



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/021

Judgment No.: UNDT/2016/219

Date: 21 December 2016

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

SARROUH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Robert Nadelson, UNDP

Introduction

1. The Applicant, a former Special Adviser at the D-1, step 5 level, in the Bureau for Development Policy of the United Nations Development Programme (“UNDP”), is contesting the “rejections of [her] candidacy for all [Resident Coordinator/Resident Representative (“RC/RR”)] posts to which she had applied in 2013”.

2. As remedies, in her application, she requests “[p]riority placement in an available RC/RR post, and moral damages in the amount of two years’ full base pay in addition to full reimbursement of legal fees she incurred since 2012”. In her closing submissions, the Applicant amended her plea for compensation, now requesting 12 months of net-base pay in compensation for moral damages; two years of net-base salary for her pecuniary losses, and USD20,000 in costs.

3. The Respondent submits that, since the Applicant failed to request a management evaluation of some administrative decisions contested in her application, namely her non-selection in April 2013 and February 2014, her claims relating to these decisions are not receivable. The Respondent further contends that, in any event, all the Applicant’s claims are without merits and that she was given full and fair consideration for any of the RC posts for which she had applied in August and November 2013 and requests that the application be rejected.

Relevant factual and procedural background

4. The Tribunal notes that, in their joint submission filed on 6 November 2015, the parties indicated a list of agreed and disputed facts. From this list, the Tribunal has identified the following facts, either agreed, not contested or disputed, as relevant to its determination of the present case:

... The Applicant submits the following background as relevant: The Applicant joined UNDP on 16 September 2002 on a project post under the former UN Staff Rules, as Institutional Reform Specialist at the L-4 level, for the Arab Region posted in Beirut, Lebanon. On 1 January 2004, the Applicant was reassigned as Policy Advisor to the Regional Bureau for Arab States [“RBAS”] at UNDP headquarters on a fixed-term appointment at the P-4 level. The Applicant was subsequently appointed as a P-5 Deputy Resident Representative at the UNDP Egypt Country Office on 1 August 2005 before she was reassigned as Policy Advisor to the Democratic Governance Group of the Bureau for Development Policy (“BDP/DGG”) at the same grade on 1 January 2007. In 2007 she was successful in the UN Resident Coordinator Assessment and qualified as United Nations Resident Coordinator/Resident Representative/DO/HC positions. From May 2008 to January 2009, the Applicant led a programme on Democratic Governance and Political Economy as Senior Specialist for the International Development and Research Centre in Ottawa, Canada. The Applicant was then appointed Director, a.i., of the Brussels Liaison Office of the UN Development Fund for Women in October 2009, a position at the P-5 grade. The Applicant was selected for a fixed-term assignment in the position of [Resident Coordinator/Resident Representative, “RC/RR”] for the United Arab Emirates [“the UAE Country Office”]. She assumed her duties on 1 June 2010.

... The Respondent submits the following background as relevant. The Applicant joined UNDP on 16 September 2002 on a project post under the former UN Staff Rules, as Institutional Reform Specialist at the L-4 level, for the Arab Region posted in Beirut, Lebanon. On 1 January 2004, the Applicant was reassigned as Policy Advisor to the Regional Bureau for Arab States (RBAS) at UNDP headquarters on a fixed-term appointment at the P-4 level. The Applicant was subsequently appointed as a P-5 Deputy Resident Representative at the UNDP Egypt Country Office on 1 August 2005 before she was reassigned as Policy Advisor to the Democratic Governance Group of the Bureau for Development Policy (“BDP/DGG”) at the same grade on 1 January 2007. In 2007 she was successful in the UN Resident Coordinator Assessment and qualified as United Nations Resident Coordinator/Resident Representative/DO/HC positions. From May 2008 to January 2009, the Applicant led a programme on Democratic Governance and Political Economy as Senior Specialist for the International Development and Research Centre in Ottawa, Canada. The Applicant was then appointed Director, a.i., of the Brussels Liaison Office of the UN Development Fund for Women in October 2009, a position at the P-5 grade. The Applicant was selected for a fixed-term assignment in the position of RC/RR for the United Arab Emirates. She assumed her duties on 1 June 2010.

...

... The Applicant submits that on January 16, 2011, a UNDP staff member informed the Applicant that the RC/RR Associate (who returned from maternity leave in Oct 2010) was leading a mobbing exercise against her aimed at undermining her management. Reports from other staff followed advising of the same. The Applicant immediately approached RBAS senior management, OHR [i.e., Office of Human Resources] and [the UNDP Office of Audit and Investigation, “OAI”] for advice.

... The Applicant submits that in April/May 2011, [OAI] undertook a mission to UAE to investigate allegations of Workplace Harassment in response to a complaint made against a staff member by the Applicant. Three subjects were interviewed, including a staff member the Applicant had identified as involved in possible wrongdoing. Of these three, in two cases OAI found that the allegations were unsubstantiated and closed the investigation, and in one case OAI elected to close the investigation due to the resignation of the staff member in question after a finding that the allegation of wrongdoing was well founded.

...

... The Applicant submits that in April 2011, [the Applicant] briefed RBAS senior management on progress made in the Country Office despite the ongoing investigation and the depleted professional capacities in the office. [Name redacted, Ms. AS], the Director of RBAS, commended the Applicant’s efforts and promised support.

...

... The Applicant submits that, in May 2011, the Applicant was approached by the UNDP Chief of Staff soliciting her input in preparation for the forthcoming Global Management Meeting as “a promising RC”. She was also approached by the Director of Poverty Practice soliciting her contributions as recognized for her “intellectual skills, knowledge and expertise”. In June 2011, RBAS management approached the Applicant to lead a regional discussion on Green Economics and Human Development and present regional recommendations at the Global Management Meeting in New York.

...

... The Applicant submits that in July 2011 [Ms. AS] called the Applicant from New York and informed her that she was approached by the Deputy Minister at MOFA during a meeting in London and informed that the two resigning staff members (who were under investigation) complained about the RC/RR to the Ministry officials.

... The Applicant submits that, the Applicant had already been informed by staff in the Office about the complaint and reported it to UNDP’s [OAI] which

asked for evidence in order to address the issue. The Applicant wrote to OAI informing them about the discussion with [Ms. AS].

...

... The Applicant submits that on 9 July 2011 [Ms. AS] called the Applicant and criticized her for informing OAI about the discussion.

...

... The Applicant submits that, on Dec 29, 2011 the Applicant undertook a mission to New York and met with [name redacted, Ms. G], the Associate Administrator, and [Ms. AS], RBAS Regional Director, and briefed them on complaints she had been receiving about the new [Deputy RR, "DRR"] from staff as well as her concerns over his weak performance. During the meeting with [Ms. AS], the Applicant was informed that the DRR had complained about her to the Ombudsman. Prior to this she had been having several discussions and raising concerns with the DRR about his performance and management of the office.

...

... The Applicant submits that on January 12, 2012, [Ms. G], and [Ms. AS] visited the UAE Country Office. [Ms. AS] met with all staff in Abu Dhabi and with senior management separately. In a separate meeting with the RC/Applicant and the DRR, she conveyed to them the staff perception of a divided management and informed them of complaints by staff of favouritism practices on behalf of the DRR.

...

... The Applicant submits that the Applicant proposed that she develop a strategy to address the situation in the Office and share it with RBAS senior management. She also managed to work out a win-win solution to avoid potential financial risks in the office and arranged with the RC in Kuwait to offer the DRR a six month assignment as DRR in the Kuwait Office. [Ms. G] supported this proposal. [Ms. AS] did not.

... In [Ms. AS's] absence, the Respondent can neither confirm nor deny this. Given the Applicant's documented poor performance, however, the Respondent disputes the relevance of this to the Applicant's non-selection to the impugned RRJRC posts.

... The Applicant submits that, while in Abu Dhabi, [Ms. AS] was approached by [Department for Safety and Security, "DSS"] staff confirming that a group of staff, including the DRR were engaged in mobbing against the RR. [Ms. AS] did not mention the discussion to the Applicant.

... The Applicant submits that on January 13, 2012, the Applicant wrote to [Ms. AS] enquiring about complaints that staff reported to her that the Director had received, while in Abu Dhabi and asked to share them with her. [Ms. AS] denied receiving such complaints. While in Abu Dhabi, [Ms. AS] apparently received a number of complaints that were not shared with the Applicant.

... The Applicant submits that, on January 20, 2012 the Applicant approached the Ombudsperson and enquired about the DRR complaint to him. The Ombudsperson [name redacted] did not share the DDR complaint or discussed it verbally with her, nor did he inform her of what were the DRR's grievances. The Applicant informed the Ombudsman of her plans on team building and seeking a professional expert to support the office in teambuilding. The Ombudsman advised that his office has now an expanded mandate of coaching and teambuilding and offered his support and services instead. This he added, would also help his office to develop models and best practices for these new services just added to his mandate.

...

... The Respondent disputes this and notes that on 27 January 2012 the Applicant discussed with the Deputy Regional Director, [name redacted, Mr. S, "the then Deputy Regional Director"], her strategy for teambuilding and urged to expedite the processing of Office coaching proposals. [The then Deputy Regional Director] her to work with the Ombudsperson stating that "instead of the coaching proposals you have submitted, the best approach for the moment would be a mission by the Ombudsperson to provide support in team-building and coaching."

... The Respondent notes that in addition, UNDP agreed to pay for the Applicant's external coaching consultant.

... The Applicant submits that the Applicant contacted the Ombudsperson Office and requested that he undertake a mission to UAE to support the office in coaching, mediation and developing a team building strategy. At the same time, she pursued the personal coaching with the Consultant. The mission was confirmed to take place from February 19-23, 2012.

... The parties submit that on February 1 and 2, 2012, the Applicant was approached by the UAE Ministry of Foreign Affairs (MOFA) with an unusual request for an official financial audit of the UNDP Office in UAE. On 6 February 2012 the Applicant wrote to RBAS Management to update them on these developments, describing the discussions with the UAE MOFA as "difficult".

...

... The Applicant submits that on February 12, 2012 the DSS staff wrote a letter to the Applicant advising her that mobbing activities against her continued and the group of staff involved in this vowed they will not stop until the RR is removed. The Applicant wrote to [Ms. AS] sending her the letter and urging [Ms. AS] to approve the coaching proposals she had sent in order to expedite teambuilding activities in addition to other actions taken to improve the situation.

... [Ms. AS] sent the letter to OAI and sent an email informing the Applicant of the action taken.

...

... The Applicant submits that on February 19, the Applicant met with the Ombudspersons and briefed them on the situation in the Office. The Ombudspersons then met privately with the DRR and other staff.

... The Applicant submits that, on 22 February 2012 [Ms. AS], communicated her decision to take away the Applicant's decision making powers on personnel matters, based on allegations she received from staff.

...

... The Respondent submits that [Ms. AS's] email stated that it had been brought to [Ms. AS's] attention that the Applicant had terminated the contract of a UNDP employee based on the financial situation of the office. In her email, [Ms. AS] inquired with the Applicant whether she had sought the advice of the Legal Support Office prior to taking such a decision and notifying the individual, as is encouraged. [Ms. AS] further asked the Applicant to clarify what considerations had been made in reaching this decision, and whether alternative solutions to cost savings had been considered prior to taking a decision to terminate the contract. She ended her email with a request that in order to ensure UNDP's due diligence in future cases, the Applicant was asked to refrain from taking decisions of termination or non-renewal prior to consulting with Headquarters, who would ensure that the advice of the Legal Support Office was obtained.

... The Applicant disagrees with the foregoing statement. The individual was not a staff member but a private contractor on an IC contract. The Applicant acted in accordance with the rules governing IC contractors. [Ms. AS] failed to follow proper due process requirements by neglecting to allow the Applicant to respond before acting.

... The parties submit that on 22 March 2012 [Ms. AS] informed the Applicant of the OAI decision that the DSS letter "d[id] not warrant a formal investigation, [and that] the issues would appear to be best handled through management and performance appraisal processes. If any evidence [were to

come] to light indicating wrongdoing, however, OAI would be happy to reassess.”

...

... The parties submit that on 27 April 2012 [Ms. AS] wrote to the Applicant as follows:

During the recent months we have received very disturbing reports and complaints about the management situation in the Country Office in the [UAE]. We are informed that the staff continue to be seriously demotivated and feeling under considerable stress owing to the state of relations between groups of staff and senior management of the Country Office. I am gravely concerned of this state of affairs, including for the wellbeing of all those concerned, and for the reputation of the Country Office and UNDP as a whole in UAE. I discussed these issues with you [. . .] during my mission to the UAE in January 2012 [...] You will recall that, as we agreed with you, as the person ultimately responsible for the proper functioning of the Country Office and the well-being of staff, would take a number of actions to ensure that the working environment in the office improved and to mitigate any reputational risks. [...]

Despite these efforts, we have received indications that the situation continues to deteriorate and that relations within the office, rather than improve, have seriously worsened [...]

It is my understanding that the programme has not grown to the extent expected at the time of your assignment to the UAE. I understand that this fact may be attributed to a number of circumstances, but I cannot but reflect that the negative atmosphere within the Country Office and the serious demotivation of staff is an important contributing factor. The consequence is a critical financial situation in the country office, which is has not been possible to remedy [...]

In view of the gravity of the situation, you are hereby instructed to undertake a mission to New York in order to conduct consultations with relevant parts of Headquarters with the objective at arriving at a sustainable solution to the management issues in the UAE Country Office. [...]

Finally, you are instructed to cease all decisions of personnel action within the Country Office until further notice. Should any personal actions be required to be taken, you must obtain the approval of the Regional Bureau [...]

... The parties submit that on the same day, 4 May 2012, [Ms. AS] reiterated her request that the Applicant come to Headquarters in the week of 21 May 2012. She further reiterated her request that the Applicant not terminate any staff members' appointments without consultation with Headquarters.

