account the nature of the irregularities on which the rescission of the contested decision was based, and the chance that the staff member would have had to be selected had those irregularities not been committed (*Appleton* 2013-UNAT-347). The Appeals Tribunal also held that in calculating such compensation, on the basis of the probability for an Applicant to be appointed to a post at a higher level but for the procedural breach, the period of the difference in salary between an Applicant's grade and that of the contested post that can be taken into account should be limited to a maximum of two years (*Hastings* 2011-UNAT-109).

87. In the case at hand, the Tribunal decided to rescind the selection decision in respect of Position 1 on the basis of two procedural irregularities—the false information in the DHRM Shortlist Matrix about the selection process and the reasons for selecting the successful candidate, as well as the consideration of the Applicant's candidacy based on her performance in a previous interview for another position rather than on her fact sheet—as well as a failure to fairly and adequately consider the Applicant's candidacy for Position 1.

88. With respect to the Applicant's chance to be selected, the Tribunal notes her professional experience as Senior Contracts Officer (P-4) and as Senior Supply Officer (P-4), together with the fact that there were no available candidates at the P-5 level in the short-list of candidates under consideration. Among the five short-listed candidates, the successful candidate was found to be the only one suitable for the post. He was, like the Applicant, at the P-4 level, and therefore was not subject to any preference/priority consideration. In these circumstances, and considering the Applicant's procurement experience, the Tribunal evaluates her chances to be assigned to Position 1 at 50 percent had the irregularities not been

committed. Although her selection for Position 1 would have had no impact on her personal grade, she would have been remunerated at the P-5 level.

89. In view of the above-referenced principles, and given that the Applicant was still remunerated at the P-4 level at the time of issuing the present decision and that the Tribunal does not have any concrete indication as to when the Applicant will be able, in the future, to seek assignment to a post at the P-5 level, it considers that it is appropriate to assess compensation, under art. 10.5(a) of its Statute, by taking into account the estimated remuneration difference between the P-4 and the P-5 grade for a period of two years, which then has to be divided by two. Based on these factors, the amount of compensation that the Respondent may elect to pay instead of rescinding the decision is set to USD3,500.

Compensation

90. The Applicant asks for compensation equivalent to up to six months net salary for “procedural irregularities and merits”, notably for failing to take a “proper assignment decision”. She also claims compensation for moral damages for, *inter alia*, “prejudicial opinion of managers”.

91. The Tribunal may, pursuant to art. 10.5(b) of its Statute, award compensation for harm suffered as a result of a contested decision, if such harm has not been compensated by the rescission. For such compensation to be awarded, the applicant must identify the harm suffered. The Tribunal notes that art. 10.5(b) of its Statute was amended by the General Assembly on 18 December 2014 to require that compensation for harm be supported by evidence. This amendment does not apply to this case given that the application was submitted before its publication on 21 January 2015 (*Ademagic et al.* UNDT-2015-115, paras. 114-117).

92. In this case, the Applicant did not identify any specific material damage for which she requests compensation. In any event, the Tribunal considers that the Applicant’s loss of chance to be appointed to a post at the P-5 level and, therefore, to benefit from an increase of salary, is fully compensated by its decision above under art. 10.5(a) of the Tribunal’s Statute.

93. Turning to moral damages, the Tribunal considers that the Applicant suffered emotional distress occasioned by the Organization's failure to consider her candidacy for assignment to Position 1 in accordance with the applicable rules while she was on a temporary assignment. The breach of her right to be fairly and adequately considered for selection to this post constitutes a fundamental breach of the Applicant's substantive entitlement, which, in line with *Asariotis* 2013-UNAT-309, warrants the award of moral damages. The amount to be paid is fixed to USD3,000.

Conclusion

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

- a. The selection decision for the position of Chief of Section (Procurement of Services) in Budapest, Hungary (P-5) (Job Opening 9324 (Expert), Position No. 10018754) is hereby rescinded;
- b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant the equivalent of USD3,500;
- c. The Applicant shall also be paid moral damages in the amount of the equivalent of USD3,000;
- d. The aforementioned compensations 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
- e. All other claims are rejected.

(Signed)

Judge Thomas Laker

Dated this 2th day of June 2016

Case No. UNDT/GVA/2015/075

Judgment No. UNDT/2016/067

Entered in the Register on this 2th day of June 2016

(Signed)

René M. Vargas M., Registrar, Geneva