... The Applicant submits that, on 5 May 2012 [Ms. AS] reiterated her instruction to the Applicant "to cease all decisions on personnel action within the UAE Country Office until further notice".

... The parties submit that on 7 May 2012 [Ms. AS] emailed the Applicant to state that [Ms. AS] had been notified that the Applicant was withholding payments, in particular final payments to personnel leaving UNDP, and that she was also withholding their performance assessments while demanding that they perform additional tasks. [Ms. AS] invited the Applicant's comments on these allegations, and asked that the Applicant send Headquarters all information regarding personnel action taken by the UAE Country Office since the beginning of 2012 for review. She reiterated that all further decisions on personnel action must be approved by the Regional Bureau. She ended by reiterating that the Applicant, as Resident Coordinator and Resident Representative, was responsible for the functioning of the Country Office, the well-being of its personnel, and the protection of the Office and the reputation of UNDP in the UAE from any risk or liability.

... The Applicant submits that on 19 May 2012 the Applicant responded with a full report on her role and achievements as RC/RR in 2011 and underscored that the allegations in question had never been disclosed to her and that she had not been given an opportunity to respond to them. She requested a professional management audit that could offer an objective perspective. The Applicant notes that she received no response.

... The Applicant submits that prior to her mission to NY, the Applicant received a letter from the Ministry of Foreign Affairs commending her work on the new Country Programme and accepting the invitation to attend the Executive Board meeting in Geneva where the Country Program would be discussed. During the mission in New York, however, [the then Deputy Regional Director] received a letter through the UAE mission in New York, from the Ministry of Economy requesting to extend the current Country Program as they did not agree with the new proposed draft presented to them. Given the apparent contradiction between the two ministries, the Applicant maintains she informed [the then Deputy Regional Director] not to take any action until she could return to Abu Dhabi and meet with the Ministry Officials to resolve the discrepancy.

...

... The Applicant submits that, upon arrival at HQ, the Applicant was directed to depart immediately from UAE. The Applicant eventually agreed to a reassignment from her current duty station to another posting conditioned on agreement on her future assignment, and that in attempting to find a solution in the best interests of the Organization, her own career and professional reputation would not be adversely affected.

... The Respondent submits that it was during the course of intensive consultations held with the Applicant in Headquarters that an alternative assignment for the Applicant was agreed upon ... [the then Deputy Regional Director] met on numerous occasions with the Applicant during her mission to New York. During these meetings, [the then Deputy Regional Director] went over a number of complaints with the Applicant in detail, providing her with an opportunity to respond. In addition, [the then Deputy Regional Director] and [name redacted, Ms. FW] also met jointly with the Applicant during her mission to New York. The various complaints and the Applicant's response to them were also discussed in these joint meetings.

... The Applicant disputes the foregoing account and submits that, the terms agreed on for the reassignment to the Bureau for Development Policy stated that a position would be created and [Terms of Reference, "TORs"] developed in consultation with the Applicant and her approval of these terms. Instead of being reassigned as promised, she was presented with a set of TORs that were not commensurate with her current level and position as RC/RR nor did they meet the criteria agreed upon with RBAS and OUR. The proposal from BDP was to absorb the Applicant at her present level of D-1 and to assign her ad hoc responsibilities of a general nature that correspond to functions she had performed previously (10 years earlier) at the P-4 level.

... The Applicant submits that on June 11, 2012 the Applicant objected that the TORs [i.e., Terms of Reference] were not commensurate with her level and provided a comparative analysis of the TORs against D1 and P5&4 positions and proposed an alternative set of TORs that were compatible with her experience and qualifications as well the classification guidelines for D1 posts. All proposals were rejected and the Applicant was again faced with a *fait accompli*.

... The Respondent disputes this and submits that on 18 June 2012 [name redacted, Mr. MS] wrote to the Applicant to clarify that the ToR presented to the Applicant reflected UNDP's operational needs at the time. Insofar as the offer suited her, the Applicant was asked to communicate her availability and interest.

...

... The parties submit that on June 23 2012, the Applicant received an email from [name redacted, Ms. P], RBAS/HR [i.e. human resources] Advisor, stating as follows:

During your mission to Headquarters at the end of May and beginning of June it was agreed with you that you will be reassigned from the [UAE] with effect from the end of July 2012. [...] I understand that you are in discussions with BDP regarding your eventual assignment with BDPD. Regardless of the outcome of these discussions, this is to inform you that you will be reassigned to a D1 level post and we will see you in New York on 4 September.

... The Applicant submits that on June 28, 2012 the Applicant received a letter from OHR in Copenhagen confirming her reassignment to NY unassigned to any specific Bureau, post or functions.

... The Respondent submits that the Applicant accepted the offer on 1 July 2012.

... The Respondent submits that on 30 August 2012, the Applicant was re-assigned to UNDP headquarters in New York, as Special Advisor at the D-1 grade with BDP/DGG starting 1 September 2012.

... The Respondent submits that on 10 September 2012, [name redacted, Mr. W, Assistant Administrator, Director, Bureau of Management, “the Management Bureau Director”], wrote to the Applicant on behalf of [name redacted, Ms. C], stating that the course of action taken by the former Regional Director was the right one including the decision to remove her from her post and reassign her to New York.

...

... The Respondent submits that on November 13, 2012 the Applicant submitted a new set of TORs for her supervisor/Director's approval. The TORs were finally signed in April 2013 (8 months after her arrival in DGG) with a functional title as “Special Advisor”. A major deliverable in the TORs (65% of her time) was to develop and lead a new strategy for UNDP on Governance in transition countries.

...

... The parties submit that on 25 May 2012, the UNDG [i.e., the UN Development Group Team] Team rated the Applicant’s 2011 performance as RC in the UAE with “4,” i.e, as a non-satisfactory performance (“the 2011 performance appraisal”).

... The Applicant asserts that no Performance Appraisal process for her Role as UNDP Resident Representative in 2011 was undertaken, although the Applicant had submitted a list of key results and achievements in 2011.

... The Respondent submits that the Applicant was never denied a RCA [i.e., a Resident Coordinator Assessment] for the year, but in fact failed to do her part despite numerous reminders from her supervisor, the Regional Director, The Applicant, however, refused to complete her part of the RCA. UNDP and the Applicant ultimately agreed that no performance appraisal for the Applicant's tenure as RR would be conducted and that if the Applicant wanted one, she would complete her part of the process.

...

... The parties submit that on 30 June 2012 the Applicant rebutted the 2011 performance assessment[.] Following the Applicant's request for reconsideration, the UNDG Team further considered its rating. On 12 September 2012, the UNDG decided to change the contested rating for the Applicant's performance in 2011 of "4" to "3 = *fully satisfactory*" but keeping the comments with no change ... [T]he end result was contradictory and inconsistent.

... The parties submit that on 18 June 2013, i.e. after her transfer to UNDP headquarters, the Regional UN Development Group Team for the Arab States [...] conducted its review of the Applicant's 2012 performance as RC in the UAE. The UNDP Team gave the Applicant a rating of "4 = *needs development*", which indicated a non-satisfactory performance. The UNDP Team stated that the Applicant "need[ed] development in nearly all respects in achieving [her] planned results" and that she had "*not demonstrated the expected management and leadership skills that would have allowed [her] to position the work of the UN Country Team within the country context.*" In addition, the UNDG Team noted in the performance evaluation "*that, based on the performance in the UAE [the Applicant was] not recommended for future [RC] positions within the [O]rganization*".

... The parties submit that a copy of the UNDG Team's 2012 performance evaluation [...] was sent to the Applicant on 3 July 2013 for comment.

... The parties submit that on July 30, 2013 the Applicant wrote to the Chair of the Regional UNDG and challenging the 2012 assessment and requesting a comprehensive reassessment of the report.

... The Applicant submits that there was no discussion of the RC appraisal in accordance with guidelines and there was no Resident Representative appraisal process for her entire tenure in UAE.

... The parties submit that on 4 September 2013 the Regional UNDG Chair concluded its reconsideration of the rating and comments in the 2012 P A. The reference to being “not recommended for any RC positions within the organization” was removed. The rating of “4” indicating “needs development” was maintained.

... The parties submit that on 17 September 17, 2013 the Applicant submitted a formal rebuttal to the UNDG Advisory Group through the UN Development Operations Coordination Office [“DOCO”]) registering disagreement with the Regional UNDG decision and contesting the validity of the Performance Appraisal process. This rebuttal process was initiated on 21 November 2013 and was completed on 13 August 2014, eight months later. The UNDG Advisory Group upheld the rating of “4 partially met expectations”.

... The parties submit that on 26 August 2013, [name redacted, Ms. FM] sent to BDP Director the Note on the Areas of work that the Applicant had completed under her supervision during her tenure at HQ, advising that the work the Applicant had started on Transitions should move ahead and noted that her reporting lines “must be discussed”. She assessed the Applicant’s performance during the year she worked under her supervision as outstanding.

...

... The Applicant submits that, on 26 April 2013 the Applicant applied for four RC positions (Macedonia, Georgia, Kosovo and Uruguay). She was not shortlisted or nominated ... [A] request to meet with the Regional Director of CIS, [i.e., the Commonwealth of Independent States] Bureau received no response.

... The Applicant submits that, in July 2013, [Ms. FM], DGG Director, resigned and announced her departure as of August 31, 2012. The Applicant was asked to write a Note on all the deliverables she had completed under her supervision. In the Note, she documented her work on Transitions strategy as an issue that requires management attention and action, She specifically pointed out that if there was no decision on moving forward with the work on Transitions at that time, her TORs would need to be revised.

... The parties submit that on 29 July 2013, the Applicant requested a management evaluation of the purported administrative decision to “exclude” her from consideration for vacant RC/RR positions.

... In her request the Applicant claimed that the contested purported decision “*appear[ed] to be a continuation of a larger pattern of [of retaliation, harassment and abuse of authority] aimed at undermining [her] UN career.*” In this connection, the Applicant put forth, *inter alia*, that the Ombudsman for the Funds and Programmes, [name redacted, Mr. B], acted in an “*unfair and*

partial” manner during the visit of the UAE Country Office, Furthermore, the Applicant asserted that the role of the Ombudsman was “*one-sided*” and “*contributed to an unfair assessment of the office issues.*” Upon inquiry by the Organization, the Applicant clarified in a message of 13 August 2013 that she did “*not wish [her] claim [of retaliation, harassment and abuse of authority as raised in the first request] to be considered as constituting an allegation of misconduct*”, explaining that she “[*only*] referred (...) to institutional patterns of harassment”. She further highlighted that she saw “*no merit in referring these matters for investigation to [the UNDP office of Audit and Investigations].*”

...

... The parties submit that on 30 July 2013, the Applicant filed an application for suspension of action of the purported administrative decision to “*exclude (her) from consideration for future [RC/RR] positions*” with the United Nations Dispute Tribunal (“the UNDT”). On 5 August 2013, following a corresponding order of the UNDT, the Respondent filed a response to her application. In an email dated 7 August 2013, the UNDT informed the Parties that the Applicant’s application for a suspension of action was refused. In Order No. 251 (NBI/2013 of 12 November 2013), the Tribunal held that the purported decision to “*exclude (the Applicant) from consideration for future [RC/RR] positions*” was not ripe for judicial view and was not *prima facie* unlawful.

... The parties submit that in a letter dated 29 August 2013, responding to the Applicant’s request for management evaluation dated 29 July 2013 (“the first response letter”), the Assistant Administrator and Director of the Bureau of Management, [the Management Bureau Director], informed the Applicant that he did not see any basis for acceding to the first request. In this connection, the Applicant was notified, *inter alia*, that there was no decision to exclude her from consideration for any vacant position to which she had applied. [The Management Bureau Director] further informed the Applicant that the 2012 performance appraisal did not advise her that she would no longer be considered for open RC/RR positions, as the UNDG Team had only made a recommendation in this respect. As the Applicant had requested re-consideration of the 2012 performance appraisal and there was thus no final assessment by the UNDG Team, [the Management Bureau Director] highlighted in the first response letter that any conclusion drawn by the UNDG Team in the 2012 performance appraisal was not final and did not therefore serve as a basis for any other decision. Finally, [the Management Bureau Director] pointed out that the record did not corroborate the Applicant’s claim that she was the subject of institutional patterns of harassment and abuse of authority or any other unfair treatment by the Organization, noting that the Applicant did not provide any specifics or evidence in this respect. In this

context, [the Management Bureau Director] advised the Applicant that complaints pertaining to the services offered by the Office of the Ombudsman could be directly filed to [name redacted, Ms. S], Chief of Staff and Director, Executive Office, a.i.

...

... The parties submit that on August 26, 2013 the Applicant applied for three RC/RR positions (Jordan, Benin and Nigeria). She was not interviewed or nominated.

... The Applicant submits that she wrote the RBAS Director to enquire about her application for Jordan twice, but no response was received. She wrote to the Director of RBA[S] to enquire about the applications for Benin and Nigeria, but was referred to OHR ([name redacted, Mr. L]). She was then informed that the Executive Group ["EG"] did not nominate her for any of the positions. No further information given on the reasons.

... The parties submit that on 29 August 2013 UNDP responded to the Applicant's request for management evaluation, rejecting her claims on the premise that the record does not show unfair treatment or there is no evidence that a decision was made to exclude her from RC positions.

... The parties submit that in November 2013, the Applicant applied for three RC/RR positions at the UNOP Country Offices in Zambia, Saudi Arabia and Laos.

... The Respondent submits that the applications for the August and November 2013 positions, which were received from the Applicant and other UNDP candidates, were reviewed by OHR. OHR then listed the names of all UNDP candidates who applied for the August 2013 positions in a matrix broken down by each of the vacant RC posts. In addition to the UNDP candidates' names, their basic employment information was included in the matrix. The names of candidates who had been nominated by other UN agencies for the August 2013 positions were also included in the matrix. A similar matrix was compiled with regards to the November 2013 positions. The two matrices were then sent to EG Secretariat. A total of 16 candidates, all of whom served in senior management positions, mostly at the D-1 or 0-2 level, had applied for the August and November 2013 positions.

... The Respondent submits that the EG Secretariat forwarded the two matrices to the EG members for the EG meetings on 5 September and 12 November 2013 for their review. The matrix and all applications received for the August and November 2013 positions of all candidates, including the applications of the Applicant, were then considered by the EG during the meetings on 5 September and 12 November 2013. Besides these country specific requirements, the EG endeavored to ensure that its nominations for the

six RC positions reflected diversity, such as North-South balance, gender balance and a broad representation of candidates among all the Organizations of the UN System. In this respect, all of the Applicant's six applications were carefully evaluated by the EG and appropriate weight was given to her professional qualifications, experience and past performance with UNDP.

...

... The Respondent submits that following its review of all the applications received, the UNDP Executive Group ... considered in its meetings on 5 September and 12 November 2013 that the Applicant was not the best candidate for the positions to which she had applied, and consequently decided not to nominate her for the August and November 2013 positions. The Applicant was therefore not among the UNDP candidates who were put forward by the EG to the Inter-Agency Advisory Panel ("the IAAP"), the body that decides on the RC/RR candidates who are proposed to the Secretary-General for his final selection. The Applicant's six candidacies were thus not successful.

... The Applicant submits that, on November 20, 2013 the Applicant met with [Mr. L] to discuss the status of her RC candidacy to the positions she had applied for, including Saudi Arabia. [Mr. L] informed her that his efforts to support her nomination were not successful and confirmed the decision that the Executive Group (EG) did not support her nomination. No reason was given.

... The Applicant submits that on 26 November 2013, the Applicant filed a complaint of abuse of authority against [Mr. B]. On 11 December 2014, the Organization sought clarification from the Applicant's Counsel in respect of the complaint, which he provided in a response of 13 December 2014.

...

... The parties submit that on 2 December 2013, the Applicant submitted a second request for management evaluation addressed to Ms. C, UNDP Administrator. In this context, the Applicant contested the administrative decision to "reject [her] candidacy for the [August and November 2013 positions]". The Respondent notes that she did not contest the April 2013 positions.

...

... The Respondent submits that in a letter dated 31 December 2013, [the Management Bureau Director] informed the Applicant that he did not see any basis for acceding to her second request for management evaluation. He informed the Applicant that her applications for the August and November 2013 positions were reviewed by the Administration and that in each of the six selection processes a matrix of all applicants, which included the Applicant's

name, was provided to and then considered by the EG during its meetings on 5 September and 12 November 2013. She was further informed that there was no automatic dismissal of her candidacy by the EG, and that the EG gave proper and fair consideration to all of her candidacies on both occasions. The Applicant was also informed that consideration did not guarantee selection and that no staff member has an automatic entitlement to a particular post. Finally, the Applicant was informed that the EG's decision was not tainted by "extraneous and improper considerations".

...

... The Applicant submits that, on February 7, 2014, the Applicant met with [Mr. L] and during this meeting he advised that there were no short term assignments available to offer her and no long term UNDP positions identified as well. There was no discussion of nomination to any of the RC current vacancies. Upon enquiring what would happen upon the expiry of her contract on May 31, 2014, [Mr. L] stated that she would not be terminated but will be placed in the Business Solution Centre while looking for posts - an arrangement that is accommodated up to one year.

...

... The Applicant submits that on 11 February 2014, the Applicant applied for five RC/RR positions at the UNDP Country Offices in Benin, Tanzania, Zimbabwe, Ghana and Saudi Arabia.

... The parties submit that on 26 February 2014, the Applicant responded stating out that the introduced comments to the Note to File she has sent him do not accurately reflect the discussion they had. She requested in light of this diverged interpretation of the meeting discussion, that each of them record their recollection of the meeting separately, and that all future actions or decisions be communicated to her in writing.

...

5. On 26 March 2014, the Applicant filed the application in the present case and on 28 April 2014, the Respondent filed his reply arguing that the application is without merits and that some of the claims made by the Applicant are not receivable.

6. On 7 May 2014, the Tribunal (Duty Judge) issued Order No. 109 (NY/2014) requiring the Applicant to respond to the Respondent's contentions on receivability.

7. On 15 May 2014, in response to Order No. 109 (NY/2014), the Applicant's Counsel filed a submission contending that all the Applicant's claims are receivable.

8. By Order No. 122 (NY/2014) dated 28 May 2014, the Tribunal (Duty Judge) instructed that the case join the queue of pending cases and be assigned to a Judge in due course.

9. On 22 July 2015, the case was assigned to the undersigned Judge.

10. By Order No. 201 (NY/2015) dated 28 August 2015, the Tribunal instructed the Applicant to inform it about her current contractual status, and the Respondent to file the decision taken by the rebuttal panel regarding the Applicant's 2012 performance evaluation. The parties were further ordered to inform the Tribunal if they agreed to solve the case informally or otherwise attend a Case Management Discussion ("CMD") on 1 October 2015.

11. In response to Order No. 201 (NY/2015), on 14 September 2015, the Applicant stated that she had separated from service on 31 July 2015 and requested that the present case be joined with Case No. UNDT/NY/2015/040 (*Sarrouh*) in which she contested her separation from UNDP.

12. On 15 September 2015, the Respondent submitted a "Final Report" of the United Nations Development Group, containing the rebuttal panel's decision regarding the Applicant's performance evaluation of 2012, and informed the Tribunal that the parties engaged in discussions for an informal resolution of the case, and requested an extension for a week.

13. On 22 September 2015, the Respondent informed the Tribunal that the parties were not in a position to agree to informal resolution of the case.

14. On 1 October 2015, the CMD was held as per Order No. 201 (NY/2015).

15. By Order No. 259 (NY/2015) dated 2 October 2015, the Tribunal instructed Counsel for the Applicant to consult with the Applicant concerning the remedies requested. The Tribunal further ordered the parties to file a submission listing the agreed/disputed facts

and legal issues and setting out the need for additional evidence as well as their views on informally resolving the dispute.

16. On 6 November 2015, the parties filed the jointly signed statement in response to Order No. 259 (NY/2015). The Applicant further proposed to amend her request for remedies in light of her separation from service.

17. By Order No. 286 (NY/2015) dated 10 November 2015, the parties were instructed to attend another CMD on 3 December 2015 which, after having been postponed at the Respondent's request on behalf of the Applicant's Counsel, was held on 20 January 2016.

18. By Order No. 20 (NY/2016) dated 28 January 2016, the Tribunal ordered the Applicant to file a list of proposed witnesses, outlining the facts which they are expected to elicit, or, alternatively, notarized affidavits by 10 February 2016; and the Respondent to file his observations on the Applicant's 10 February 2016 submission and/or a list of proposed witnesses, if any, outlining the facts which they are expected to elicit, or, alternatively, notarized affidavits by 24 February 2016. The Tribunal further instructed the Respondent to file: (a) the selection decisions regarding the vacant RC/RR posts for which the Applicant applied in April 2013 and the management evaluation response to the Applicant's request therefor, if any; (b) the available selection records for the RC/RR positions for which the Applicant applied in April, August, and November 2013 and for the non RC/RR position(s) she applied in October 2013, except the ones already filed; (c) the CVs of the other candidates in the relevant processes and, if necessary, in a redacted form; (d) documentation on how the UNDP Executive Group functions; and (e) the rules on UNDP's selection system. Finally, the Tribunal directed the parties to file a joint submission in which they set out their proposed and agreed dates for a hearing by 24 February 2016.

19. On 10 February 2016, the Applicant filed her submission pursuant to Order No. 20 (NY/2016), providing a list of proposed witnesses and the facts which they were expected to elicit. The proposed witnesses were: the Applicant; Ms. H, a former UNDP Deputy Regional

Director, RBAS; Mr. L, a former UNDP Director of the Regional Centre for Arab States, Cairo; Mr. A, a Security Associate in DSS; and Mr. E, a Security Associate in DSS, Dubai Office. By notarized affidavit, the Applicant filed the testimony of two other witnesses, namely Mr. RL, former UNDP official and Director of Social Development Planning for Qatar and Mr. AQ, Ambassador of Oman to the United Arab Emirates.

20. On 12 February 2016, the Respondent filed a motion regarding Order No. 20 (NY/2016) requesting to have any affidavit “witnessed by Counsel for the Respondent” instead of notarized and noting that all witnesses proposed by the Respondent were located at UNDP Headquarters in New York.

21. By Order No. 40 (NY/2016) dated 12 February 2016, the Applicant was instructed to file his comments, if any, to the Respondent’s 12 February 2016 motion by 17 February 2016. The Applicant’s comments were duly filed on that date.

22. By Order No. 47 (NY/2016) dated 23 February 2016, the Tribunal rejected the Respondent’s 12 February 2016 motion, noting that the witnesses to be proposed on behalf of the Respondent were all located at UNDP Headquarters in New York and therefore were able to attend the hearing. The Tribunal further informed the parties that, for administrative reasons, the hearing could not take place between 21 March and 1 April 2016 and between 27 April and 6 May 2016.

23. By joint submission in response to Order No. 20 (NY/2016) of 24 February 2016, the parties stated that they had agreed on the dates of 7 and 8 April 2016 for a hearing, with the possibility of extending the hearing through the following week, if needed.

24. By submission in response to Order No. 20 (NY/2016) of 24 February 2016, the Respondent stated that “none of the witnesses proposed in the Applicant’s submission of 10 February 2016 are relevant to these proceedings” and provided explanations therefore. As his own witness, the Respondent proposed that the Management Bureau Director, Assistant Secretary-General, Bureau for Management Services, UNDP, testify in person and outlined

the facts to which he would testify. To the submission, the Respondent appended a number of documents in response to the Tribunal's instructions in Order No. 20 (NY/2016), para. 26 (a)–(e).

25. By Order No. 72 (NY/2016) dated 9 March 2016, the Tribunal instructed the parties that the hearing would take place on 7 and 8 April 2016 and that, considering the witnesses proposed by the Applicant and the similarity of the facts to which they are to testify, the oral evidence in Case No. UNDT/NY/2015/040 and the present case would be heard together but that the cases would not be joined—each case would therefore continue to have its distinct written record and separate judgments will be issued—and that the proposed witnesses would be heard in the following order: the Applicant; Ms. H; Mr. PL; Mr. A; Mr. E; and the Management Bureau Director.

26. By “motion for permission to submit notarized witness statement” dated 10 March 2016, Counsel for the Respondent requested that the Management Bureau Director's testimony be submitted as a notarised witness statement or that he be heard on 11 April 2016.

27. By Order No.74 (NY/2016) dated 10 March 2016, the Tribunal ordered the Applicant to file his comments, if any, to the Respondent's 10 March 2016 motion by 11 March 2016.

28. Counsel for the Applicant filed a response as per Order No.74 (NY/2016) on 11 March 2016 stating, *inter alia*, that: “[f]rom the witness statement that has been submitted, the Applicant believes it is important to have the opportunity to examine [the Management Bureau Director]”.

29. By Order No. 75 (NY/2016) dated 16 March 2016, the Tribunal rejected the Respondent's request for permission to submit a notarized witness statement for the Management Bureau Director and granted his alternative request for the witness to give testimony on 11 April 2016.

30. The hearing started on 7 March 2016 and the Applicant gave oral evidence. At the second day hearing, on 8 March 2016, Mr. L, Mr. A and Ms. H gave oral evidence (the Applicant recalled her wish to call Mr. E to testify).

31. On 8 March 2016, Counsel for the Respondent filed a motion and requested that the then Deputy Regional Director (now RC/RR in Sierra Leone), be called as a rebuttal witness to testify as to “the nature and content of the consultations held by [the then Deputy Regional Director] with the Applicant during her mission to New York in May-June 2012”. The Tribunal granted the request for the then Deputy Regional Director to give oral evidence on 11 April 2016.

32. On 11 April 2016, the Management Bureau Director and the then Deputy Regional Director gave oral evidence.

33. On 12 April 2016, each of the parties filed signed confidentiality undertaking regarding access to the audio recording of the hearing. The recordings were uploaded on the eFiling portal on 15 April 2016.

34. On 20 May 2016, each of the parties filed their written closing submissions.

35. On 19 August 2016, the Tribunal requested transcripts to be made of the hearing for an accurate reasoning of the judgment. The transcripts were provided to the Tribunal on 31 August 2016 and uploaded in the eFiling portal to allow the parties access to them.

Applicant’s submissions

36. The Applicant’s principal contentions may be summarized as follows:

- a. The Applicant has a right to be fairly considered for all available vacancies as well as benefit from applicable career development and promotion policies. The test for whether a candidate was treated in a “fair and reasonable manner” as contended by the Applicant has been set out by the United Nations Appeals Tribunal in *Rolland*

2011-UNAT-122. In *Weiler* UNDT/2010.063, the Dispute Tribunal has prescribed a general requirement for evaluating the fairness of a selection procedure:

The question of whether an applicant was given full and fair consideration is a question of fact. Were the factors relied upon to evaluate the Applicant applied in accordance with the requirements of the relevant regulations and administrative instructions.

b. Thus far, the Respondent has been unable to explain or document how the Applicant's candidature could have received full and fair consideration or to explain what factors were taken into account in rejecting her, without a single interview or inclusion in a shortlist of qualified candidates. The Respondent's assertion that her name appeared on a preliminary list of those who applied does not represent a minimal showing that someone with her experience and standing was carefully considered. The contested decision cannot be evaluated without reference to what preceded it. The background and evidence produced) creates a *prima facie* case that extraneous considerations have influenced the outcome;

c. There was a systematic exclusion of the Applicant's candidacy based on an institutional bias directed from the highest levels of management, including the EG making decisions on her candidacy. She traces this bias as a retaliatory action against her tied to her refusal to write back to the Foreign Minister in UAE as she was instructed. She has adduced evidence that raises serious questions over whether her candidacy has received fair consideration because of this bias;

d. Throughout the period in question, the Applicant has repeatedly and unsuccessfully sought information on why her applications were unsuccessful. The rebuttal process was not even finalized at the time the decisions to exclude her from any RC nomination were taken and hence should not influence that decision making process, although it appears from the management evaluation that this has been a major factor. Considering her ongoing rebuttal of her 2012 performance appraisal as well as her rebuttal for the 2011 evaluation and in the absence of any factual evidence

provided by the Respondent in the management evaluation, the unjustified criticism of her performance can only be explained in terms of continued systemic discrimination against the Applicant;

e. Throughout the period in question, the Applicant repeatedly and unsuccessfully sought information on why her applications were unsuccessful. The rebuttal process was not even finalized at the time the decisions to exclude her from any RC nomination were taken and hence should not influence that decision making process, although it appears from the management evaluation that this has been a major factor. Considering her ongoing rebuttal of her 2012 performance evaluation as well as her rebuttal for the 2011 evaluation and in the absence of any factual evidence provided by the Respondent in the management evaluation, the unjustified criticism of her performance can only be explained in terms of continued systemic discrimination against the Applicant;

f. The inclusion of the comment on her 2012 performance appraisal that, based on her performance in the UAE, she was not recommended for future RC/RR positions, represents *prima facie* evidence of an exclusionary motivation on the part of senior UNDP managers. The fact that this comment was later removed when the Applicant challenged its basis and filed a request for management evaluation of the decision to include it in her official records, does not indicate any underlying change in attitude;

g. No corrective action was initiated. The fact that after numerous attempts to be considered for suitable vacancies, she has never been supported, suggests the motivation continues. The fact that the rating of “4” was maintained without providing any evidence or critical incidents as per the RC guidelines, means it was taken against applicable policies and in support of what appears to be an intent to continue to exclude her in a less overt way. RC candidates are expected to maintain a performance record of “fully satisfactory” in order to be qualified for nomination; Hence, by

removing the “recommendation”, the Respondent is avoiding legal implications of maintaining such a statement, while indirectly achieving the same result of exclusion by keeping a rating of “4”. Moreover, all this was done without any clear justifications remains a decision UNDP policy claims to support gender equality and aims to improve the representation of women in managerial positions. Yet, when presented with a female candidate in a region short on female and Arabic speakers, there appears to be no place in the Organization for her. It is this inertia that the Applicant has labeled institutional discrimination, which emanates from the senior management of the Organization. Discrimination is not always obviously manifested but can be gleaned from the surrounding circumstances. This is precisely why the detailed account of the Applicant’s service in UAE and the effects on her career since returning to HQ are important to understanding why she has been excluded from full consideration;

h. The Applicant had requested a management evaluation of the corporate decision to exclude her from consideration for any RR position based on the statement placed in her performance evaluation by the UNDG Team. She cited the written reference in her 2012 performance appraisal as well as exclusion of her candidacy from four posts she applied for in April 2013 as evidence of the claim she was making. The Respondent issued a general denial. In the interim, the offensive comments were removed from her performance appraisal. However, the reasons for her exclusion in the April round were unknown at the time that the Respondent maintains she was time bound to challenge the process. The Respondent appeals to the Tribunal to be excluded from accountability due to his own prevarication;

i. The Applicant also cited the issue of her performance evaluation and not being shortlisted for four posts in April 2013 as relevant to her request for management evaluation of 2 December 2013, although the administrative decisions prompting her request were her exclusion from two further rounds of vacancy announcements in August and November 2013;

j. Both requests for management evaluation contain the same reasons and arguments why the rejection of her candidacy is improperly motivated. Improper motivation can only be manifested through concrete action. While the rejection for one post or even several posts can be viewed in isolation as the result of a competitive process, the continuing rejection of an otherwise viable candidacy over several rounds and numerous vacancies, taken together, may be seen as indicative of an intent. This is no doubt why the Respondent wishes to narrow the scope of the review;

k. The contested decision is on-going. It should be noted that the posts in Saudi Arabia and Benin that were cited in her management evaluation were the subject of a further vacancy announcement in February 2014 before she filed her appeal. It is therefore relevant to include them as part of the process being contested. The inclusion of posts from the 2014 round of applications, while not the subject of the request for management evaluation which preceded it, may nevertheless, like the earliest round, be admissible as relevant evidence of the claim that is being put forward. This has long been the practice of the Dispute Tribunal with respect to admitting relevant evidence (see *Applicant* UNDT/2010/115);

l. Likewise, the Applicant's claim of a breach of duty of care, and more specifically of a duty to give the fullest consideration to the Applicant as a qualified female candidate in the pool and in need of placement, in accordance with stated policy objectives, is implicit in her claim set out in the request for management evaluation that she has been blacklisted, excluded from consideration for any appropriate reassignment and subjected to an animus manifested in a refusal to regularize her status. In *Shashaa* UNDT/2009/034, the Dispute Tribunal provided a general principle for application to all administrative acts: "As this Tribunal found in *James* (2009), the universal obligation of both employee and employer to act in good faith towards each other includes acting rationally, fairly, honestly and in accordance with the obligation of due process". This principle and its obligation on the Respondent is not the proper subject of receivability;

m. Since the Applicant's exclusion is an ongoing decision, should she prevail in her claim, the remedy being sought renders the Respondent's arguments on receivability superfluous;

n. The Respondent's request to render her claims not receivable is an attempt to avoid legal scrutiny into the decisions which she maintains are retaliatory and flawed by a lack of due process. They have directly led to her present uncertainty over her contractual status and future place in the Organization, threatening to become a constructive dismissal;

o. The final rebuttal decision by the UNDG Advisory Group, in endorsing the Regional UNDG rating and assessment for 2012 are questionable. The UNDG contradicted its own findings of the Regional UNDG Report where it identified its feedback and assessment as non-compliant with RC Guidelines and Policy Note on Performance RC Appraisal. The UNDG's views remained indecisive in its conclusion as to whether the Applicant received appropriate coaching and timely structured feedback on her performance before judging her performance as "partially satisfactory". In addition, the UNDG noted that the provided summary narrative did not allow an accurate assessment of her achievements against the key results achieved;

p. The UNDG used double standards, when it dismissed feedback from the United Nations Country Team ("UNCT") submitted using the "One 80 Survey tool", on the grounds that the number of respondents did not meet the minimum participants required for a representational feedback. In endorsing the "R/UNDG" decision, the UNDG relied on feedback from interviews conducted with UNCT members. However, only one member was interviewed out of 14 UNCT members, rendering the feedback also non-representational. None of these issues has been reviewed since the final decision by the UNDG is not subject to further appeal;

q. Following the receipt of the letter to the Administrator from the Minister of Foreign Affairs in UAE in August 2012, the Applicant experienced a systemic pattern of institutional discrimination and harassment and, as a result, on 26 February 2014, the Applicant was placed on sick leave under the care of a medical team treating her for Post-Traumatic Stress Disorder;

r. The uncertainties and distress that these harassing practices and patterns of communication inflicted on the Applicant had a serious effect on her and caused a setback in her medical condition to the extent her treating doctors recommended all communications from UNDP go through her Counsel.

Respondent's submissions

37. The Respondent's principal contentions may be summarized as follows:

a. The Applicant's claims related to the April 2013 are time-barred, since she did not challenge them in the first, second or any other request for management evaluation, which is a mandatory step when challenging administrative decisions. Furthermore, the Applicant did not request a management evaluation of the decisions regarding the February 2014 positions. The Applicant's claims related to the April 2013 and February 2014 posts are therefore not receivable;

b. To the Applicant's point that it was incumbent on the Respondent to provide clearly articulated reasons for not placing the Applicant in an appropriate post commensurate with her abilities since she had been on special assignment at Headquarters for nearly two years, this seems to imply that there was a breach of duty on part of the Respondent to place the Applicant in another post. However, irrespective of the fact that she did not have any entitlement to any other position, the Respondent's purported breach of duty to place the Applicant in another post needs to be distinguished from the contested decisions of non-selection for specific RC

positions. As the claimed breach of duty was not raised through a request for management evaluation, it is also not receivable in the context of this application;

c. The Applicant raises some unspecific claims, according to which she was the subject of unfair treatment by the Organization in connection with the Applicant's tenure in the UAE and her subsequent reassignment to UNDP headquarters in New York and that this was, in general terms, due to institutional bias, retaliatory action, mistreatment and systemic discrimination against her. The Applicant was not treated unfairly in any such manner by the Organization; on the contrary, she was provided with adequate guidance and fair support during her tenure as RC/RR in the UAE. The intention behind the letter and the Applicant's subsequent mission to New York was to help her to mitigate the tense work situation at the Country Office. Contrary to her statement, the consultations with the Applicant in New York were an effort to obtain her perspective on the working environment at the UAE Country Office and to work with her on a strategy to improve it. The Applicant agreed to the terms of reference of her current position and to her reassignment to New York, which was therefore an agreed move from a position at the D-1 level to another position at the same level;

d. The burden of proving prejudice or improper motive rests with the party making the allegation. The Applicant has not identified any specific fact or proof that would show that she was the subject of unfair treatment. The Applicant herself conceded in writing that her claims of retaliation, harassment and abuse of authority would not constitute an allegation misconduct warranting the initiation of an investigation;

e. Regarding the Applicant's allegation that the Ombudsman failed to properly act on her complaint, there is no factual basis for this and action was taken by the UNDP Executive Office. Since the applicable UNDP policy on Workplace Harassment and Abuse only requires the Administration to inform the complainant of a harassment allegation about the outcome of an investigation conducted into the

allegation, the Respondent was not obliged to keep the Applicant informed about any step taken in response to her complaint and the Applicant did not request any update from the Respondent in this respect. Notwithstanding the action taken in response to the Applicant's complaint and its outcome, the present record does not demonstrate any misuse of the Ombudsman's mandate to undermine the Applicant's position in the UAE;

f. The record does not indicate any irregularity in respect of the 2011 and 2012 performance appraisals. The Applicant only challenged her 2011 appraisal of "4" at the regional recourse level, notably on 30 June 2012. Following its review of the Applicant's request, the UNDG Team decided on 12 September 2012 to change the contested rating of the Applicant's performance in 2011 of "4" to "3". The Applicant did not rebut this final outcome, which demonstrated that the Applicant's requests for reconsideration of performance appraisals were assessed in a fair manner by the Organization. As to the Applicant's assertion that the rating of "4" for her 2012 performance as RC was taken against applicable policies, the 2012 performance appraisal did not breach any of the rules applicable in the context of the RC performance evaluation process finalized in August 2014;

g. After the regional recourse process was completed on 4 September 2013 and there was a final rating of the UNDG Team, it was legitimate for the EG to take facts that related to the 2012 performance of the Applicant into account when deciding on her August and November 2013 applications in the EG meetings on 5 September and 12 November 2013;

h. It was the EG which decided not to nominate the Applicant for the August and November 2013 positions. The Applicant's name was included in the two matrices, which were submitted to the Executive Group ("EG") for their review. The Applicant's applications were then considered by the EG during its meetings on 5 September and 12 November 2013. The Applicant's six applications were carefully

evaluated by the EG and appropriate weight was given to her professional qualifications and experience, which included her past performance as RC in the UAE. There was no automatic dismissal of the Applicant's applications for the August and November positions. Had the Applicant's applications not been brought to the attention of the EG, the Applicant's name would not have been included in the two matrices and her applications and the Resident Coordinator Assessment Centre records would not have been forwarded;

i. Priority consideration is not given to UNDP candidates in the context of a RC/RR selection process under the applicable policies. The recruitment of RC/RRs is governed by an inter-agency mechanism, and UNDP staff members do not enjoy priority over staff members of other agencies in this context. The applicable UNDP Recruitment and Selection Framework provides that the selection of candidates for the posts of RC/RRs follows a separate policy and procedure agreed upon by the Funds, Programmes and Agencies of the UN system.

j. The UNDG Guidelines do not stipulate special measures for identifying qualified female candidates that needed to be followed. The UNDP Guidelines only highlight that UNDP endeavours to achieve a 50/50 gender distribution, in accordance with General Assembly Resolution 61/244 (Human resources management). The EG takes gender balance as guiding principle into account when deciding on nominations for RC positions in addition to other principles, such as North-South balance and broad representation of candidates among the United Nations System, as well as the candidates' professional qualifications and experience. In all the relevant selection cases, the EG complied with the gender balance requirements, as stipulated in the UNDG Guidelines. The Applicant erred when she seemingly indicated that she was entitled to at least one nomination in 2013. As there is a much higher number of RC candidates in the RC pool than RC vacancies in a calendar year, it would not be in the position to nominate each RC pool candidate for an RC pool, and the UNDG

Guidelines stipulate that UNDP only nominates candidates for RC posts that match their profile;

k. The Organization has a broad discretion in matters of appointment, and the Appeals Tribunal had consistently held that it is not the function of the Tribunals, in the absence of evidence of bias, discriminatory practices or *mala fides* to substitute its judgment for that of the competent decision-maker (see *Bofill* 2013-UNAT-383, *Charles* 2012-UNAT-242 and *Frahlo* 2011-UNAT-141). In reviewing administrative decisions regarding appointments, the Tribunal examines whether the procedure as laid down in the applicable rules was followed and whether the staff member was given fair and adequate consideration. The Appeals Tribunal held in *Rolland* 2011-UNAT-22 (and subsequent judgments) that there is always a presumption that official acts have been regularly performed and, if the management is able to even minimally show that the staff member's candidature was given a full and fair consideration, then the presumption that official acts have been regularly performed stands satisfied. The Respondent made such minimal showing that the EG gave full and fair consideration to the Applicant's applications and that UNDP followed its procedures outlined in the UNGD Guidelines and the IAAP SOPs in respect of the contested nomination processes. The burden of proof in the case at hand shifted to the Applicant, who was to show through clear and convincing evidence that her applications were denied full and fair consideration and that the contested decisions of the EG were tainted by improper motives. However, the Applicant did not submit any proof showing that the contested decisions were tainted by bias or any other improper motive.

l. Even if the EG had nominated the Applicant to the IAAP, it would be extremely unlikely and perhaps impossible that the agencies represented in the IAAP would have suggested her candidacy to the Secretary-General, given that many of those same agencies had rated her performance for 2012 as "4". As a result, she could not have ultimately been appointed to any of the RR/RC positions to which she

applied in 2013, and UNDP's decisions not to nominate the Applicant for the relevant RC/RR positions had no adverse effect upon the Applicant.

Consideration

Applicable law

38. The UNDP Recruitment and Selection Framework effective since 1 July 2009 and most recently reviewed on 22 March 2012, sec. 1.0, para. 4, provides that the selection for a RC/RR position follows a special procedure:

... The selection of candidates for the posts of UN Resident Coordinator/UNDP Resident Representative (RC/RR) follows a separate policy and procedure agreed upon by the Funds, Programmes and Agencies of the UN system.

39. The UNDP Guidelines for the Selection and Appointment of Resident Coordinators of November 2009 describes the special procedure to be followed when making a selection for an RC position and provides as follows:

The United Nations Development Group (UNDG) has identified Resident Coordinator talent management as a priority work area. This is in line with the Triennial Comprehensive Policy Review (2007) which called upon, "the Secretary-General to improve the transparency and competitiveness of the recruitment processes for senior high-level posts in the United Nations development system in order to find the best candidates both inside and outside the United Nations System." It is in this context that this document provides information on the selection and appointment process for the Resident Coordinator (RC). The Resident Coordinator position is normally combined with the Resident Representative (RR) and is in most cases also the Designated Official ["DO"]. Depending on the specific country context, the RC may also serve as the Humanitarian Coordinator (HC). In those countries with peacekeeping and/or political missions, the RC is also normally the Executive Representative of the Secretary-General (ERSG) or the Deputy Special Coordinator (DSC) or the Deputy Special Representative of the Secretary-General (DSRSG). [Footnote omitted]

For ease of reference, the document refers to the generic RC function with the understanding that it may be combined with other responsibilities, as outlined above. For more information, see the RC Job Description at www.undg.org/rconline (not yet launched).

Purpose and scope of this note

This document provides information on the overall selection and appointment for RC vacancies and other combined functions, including those of the RR, DO, HC and the ERSG, DSC or DSRSG. It is organized in 6 parts including:

1. Overview of the RC post and eligibility requirements;
2. Assessment for suitability to be an RC;
3. The RC pool mechanism;
4. The ERSG/DSC/DSRSG pool mechanism;
5. Application, selection and appointment process for RC vacancies;
6. Application, selection and appointment process for ERSG, DSC or DSRSG/RC/RR/HC vacancies.

This document supersedes all previously issued guidance notes on the RC selection and appointment including the Inter Agency Advisory Panel (IAAP) notes on the Selection, Appointment and competency-based management of the United Nations Resident Coordinator (1998 and 2000) [Footnote omitted].

Principles guiding the RC selection and appointment

- The RC application, selection and appointment process is guided by the following overarching principles,
- Nominations for RC positions that reflect “the best and brightest” candidates.
- The selection process promotes transparency, participation and ownership by the UN System.
- Representation: to ensure that candidates being considered for RC positions reflect diversity in accordance with the following broad criteria,
 - North-South balance: the composition of candidates is reflective of the principle of equitable geographical distribution, in accordance with Article 101, paragraph 3, of the Charter of the United Nations,
 - Gender balance: every effort is made to achieve a 50/50 gender distribution, in line with A/RES/61/244: XI. [Footnote omitted]
 - Representative of the UN system: efforts are made to ensure a broad representation of candidates from across the UN system,

including candidates from Specialized Agencies, Non Resident Agencies and the UN Secretariat.

- Broadening the RC selection and appointment to external candidates from outside the UN System
- Confidentiality of IAAP discussions on individual candidates.
- Efficiency in both the selection and clearance process, including the ad-hoc selections, which fall outside the annual cycle.

Keeping these principles in view, the overall goal of the IAAP is to nominate the most suitable candidates for RC positions.

Part 1: Eligibility for the Resident Coordinator position

What is it?

The RC serves as a representative of the Secretary-General and is usually the most senior level UN official in the country. The RC is responsible for leading and strategically positioning the United Nations Country Team (UNCT) in support of common goals for development and maximizing the impact of the UN in responding to national priorities, strategies and programmes. Normally, the RC is also the UNDP Resident Representative (RR), in accordance with the established legislation of the General Assembly, S/he remains accountable for UNDP business in accordance with the Management and Accountability System,[footnote omitted] endorsed by the undg in August 2008. In most cases the RC is also the Designated Official (DO), responsible for security management of UN staff and their dependents in the country. Depending on the specific country context, the RC may also serve as the Humanitarian Coordinator (HC). In those countries with peacekeeping and/or political missions, the RC is also normally the Executive Representative of the Secretary-General (ERSG) or the Deputy Special Coordinator (DSC) or the Deputy Special Representative of the Secretary-General (DSRSG).

The number of responsibilities that are combined with the RC function depends on the country context and reflects an increasing level of complexity. The RC post thus requires a level of skills and experience that match the country specific post profile. In certain cases, previous RC experience may be required and is reflected in the post profile. A simplified typology of the possible combination of functions (RC/RR/DO; RC/RR/HC/DO; ERSG, DSC, DSRSG combined with the RC/RR/HC roles) and the corresponding country context is provided in the table below:

Function	Country context
1. RC/RR/DO	Development challenges and/or political challenges with potential including humanitarian, human

	rights and disaster risk dimensions.
2. RC/ RR/HC/DO	Complex development challenges, strong political undertones with complexity and humanitarian and human rights dimensions In crisis/ post crisis context.
3. ERSO, DSC or DSRSG combined with the RC/RR/HC [footnote omitted]	Highly complex crisis situation with challenging political, developmental, human rights and humanitarian dimensions, within an integrated peacekeeping mission structure.

Who is eligible?

The RC position is open to:

1. Senior UN staff from the Funds, Programmes, Specialized Agencies and the UN Secretariat (P5 and above),
2. External candidates with relevant experience from recognized international and regional organizations, intergovernmental organizations, nongovernmental organizations and academic institutions

Breakdown of the Post Profile Typology and Required Qualifications

RC/RR/DO posts

Interested individuals should normally meet the minimum qualifications and experience indicated below:

Education: a Master's Degree or equivalent in International Relations, Political Sciences, Economics, Social and/or other Sciences, Human Rights, Humanitarian Law or related fields.

Experience: At least 15 years of substantive experience and results at the international level, including five years of cumulative experience in development or humanitarian work, at country level. Relevant experience includes the development of strategies affecting the provision of advisory services; inter-organisation and international cooperation; negotiation of partnerships; mobilisation of resources; and management and leadership of programmes in development-related areas, working with national, regional and international Entities. Excellent knowledge of the UN System/Resident Coordinator System and basic knowledge of international norms and standards.

Competencies: The RC function is anchored in a set of core competencies that are defined by an inventory of behaviors, skills and knowledge, expected of the

RC. Conformity with and observance of the requirements outlined in the RC competency framework is a prerequisite for the RC post – see the RC Job Description at (provide web link)

Languages: Fluency in English and/or French with a working knowledge of the other, knowledge of other official UN languages desirable (depending on the region of assignment).

RC/RR/HC/DO posts

The RC may also be designated as the Humanitarian Coordinator by the Emergency Relief Coordinator (ERC). The ERC will consult with the Inter Agency Standing Committee (IASC) when making such a designation. In addition to the requirements for the RC function noted above, such candidates should have the following,

Experience: humanitarian experience, including progressively responsible professional experience in the coordination and management of humanitarian affairs; field experience, including at least 5 years in the management and coordination of multi-sectoral humanitarian assistance operations, preferably in a multilateral context; extensive knowledge of the humanitarian system, humanitarian principles, standards and mandates relevant to the United Nations, the Red Cross/Red Crescent Movement, IOM and humanitarian NGOs; knowledge of international law, in particular International Humanitarian Law, International Refugee Law, International Human Rights Law, and its application to humanitarian response.

Competencies: in addition to the RC competencies, candidates must have demonstrated Humanitarian Coordination Competencies [footnote omitted].

Part III: The RC pool

What it is and who is in it?

The RC pool serves as an interagency roster of candidates who have passed the RCAC and are eligible to take up RC positions. The pool consists of three sub groups:

Pool A: candidates who are immediately available for assignments.

Pool B: currently serving RCs.

Pool C: candidates who will be available in future including any former RCs who are serving on other assignments but who could be available subject to exigencies of service; and b) candidates who have passed the RCAC but who are serving on other assignments.

External candidates: such candidates continue to be sponsored by the respective UN entity that has initiated the arrangements for them to undertake the RCAC. In particular, the sponsoring UN entity puts up such candidates for inclusion into the RC pool as well as nominations for RC vacancies that match their profile. Additionally the sponsoring UN entity is responsible for supporting and monitoring competency development for those candidates with identified development needs.

Criteria for retention in the RC pool

Pool A: candidates are nominated by their sponsoring UN entity for RC posts that match their profile, with a minimum of 1 nomination per year. Candidates who do not meet this criterion will be taken off the Pool A list and moved to Pool C. Exceptions to this rule, allowing candidates to remain in Pool A, include the following reasons: a. personal/family issues (health, spousal employment and/or education) that do not allow the candidate to apply for the available vacancies; and b. short term corporate priorities associated with the candidate's current assignment that do not permit the candidate to be available for RC assignments during the calendar year.

Pool B: all candidates currently on assignment as RC are retained during their tenure.

Pool C: candidates are retained for a 2 year period after which time their case is reviewed by their respective nominating UN entity with DOCO support, for suitability to remain in the pool. Candidates who express a continued interest to serve as an RC are retained in Pool C for a maximum duration of 4 years when assigned to field duty stations and a maximum of 6 years when assigned to a headquarter duty station. Alternatively, those candidates who do not express any interest in taking up any future assignment as an RC are removed from the RC pool.

Maintenance of the RC pool

The RC pool is managed and maintained by DOCO on behalf of the IAAP and is updated on a regular basis, once per annum in the first quarter. The overall purpose is to ensure an active roster of viable candidates for RC positions. The exercise is conducted on behalf of and in consultation with the IAAP members and is structured around the following,

Step 1: At the beginning of each calendar year, DOCO sends a communication to HR Directors, requesting them to indicate whether their respective RC pool candidates are interested to remain in the RC pool for the current year. This communication is copied to the respective RC pool candidates.

Step 2: based on the response of each UN entity concerning the status of their respective RC pool candidate(s), the following actions may be taken,

Pool A: candidates who have not met the requirement for retention in the pool or indicate they are no longer available for RC positions may be put in Pool C, as per the request of their sponsoring UN entity. Candidates who indicate they are no longer interested in the RC position will be removed from the RC pool.

Pool B: candidates remain in this pool as long as they are serving RCs.

Pool C: candidates will remain in Pool C for a maximum of 4 years when assigned to field duty stations and a maximum of 6 years when assigned to a headquarter duty station. Those candidates who become available and wish to be considered for RC positions will be moved to Pool A, as per the request of their respective sponsoring UN entity. Candidates who are no longer interested to pursue RC positions should formally inform their HR Director as well as DOCO and are subsequently removed from the list. See below under Other Considerations for another option concerning re-entry to the RC pool.

Other:

1. If a candidate turns down a formal offer for an RC post, for which he/she has been approved by the Secretary-General, the candidate is removed from the pool. Exceptions to this rule, consists of those circumstances not foreseen at the time of the application and require the approval of the IAAP. A formal letter must be submitted by the sponsoring Agency to the IAAP indicating the nature of the problem and requesting that the IAAP retain the candidate on the RC pool list.
2. Candidates who are removed from the RC pool but later wish to re-enter may be resubmitted by their respective sponsoring UN entity to the IAAP. This is done through a formal written communication to the IAAP Chair with a brief explanation on the candidate's changed circumstances, leading to a request to have the candidate reinstated into the pool.

The Inter Agency Standing Committee Humanitarian Coordination Pool

What is it?

The Inter Agency Standing Committee (IASC) Humanitarian Coordination Pool consists of pre-screened candidates for humanitarian coordination posts including RC/HC posts and for RC posts in countries where the RC may be expected to perform humanitarian coordination functions [footnote omitted]. As such, it is a feeder pool to the RC pool. [Footnote omitted] HC pool members who wish to be considered for RC posts must have passed the RCAC and belong to the RC pool. Membership in the IASC HC pool Indicates that the concerned individual is considered by the main stakeholders of the humanitarian system as fully qualified to perform humanitarian coordination functions, and enjoys the full support of the IASC.

It also provides individuals with formal and on-the-job training and secondment opportunities, so as further to develop competencies, knowledge and experience relevant to humanitarian coordination work.

Functioning of the IASC Humanitarian Coordination Pool

A call for applications is issued yearly in January and disseminated widely through Relief Web and UN entity HR networks, IASC agencies submit nominations to OCHA, who manages the HC pool. Rigorous screening and interview processes are carried out by IASC panels comprising both UN and non-UN representatives. Current RC/HCs and HCs are not required to undergo the screening and interview processes; they are accepted into the HC pool on a no-objection basis.

HC pool members are required to undertake four mandatory trainings on using international legal frameworks in humanitarian coordination; working with UN and non-UN partners; RC & UNCT leadership and coordination; and security. In addition, on-the-job training and secondment opportunities will be explored.

Twice a year, an IASC Panel matches suitable HC pool members against projected vacancies in humanitarian coordination positions (RC/HC, HC, Deputy HC, and RC positions in countries where the RC may be expected to perform humanitarian coordination functions) and provides recommendations to the Emergency Relief Coordinator (ERC) for his/her consideration. The ERC draws from the HC pool to select individuals to submit to the IAAP. While the ERC is committed to selecting individuals from the HC pool for the above-mentioned positions, s/he retains the right to select individuals who are not members of the HC pool. [Footnote omitted] Likewise, UN entities that are members of both the IASC and the IAAP are committed to submitting candidates to the HC pool, but retain the right to submit to the IAAP candidates who are not members of the HC pool. All IAAP members retain the right to submit to the IMP candidates for RC/HC posts and for RC posts in countries where the RC may be expected to perform humanitarian coordination functions.

Part V: Application, selection and appointment for Resident Coordinator positions

How is it done?

Step 1: applying for an Resident Coordinator vacancy

- ✓ The application for a specific RC vacancy begins with the dissemination of a Vacancy Announcement (VA) and an accompanying post profile. The RC vacancies and post profiles are announced: i) at the middle of the calendar year in July when an annual projected plan

of all upcoming vacancies for the following year is disseminated; ii) ad hoc VAs, as necessary; and iii) a long term 5 year projected plan of vacancies. This information is provided by OHR/UNDP and made available as follows,

- **Serving RCs:** may access the information at http://practices.undp.org/management/hr/staffservices/R_CRR_projected_vacancies;
 - **RC pool candidates:** the information will be shared by their respective HR Director as well as made available at UNDG RC Online (Vas will be made available on a restricted access page for which RC pool candidates will be issued a password) site at: www.undg.org/ronline;
 - **IAAP members:** information will be made available via email from OHR/UNDP.
- ✓ UN entities identify their respective qualified candidates, drawing from the RC pool or interested candidates indicate their interest to apply for specific posts to their respective HR Director. If the UN entity agrees to pursue the nomination of a respective candidate for an RC vacancy, UN entities subsequently screen their candidate to determine whether there is a suitable fit between the post profile and the candidate's qualifications. To assist in this stage, a generic country checklist is made available for use by HR Directors and IAAP members [reference to annex omitted]. It comprises a set of minimum, standard criteria to assess the suitability of the candidate against the requirements contained in the post profile. Depending on the country of assignment, the checklist applies criteria for HC and DO functions and whether the post requires previous RC experience. If the candidate meets all the criteria in the checklist as per the post profile, the UN entity may formally submit the nomination to the OHR/UNDP at RC.placement@undp.org, within the deadline for receipt of applications. Supporting documentation is submitted along with the formal nomination, including the following,
- The candidate's CV (Including the candidate's performance appraisal rating for the previous 3 years)
 - Competency development plans and annual progress report, if any (this applies to RC pool candidates with identified development needs based on the results of the RCAC)
 - The completed country checklist (see Annex 1 for the Country Checklist)

Step 2: the IAAP review

The IAAP meeting reviews all the nominated candidates against the vacancies with the aim of identifying a shortlist of a minimum of 3 candidates per vacancy, at least one of whom is a woman.

Step 3: final selection and appointment

- ✓ The shortlisted candidates are put up to the Chair, UNDG for his/her final endorsement before being presented to the Secretary-General. If needed, the Chair consults with the UNDG Principals on the recommended candidates prior to being presented to the Secretary-General. A joint meeting is held with the Secretary-General and Chair, UNDG to discuss the nominated candidates. The Secretary-General makes the final selection of the candidate for each vacancy. This information is shared in the form of a meeting note to the IAAP members and nominating UN Agencies.
- ✓ It is the responsibility of the sponsoring UN entity to inform their respective candidate's on the outcomes of the RC selection and appointment.
- ✓ The selected candidate is presented on behalf of the Secretary-General to the host country Government for their clearance.

Step 4: the appointment of Resident Coordinator

- ✓ Once cleared by the host country Government, the candidate is formally contracted by OHR/UNDP for the position.

Step 5: designation as Humanitarian Coordinator

- ✓ The HC designation process follows the RC selection process. At this point, the ERC informs the IASC of his/her intention to designate him/her as HC and asks for the IASC's concurrence on a no-objection basis.

40. The process on how candidates for the RC/RR positions are selected is further elaborated in the IAAP's Standard Operating Procedures approved on 30 November 2009. Regarding the identification and screening of potential candidates or RC positions, the possible subsequent submission of a nomination to the IAAP and the IAAP meeting preparation, these Standard Operating Procedures provide, in relevant parts:

Identification and screening of potential candidates for RC positions:

Qualified RC pool candidates are identified by their respective sponsoring UN entity or interested RC pool candidates initiate discussions on their interest to apply for specific posts with their respective HR Director. If the identified candidate is interested in applying, the next step is for the sponsoring UN

entity to screen their potential RC candidates against the requirements of the specific post profile. To assist in this process, a country checklist is used to determine whether there is a sufficient match between the post profile and the candidate's experience and qualifications. The country checklist contains a set of minimum criteria to assess the suitability of the candidate, including, among others, whether a country is classified as previous RC experience is normally required - see Annex 1. Depending on the requirements of the country of assignment, the checklist may apply criteria for humanitarian coordination functions, DO functions as well as for politically complex countries requiring a higher level of political skills and acumen. The checklist will be made available together with the post profile and VA.

Submission of UN Agency nominations to the IAAP:

If the candidate meets all the criteria on the checklist, the UN entity may formally submit their nomination to the OHR/UNDP at rcrr.placement@undp.org, within the deadline for receipt of applications, within the deadline for receipt of applications. Supporting documentation to be submitted includes the following:

- the candidate's CV (including performance appraisal ratings for the past 3 years);
- competency development plan and annual progress reports, if any;
- the completed country checklist for the RC vacancy.

Nominating UN entities may submit up to 2 candidates per vacancy, providing s/he meets all criteria as specified in the country checklist for nominations. Nominating UN entities may submit the same candidate for multiple vacancies being considered by the IMP. Such cases must indicate an order of preference at the time of the submission e.g. a) first choice; b) second choice, etc.

Once all nominations are received, the OHR/UNDP prepares a post-candidate matrix and forwards it to DOCO. In the event that there are insufficient applications for RC vacancies and prior to the IAAP meeting, DOCO reviews the candidates in the RC pool and proposes suitable candidates who match the post profile. Such candidates are forwarded by DOCO to the concerned UN entity for consideration and if agreed, the concerned UN entity nominates the candidate to the IAAP.

IAAP meeting preparation:

Given the new post advertisement procedures outlined above, it is anticipated that the first IAAP meeting of the year (to be scheduled during the first quarter) will discuss all planned vacancies for that year. Following this, there will be one IAAP meeting per quarter, to address ad-hoc vacancies and emerging policy issues. DOCO will send out the meeting invitation to the IAAP members along with all supporting documentation, 2 weeks prior to the agreed

meeting date. In addition, DOCO will send the invitation and coordinates with other UN entities that are not IAAP members but who are presenting candidates to the IAAP. The full set of documentation for the IAAP meeting includes the following:

- Matrix of posts and nominated candidates;
- Post profile for each country being reviewed;
- Matrix of UN entity presence in each country;
- Updated RC pool list and list of proposed changes to the pool;
- RCAC Ranking Results Matrix
- List of serving RCs;
- For each nominated candidate: set of supporting documentation including their CV, RCAC report, completed country checklist and any competency development plans and related progress reports (as per the section above on Submission of UN Agency nominations to the IAAP).

41. The Terms of Reference of the EG (i.e., the UNDP Executive Group), appended as an annex to the Respondent's 24 February 2016 submission, state as follows:

The Executive Group (EG) is UNDP's highest internal governing body. Chaired by the Administrator, it is responsible for strategic leadership and management of the organization. It sets corporate priorities, provides strategic orientation and direction for the organization, advises the Administrator on strategic policy, programme and management issues, and monitors corporate performance.

In their capacity as senior executives of the Organization, members of the Executive Group will act as a unified collective leadership team, promoting values for the whole organization and demonstrating the values of good governance through their actions.

The EG is supported by the Organizational Performance Group (OPG) chaired by the Associate Administrator. The OPG advises on key priorities for operational policy to support organizational performance, and takes decisions on changes to operational policy and procedures where appropriate.

Functions and key responsibilities of the Executive Group

I. Shapes the vision and strategic agenda of the organization and ensures strategic alignment of resources [of the organization]

- [...] Assesses trends and developments relevant to the organization and sets overall strategic directions
- Identifies strategic priorities of the organization for 3 – 5 years, and reviews these regularly as appropriate

- Determines annual priorities on the basis of the overall organizational strategy and related priorities
- Agrees on the overall partnership, resource mobilization and other key organizational strategies
- Decides on the allocation of resources, and ensures alignment of resource allocation with organizational and strategic priorities

II. Ensures strategic management of the organization

- Determines UNDP's values and principles, and effectively promotes these throughout the organization
- Advises the Administrator, in a collective fashion, on highest level decisions on policy, programmes and management issues involving significant risks, opportunities, sensitivity or reputational impact
- Reviews progress on strategic priorities
- Ensures there are appropriate management regimes in place throughout the organization to deliver on UNDP's strategic priorities

III. Representation

- Executive group members are collectively responsible for representing the organization, and developing and maintaining effective relationships with relevant constituencies.

Composition of the Executive Group

- The EG is chaired by the Administrator and includes the Associate Administrator and the Directors of Regional and Central Bureaus (ASGs). The Chief of Staff and the Special Advisor to the Administrator attend all meetings. There is no substitution of members in EG attendance. The Director of DOCO [i.e., Development Operations Coordination Office] participates when issues related to UN coordination are on the agenda and other senior staff may be invited to participate when relevant issues are being discussed. External resource persons with specific expertise may be invited to make technical presentations.

Secretariat and technical support

The Chief of Staff, acts as Secretary of the EG. He is supported in this role by the Strategy and Change Implementation Team. The secretariat team will develop a forward agenda for the EG agenda aligned with organizational priorities. It will help coordinate EG and OPG agendas in close collaboration with the Operations Support Group. It will review and support the submission of high quality papers to the EG, and track and monitor implementation progress of EG decisions and recommendations.

42. The “Explanatory Note for the [RC]/[HC]/[DO] and [UNCT] Performance Appraisal Process” for the 2012 Performance Year, October 2012 version, provides as follows:

Introduction

The UN resident Coordinator/ Humanitarian Coordinator/ Designated Official (RC/HC/DO) and UN Country Team (UNCT) performance appraisal process emphasises:

- Mutual accountability for the achievement of results, in line with the agreements contained in the Management and Accountability System and implementation Plan, for both the RC/HC/DO and the UNCT, within an inclusive approach;
- Results based management and strategic direction of the UN operational activities for both development and humanitarian coordination at country level.

The annual RC/HC/DO and UNCT performance appraisal cycle runs from 1 January to 31 December of the current year. Only those RCs/HCs/DOs who have performed functions for at least six months or longer will be appraised by the UNDG Regional Team.

Completion of all elements of the RC/HC/DO and UNCT performance appraisal process is mandatory.

RC/HC/DO and UNCT members are accountable to the Regional UNDG Team for the timely completion of the performance appraisal cycle as stipulated in this Explanatory Note. Failure to submit all elements of the appraisal -except for those RC/HC/DO and UNCT who have been granted an exemption by the UNDG Regional Team--will be recorded in the performance appraisal documentation of the RC/HC/DO and UNCT members, archived in UN-DOCO, and used as input in the RC selection process.

Main components of the performance appraisal.

RC/HC/DO Appraisal: the appraisal will be based on the RC/HC/DO's self-assessment of results, as well as structured performance feedback from all UN System stakeholders. For those RCs who also perform integrated mission leadership functions (i.e. DSRSG/ERSG/DSC), DPA or DPKO provide inputs to their performance appraisal. The inputs are incorporated into one reporting instrument which is then used by the Regional UNDG Team to appraise the RC/HC/DO across all job functions and to provide concrete feedback on 2012 performance, and expected future performance including the 2013 key planned results.

UNCT Appraisal: the UNCT will be primarily appraised by using the RC Annual Report, as well as other relevant inputs. The appraisal will ensure that the UNCT (as a collective entity) will receive managerial feedback from the Regional UNDG Team on 2012, and expected future performance including the 2013 U NCT work plan.

Purpose of this note

The purpose of this note is to provide an instructional overview of the RC/HC/DO and UNCT performance appraisal steps for the 2012 reporting year. This note should be read in conjunction with the '**UNDG Reporting Format for the 2011 BC/HC/DO and UNCT Performance Appraisal Process**'. The note is organized around the following steps:

Step One: RC/HC/DO reporting on results and planning future performance

Step Two: Preparing for the Regional UNDG Team appraisal process

Step Three: The Regional UNDG Team performance appraisal

Step Four: Post appraisal - the rebuttal process

STEP ONE: RC/HC/DO reporting on results and planning future performance.

What is it and how is it done?

2012 RC/HC/DO report on results: At the start of 2012, the RC/HC/DO was requested to identify five key results that s/he would be accountable for delivering. These key results were submitted to their respective Regional UNDG Team. The key planned results form the basis on which to measure performance for the appraisal in 2012.

- The RC/HC/DO reviews his/her five key planned results for 2012 and reports on performance and achieved outcomes against these results, through the online RC Annual Report (RCAR) system, on the UNDG website.

UNCT reporting on results:

- The UNCT reporting on results should be done on a collaborative basis by the UNCT members, using the '2012 Results Table' within the RCAR.

How to articulate the results achieved in the reporting:

- When submitting his/her achievements for 2012, the **RC/HC/DO is strongly encouraged to articulate them in a strategic manner - demonstrating the impact of his/her efforts.** The reporting should emphasize tangible outcomes over activities, processes or tasks. It should show how results have been achieved and concrete changes in the development and/or humanitarian or security context. Specifically illustrating the contribution of

his/her work and leadership to the achievement of wider plans - linkage to UNDAF priorities, which should be in support of national priorities.

- The RC/HC/DO reporting should also demonstrate specific examples of leadership performance that have contributed to achievement against the key planned results, with emphasis on the competencies (and related success indicators) highlighted in the RC job description.

Humanitarian Coordinators: In addition, Humanitarian Coordinators have developed a Compact with the Emergency Relief Coordinator (ERC) that outlines up to five key humanitarian results. The HC will be appraised by the ERC against these objectives in the humanitarian section of the reporting format (section B),

2013 RC/HC/DO key planned results: The RC/HC/DO at the beginning of 2013, along with reporting on the 2012 performance, identifies five key results that s/he will be accountable to the Regional undg Team for delivering (see Guidance for establishing 2013 RC/HC/DO Key Planned Results). These results are submitted to the Regional undg Team and uploaded on the undg website.

Who does what and when? The RC/HC/DO and UNCT reporting on 2012 results as well as the submission of 2013 key plan results will be conducted from 1 November 2012 to 15 January 2013. A checklist of all the documents and the process of the performance appraisal is included as Annex I of this Explanatory Note.

- The UN Coordination Officer may assist in entering the performance appraisal and RCAR information. The completed RCAR - including the performance appraisal sections - will be submitted online through the undg
- The 2013 key planned results are uploaded by the RC Office staff on the undg website and submitted via email to the Regional undg Team, through the Regional Secretariat.

Step Two: Preparing for the regional undg Team appraisal.

What is it and how is it done?

A collection of all additional inputs for the Regional undg Team performance appraisal process is undertaken -comprising the Resident Coordinator Annual Report (RCAR), feedback from OCHA, DSS and CEB members on the RC/HC/DO performance, the One80 reports, and the 2013 key planned results, as follows:

1. **RCAR:** each RC/HC/DO and UNCT has completed the 2012 RCAR, which captures a broad range of results, The RCAR may be summarized by the Regional Coordination Specialist and presented as an input to the appraisal,

The RCAR cover letter to the Secretary-General may be a part of the background information for the performance appraisal meeting.

2. **One80 Competency Development Reports:** each RC/HC/DO and UNCT members have completed the One80 competency development reports, which capture a broad range of competencies to provide the RC and UNCT members with meaningful and useful feedback to help with the on-going planning, review and development of their performance, as a collective team, and as an RC. The One80 reports of the RC and UNCT will be summarized by UN-DOCO and presented as an input to the RC/HC/DO and UNCT appraisal during the regional appraisal meetings. [Footnote omitted]

3. **OCHA feedback on RC/HC performance:** OCHA provides feedback on the performance of: i) designated HCs; ii) RCs having performed humanitarian coordination functions; and iii) all other RCs for response preparedness efforts. Other UN entities are encouraged to comment on the RC/HC performance of humanitarian coordination responsibilities through oral comment in the appraisal meeting or CEB reporting.

4. **DSS feedback on DO performance:** DSS provides inputs on the RC's performance as DO or other UN security functions. As with the humanitarian function, other UN entities are encouraged to comment on the RC/DO performance of security responsibilities through oral comment in the appraisal meeting or CEB reporting.

5. **UN Chief Executives Board (CEB) feedback on RC/HC/DO performance:** UN system entities with country programme not able to participate in the Regional UNDG Team appraisal meeting are invited to take part to the performance appraisal process through the provision of written inputs on the 2012 RC/HC/DO's performance using the template provided in section D of the UNDG Reporting Format for the 2012 RC/HC/DO and UNCT Performance Appraisal Process. The UNDG Chair will send a formal communication to the CEB Principals asking for feedback on the 2012 performance of the ROs/HCs/DOs via email, directly to UN-DOCO.

6. **DPA and DPKO feedback on DSRSG/ERSG/DSC performance:** DPA or DPKO provide feedback on the performance of RCs having performed integrated mission leadership functions (Le. DSRSG/ERSG/DSC). As with the humanitarian and designated official function, other UN entities are encouraged to comment on the DSRSG/RC/HC performance of political responsibilities through oral comment in the appraisal meeting or CEB reporting.

Who does what and when?

- The Regional Coordination Specialists will be responsible for the preparation of the required background information and submitting this to the Regional UNDG Team **at least two weeks prior to the appraisal meeting.**

- UN-DOCO will request OCHA and DSS for inputs / participation in the relevant appraisal meetings for the HC and DO functions. The request will be sent by the end of **November 2012 with a deadline for submission at least four weeks in advance of the appraisal meetings**. The inputs should be presented by senior headquarters or regional-level staff (D2 or above) with responsibility for oversight of the work of their organization in the country concerned.
- UN-DOCO, on behalf of the Regional UNDG Teams, will request DPA and DPKO inputs for / participation in relevant appraisal meetings - for discussions on RCs who also perform integrated mission leadership functions (i.e. DSRSG/ERSG/DSC). Inputs will be requested **by the end of November 2012 with deadline for submission at least four weeks in advance of the appraisal meetings**.
- The UNDG Chair to request the CEB for feedback on the 2012 RC/HC/DO and UNCT performance in **by end of November 2012 with 3-week-deadline for submission**.
- UN-DOCO will be responsible for the coordination of all inputs/feedback received from the concerned UN entities and submission to the respective Regional UNDG Team through the Regional Coordination Specialist, Submissions of the additional inputs/feedback will be **at least three weeks prior to the appraisal meeting**.

STEP 3: The regional UNDG Team performance appraisal.

What is it and how is it done?

The next step in the process is the Regional UNDG Team appraisal meeting which allows for an inter-agency appraisal, based on the performance reporting inputs (RC/HC/DO results reporting, RCAR and feedback from OCHA, DSS and CEB) as well as the One80 reports and the key planned results for the following year. The main output of the appraisal will be i) a unified and collective Regional UNDG Team appraisal statement and rating for the RC/HC/DO; ii) feedback comments on the UNCT performance (as a collective entity); and iii) setting expectations through feedback on the 2013 RC/HC/DO key planned results and UNCT workplan.

Who participates?

The participation in the Regional UNDG Team appraisal meetings is intended to be inclusive of the UN system and may include senior officials from across the Funds, Programmes and Specialized Agencies. When deciding on participation at the meeting, the following three criteria should be taken into consideration (agreed during the Global RDT Meeting in March 2008):

1. A direct country presence and budget.
2. Direct oversight responsibility for the respective UNCT member.

3. Serving at D2 level or above.

A Regional UNDG Team secretariat, made up of senior staff of UN-DOCO and the Regional Coordination Specialist will be present during appraisal discussions.

How should the Regional UNDG Team appraisal meeting be conducted?

1. The appraisal meeting should be held over two days to allow for meaningful feedback to the RC/HC/DO and UNCT of their previous year performance as well as on the result planning for the following year.

2. A brief, oral overview presentation, highlighting the strategic positioning of the UN in the country, and significant substantive, team or individual performance achievements or issues including key planned results for 2013, should be made by the Chair of the Regional UNDG Team.

3. A summary presentation of the written inputs received from OCHA/DSS/CEB, as well as from DPA/DPKO for those RCs who also perform integrated mission leadership functions (i.e. DSRSG/ERSG/DSC) drawing attention to key points, will be presented by the UN-DOCO.

4. A summary presentation of the results of the One80 Competency Development Tool for the RC/HC/DO and the UNCT).will be made by UN-DOCO,

5. A “tour de table” in which each Regional UNDG Team member states their views on the performance of the RC/HC/DO and UNCT, including their views on the One80 inputs and also the RC/HC/DO key planned results for 2013. In presenting their views on the performance of the RC/HC/DO and UNCT, Regional UNDG Team members should be specific and concrete about the reasons for their qualitative assessment of the performance, consider the role of the Regional UNDG Team in the RC/HC/DO and UNCT performance, as well as propose steps to be taken by the RC/HC/DO and UNCT for any desired change.

6. Initial summarization of views and key points should be made by the Chair followed by a discussion of the overall performance appraisal written feedback and rating for the RC/HC/DO, and the written feedback for the UNCT. The process is meant to develop consensus on the appraisal statements of the Regional UNDG Team - including concrete and precise feedback on the RC/HC/DO key planned results for 2013. The overall performance appraisal should aim at reinforcing the performance the Regional UNDG team wishes to see in the RC/HC/DO and UNCT in terms of expected results and performance,

7. After completing the appraisal and rating of all RC/HC/DOs and UNCTs, as well as the feedback on the 2013 expected performance, the Regional UNDG

Team reviews its work to i) ensure comparability of ratings; ii) to revisit any disputed or unresolved cases; and iii) to draw from its deliberations findings and conclusions on country strategy, individual or team performance, desirable future performance or other matters.

8. A summary list of follow-up actions should be attached with the meeting notes and which outlines any issues that the Regional UNDG Team wishes to pursue further at future meetings and follow with individual RC/HC/DOs and UNCTs (including recommendations for competency development and/or to address gaps in performance).

9. Agreement on tentative dates in the third quarter of the year to Conduct mid-term reviews/discussions, of those RCs/HCs/DOs and UNCTs with performance falling below expectations should be pursued.

RC Rating

A. Final unified numerical rating of RCIHCIDO results: once the Regional UNDG Team has qualitatively discussed the performance of the RC/HC/DO fully, it provides a single numerical rating for the overall performance of the RC/HC/DO. This rating covers all UN System responsibilities and takes into account the assessment of individual results and additional feedback on performance, The Regional UNDG Team collectively decides on a Single final performance rating for the RC/HC/DO. This final rating will use the following five-level, numerical scale:

1. **Outstanding Performance:** Has produced outstanding key results in qualitative and quantitative terms, contributing to the recognition of the UN system work both inside and outside of the country. In achieving results, the staff member displayed a wide range of competencies that serves as an outstanding example (a “role model”) in these areas to peers and colleagues [in the UNCT, country of assignment and globally].

2. **Exceeded Expectations:** Has produced key results that exceeded expectations in qualitative and/or quantitative terms. In achieving his/her planned results, the staff member has displayed a range of competencies that renders the RC/HC/DO as a resource person among peers serving in the same or similar positions. Exceeds the standard of competency strength expected of an RC/HC/DO in the same or similar position which resulted in enhanced individual and/or team-based results, beating expectations of quality of outputs.

3. **Fully Met Expectations:** Has produced successful key results that met expectations in qualitative and quantitative terms. In achieving his/her planned results, the RC/HC/DO displayed competencies that fully met the expected standards. S/he has demonstrated adequate knowledge across the range of RC/HC/DO functions and responsibilities during the year, and has made substantive contributions in one or more areas during the year when asked for advice and help in these areas.

4. **Partially Met Expectations:** Has generally produced key results that were partially successful in qualitative and/or quantitative terms. The RC/HC/DO displayed a range of competencies that need development in nearly all respects in achieving his/her planned results. Needs to develop in order to enhance individual results and/or contribution to team-based results and in order to improve the required level of competency strength; requires a set of learning activities and coaching/mentoring that address this competency/indicator during the next performance cycle. S/he has partially succeeded in realizing the learning plan actions. The RC/HC/DO has demonstrated some knowledge in one or more areas of RC/HC/DO work during the year.

When this final performance rating is assigned to a staff member for the first time, the Chair of the Regional UNDG Team must take a more structured approach to helping the RC/HC/DO improve his or her overall performance in the next annual performance cycle. The appraisal report has to include elaborate description of concerns and concrete recommendations for areas of improvement. A structured approach also includes more intensive coaching and more frequent feedback, through regular two-way performance discussions between the Chair of the Regional UNDG Team, and mid-term reviews when appropriate. The Chair of the Regional UNDG Team and the RC/HC/DO must include in next year's work plan an agreed set of priority learning activities designed for targeted development in the identified performance areas. The Chair of the Regional UNDG Team is expected to assist the RC/DO/HC to follow up on these learning activities and to closely monitor performance and provide regular feedback. The Regional UNDG Team may also recommend that a Regional UNDG Team member will be available as a coach for the RC/HC/DO, if relevant.

Unsatisfactory Performance: Has consistently not produced expected results, or has not displayed sufficiently development of competencies. S/he has shown little interest in developing deeper knowledge, has hardly any participation in or contribution to RC/HC/DO work, and has failed to act on learning plan actions. A rating in this category indicates that the Regional UNDG Team has serious reservations as to the staff member's continued service as an RC/HC/DO.

B. UNCT appraisal and comments: the Regional UNDG Team is to consolidate a unified set of feedback comments on the UNCT performance, The Regional UNDG Team comments should be structured as an overall aggregate qualitative and specific feedback on the team performance; recognize successes and if needed, give recommendations of specific steps to be taken for improvement. The Regional UNDG Team should also provide feedback to the UNCT on its workplan, including recommendations on substantive work areas to focus on, if applicable.

Receivability

43. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O'Neill* 2011-UNAT-182, *Gehr* 2013-UNAT-313, and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute of the Dispute Tribunal prevents it from considering cases that are not receivable.

44. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment” (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

45. It results that in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione materiae

46. The Tribunal notes that, as results from Order No. 20 (NY/2016), at the CMD that took place on 20 January 2016, Counsel for the Applicant confirmed that, in the present application, his client contested (a) the selection processes in which she was not nominated for the vacant RC/RR positions for which she had applied in April, August and November 2013, and (b) the selection process for the vacant RC/RR position for which she had applied in October 2013. She did not challenge the processes that took place for the positions for which she applied in February 2014. The Tribunal further notes that the Applicant stated that the August and November 2013 non-selection decisions were communicated to her on 12 and 20 November 2013, which is not contested by the Respondent.

47. The Tribunal further notes that the Applicant filed a management evaluation request on 2 December 2013, within 60 days from the dates of notification of the contested administrative decisions. In this request, the Applicant stated:

I am writing to request a formal management evaluation of the decision to reject my candidacy for the positions of RC/RR to which I recently applied in August and November 2013.

Last July I asked for a management evaluation of the decision to exclude me from consideration for all such assignments based on comments placed in my latest performance appraisal. In the reply of 29 August 2013, the Assistant Administrator affirmed that no such decision had been taken, and the recommendation to exclude me from consideration reflected in the draft 2012 performance appraisal that is under rebuttal did not reflect a final decision. I nevertheless received no explanation as to why I was not shortlisted for the posts in Macedonia, Georgia, Kosovo and Uruguay to which I had applied last April 2013.

I proceeded in good faith to apply for three RC/RR posts in the August 2013 round (Jordan, Benin and Nigeria). I was not shortlisted or nominated or advised of any steps taken to place me in spite of being in the approved RC pool of potential candidates and being in need of placement.

...

On November 12, 2013 I applied to three posts for which I possessed the necessary qualifications (Zambia, Saudi Arabia and Lao Peoples

Democratic Republic). In a meeting with [Mr. L] on 20 November 2013, he informed me that the Executive Group did not nominate me for any positions. [Mr. L] had no further information on the matter. I should note that I have also applied for two non RR/RC positions with UNDP: Global Team Leader, Stakeholder Mobilization and Sustainable Energy for All, UNDP/BDP in September and Director, Human Development Report Office, Delhi, India UNDP/HDRO in October. I was not short listed for either of the positions although I am fully qualified, and as a displaced staff member, I have a priority to be considered and placed, according to UNDP recruitment policies. It thus appears that in spite of disavowals, I have in effect been blacklisted. In spite of the lack of transparency in handling my candidacy, the evidence that I am being subjected to discriminatory treatment is manifest. The background has been set forth in my previous correspondence. As you are aware, and as confirmed in my informal consultations, my lack of career advancement appears tied to circumstances surrounding my departure from UAE.

48. The Tribunal considers that, in the management evaluation, the Applicant mentioned the positions she applied for in April 2013 (the RC positions in Macedonia, Georgia, Kosovo and Uruguay) and September 2013 (“Global Team Leader”, “Stakeholder Mobilization and Sustainable Energy for All”, “UNDP/BDP”) and the position of “Director, Human Development Report Office Delhi, India, UNDP/HDRO” for which she applied in October 2013 as part of the factual circumstances to support her allegations that she was blacklisted and subjected to a discriminatory treatment. The Applicant, therefore, did not request a management evaluation of the selection processes regarding these positions.

49. Consequently, the Tribunal considers that the application is receivable *ratione materiae* only in part, regarding the non-selection decisions relating to those positions for which the Applicant applied for in her August and November 2013 applications, which are: (a) the three RC/RR positions which were vacant at the UNDP Country Offices in Jordan, Benin and Nigeria (“the August 2013 application”); and (b) the three RC/RR positions that were vacant at the UNDP Country Offices in Zambia, Saudi Arabia and Laos (“the November 2013 application”). The application regarding the positions against which the Applicant did not request a management evaluation, is not receivable *ratione materiae* and is to be rejected.

Receivability ratione personae

50. The Tribunal notes that the Applicant is a former Special Advisor at the D-1 level in BDP, UNDP, and that the application is therefore receivable *ratione personae* pursuant to art. 3.1(b) of the Statute of the Dispute Tribunal.

Receivability ratione temporis

51. Pursuant to the mandatory provision of art. 8.1(d)(i)(a) of the Dispute Tribunal's Statute, for an application to be receivable, it must ("shall") be filed within "90 calendar days of the applicant's receipt of the response to management of his or her submission" in cases like the present one, where a management evaluation of the contested decision is required under staff rule 11.2(a).

52. The Tribunal notes that the contested decisions regarding the August and November 2013 applications were communicated to her on 2 and 20 November 2013. Therefore, pursuant to art. 8.1(d)(ii) of the Dispute Tribunal's Statute an appeal against these non-selection decisions was to be filed within 90 days from the date of communication of the response to the management evaluation request of 2 December 2013. The management evaluation response was communicated to the Applicant on 31 December 2013 and the revised application in the present case was filed before the Tribunal on 26 March 2014, within 90 days from the date of notification. Therefore, the application is receivable *ratione temporis*.

Scope of the judicial review

53. The Tribunal underlines that the Tribunal is to review the contested non-selection decisions related to the six RC/RR positions for which the Applicant applied in August and November 2013: (a) three RC/RR positions which were vacant at the UNDP Country Offices in Jordan, Benin and Nigeria; and (b) three RC/RR positions that were vacant at the UNDP Country Offices in Zambia, Saudi Arabia and Laos.

54. As consistently held by the Appeals Tribunal, staff members do not have a right to selection/promotion but to have a full and fair consideration of their job applications (see *Andrysek* 2010-UNAT-070).

55. In *Ljungdell* 2012-UNAT-265 (recalled in *Scheepers* 2015-UNAT-556), the Appeals Tribunal stated:

30. ... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration [footnote: *Schook* 2012-UNAT-216, quoting *Sanwidi* 2010-UNAT-084].

56. In *Abbassi* 2011-UNAT-110 (recalled in *Scheepers* 2015-UNAT-556), the Appeals Tribunal stated:

23. In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (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.

24. The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

57. In *Aliko* 2015-UNAT-540, the Appeals Tribunal summarized its jurisprudence on the judicial review of selection decisions as follows:

30. “[I]t is not the function of the Dispute Tribunal [...] to take on the substantive role with which the interview panel was charged” [footnote: *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141, para. 32]. Rather, the Dispute Tribunal reviews the challenged selection process to determine whether a “candidate[] ha[s] received fair consideration, discrimination and bias are absent, proper procedures have been

followed, and all relevant material has been taken into consideration” [footnote: *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 20]. The burden is on the candidate challenging the selection process to “prove through clear and convincing evidence” that he or she did not receive full and fair consideration of his or her candidacy, the applicable procedures were not followed, the members of the panel exhibited bias, or irrelevant material was considered or relevant material ignored [footnote: *Ibid.*, para. 21].

Facts relevant for the Applicant’s August and November 2013 applications

58. The following uncontested facts are considered relevant:

- a. The Applicant joined the Organization on 16 September 2002 on a project post under the former staff rules with UNDP Lebanon at the L-4 level;
- b. She was reassigned on 1 January 2004 as a Policy Advisor to RBAS at UNDP Headquarters on a fixed-term appointment at the P-4 level;
- c. On 1 August 2005, she was appointed as a Deputy Resident Representative at the UNDP Egypt Country Office at the P-5 level;
- d. On 1 January 2007, she was reassigned as Policy Advisor to BDP/DGG at the P-5 level;
- e. In 2007, she successfully passed the UN Resident Coordinator Assessment test and qualified for appointment as RC/RR/HC.
- f. In October 2009, she was appointed Director of the Brussels Liaison Office of the United Nations Development Fund for Women at the P-5 level;
- g. On 1 June 2010, the Applicant was selected and accepted the fixed-term appointment of RC/RR at the D-1 level at the UNDP Country Office in the UAE;

h. On 30 August 2012, based on a mutual agreement, she was moved to UNDP Headquarters in New York as a Special Advisor at the D-1 level with BDP/DGG;

i. On 26 April 2013, she applied for three RC/RR positions in Macedonia, Georgia and Uruguay and for a Development Coordinator post in Kosovo for which she was not selected;

j. In August and November 2013, she applied for six other RC/RR positions: three RC/RR positions which were vacant at the UNDP Country Offices in Jordan, Benin and Nigeria and three RC/RR positions that were vacant at the UNDP Country Offices in Zambia, Saudi Arabia and Laos;

k. During its meetings on 5 September and 12 November 2013, the EG decided not to nominate the Applicant to the posts which she had applied for in her August and November 2013 applications and she was not among the UNDP candidates that were put forward by the EG to the IAAP to be considered for selection.

59. From the UNDP Guidelines for the Selection and Appointment of Resident Coordinators of November 2009, it clearly results that selecting an RC/RR is a competitive process.

60. The Tribunal will further analyse if, based on her August and November applications, the Applicant's candidature for each of these posts was fully and fairly considered by the EG and if all mandatory procedural steps were respected.

The Applicant's eligibility for the RC/RR positions for which she applied in her August and November applications

61. The Tribunal notes that, on 5 March 2010, the Applicant was notified by the Human Director in the UNDP Bureau of Management that she had been selected for the RC/RR position in the UAE. In addition, the Department of Safety and Security approved her

selection as a Designated Official for Security. The Applicant was further informed that the Resident Coordinator Assessment Centre will automatically consider staff member who have successfully completed the RC test (the so-called “RCAC”, which is also an abbreviation for Resident Coordinator Assessment Centre) to be part of the pool of pre-assessed staff for future RC positions. Therefore, while she was undergoing the clearance process for an RC position, her name was also added to the reserve pool of RCs for the future. A staff member is moved from the reserve to the active pool when the Agency of that staff member agrees that the staff member is ready for reassignment.

62. The Applicant’s mandate as RC in UAE ended on 31 July 2012 and within one year she applied for other RC positions, thereby clearly expressing her immediate availability to take on other RC assignments and her willingness to be nominated as RC by UNDP.

63. The Tribunal considers that, by the end of November 2013, the Applicant had the right to be retained in the RC, Pool A, in accordance with Part IV of the UNDP Guidelines for the Selection and Appointment of Resident Coordinators of November 2009. Starting from 20 November 2013, when it was clear that, by the end of the calendar year 2013, she would not be nominated for at least one RC position, as a former RC now serving at the D-1 level at the UNDP Headquarters in New York, she had the right to be moved in the RC, Pool C, and be retained here for a period of two years. Thereafter, her suitability to remain in Pool C, was to be reviewed by UNDP and be extended up to maximum six years, subject to her continued interest in serving as an RC.

64. The Tribunal further considers that, in any case, even if the Applicant was not considered as being part of the RC, Pool A, until December 2013, from 1 September 2012 when she was moved to New York, she would be maintained in the RC, Pool C, for at least two years, as mentioned above, after which time her suitability to remain in this Pool was to be reviewed by UNDP and extended up to a maximum six years, subject to her continued interest to serve as an RC.

65. The Tribunal concludes that, since the RC Pools serve as an interagency roster of candidates who have passed the RC test (the RCAC) and the Applicant was in the RC Pool, she was an eligible candidate for any of the RC posts for which she applied in August and November 2013.

66. The Tribunal notes that the Applicant's August and November 2013 applications were reviewed by OHR after which the EG Secretariat correctly included her name as an eligible candidate in the two matrices forwarded to the EG members, which were then to assess her suitability for being nominated as a UNDP candidate (see the UNDP Guidelines for the Selection and Appointment of Resident Coordinators of November 2009 and the IAAP's Standard Operating Procedures).

Did the UNDP EG fully and fairly consider the Applicant's August and November 2013 applications?

The standard criteria for being nominated for IAAP's consideration and the process followed when assessing the Applicant as a possible nominee

67. The Tribunal notes that, as results from the IAAP's Standard Operating Procedures, to assist UNDP as the Applicant's nominating entity in this process, a country checklist was to be used to determine whether a sufficient match between the post profile and the potential nominee's experience and qualifications existed. This country checklist—a tool for use by nominating UN entities to ensure that nominees have sufficient and relevant qualifications as per the specific requirements of a given RC position—was to contain a set of minimum criteria to assess the suitability of the candidate, including, among others, whether a country was classified as “previous RC experience is normally required”.

68. The standard criteria, which follows from the country check list that is appended as annex 1 to the IAAP Standard Operating Procedures and which must be assessed by any nominating entity, are the following:

- a. "Resident Coordinator Function":
 - i. Education (an advanced degree);
 - ii. Professional experience (minimum of 15 years of substantive experience, senior management with representative function, experience in crisis and/or politically complex country, as applicable to the profile of the post);
 - iii. RCAC (pass);
 - iv. Language (meets the post language requirement);
 - v. RC experiences;
- b. "Humanitarian Coordinator Function":
 - i. Professional experience (humanitarian experience; field experience; knowledge of international humanitarian system; principles and mandates; knowledge of international humanitarian law, international law, refugee law, international human rights law; Humanitarian Coordinator competencies);
- c. "Designated Official function":
 - i. Security management experience (experience as an Area Security Coordinator (described as an "advantage"; previous experience in a country/area with a Security Phase at least as high as in the proposed country).

69. According to the IAAP Standard Operating Procedures and its annex 1, the use of country check list for IAAP nomination has two steps:

- a. Review of the post profile and the country check list to determine the required work functions; and
- b. For each function and corresponding minimum criteria assess the suitability of the candidates.

70. The Tribunal notes that there is no evidence on record filed by the Respondent that demonstrates that, as required by the IAAP Standard Operating Procedures, UNDP and the EG actually reviewed the profiles of each of the relevant posts and the corresponding country check list to determine the required work functions and assessed in writing the Applicant's suitability as a potential nominee for each functions and corresponding minimum criteria.

71. The Tribunal further notes that, as results from the Management Bureau Director's written statement, the Applicant's qualifications against the posts for which she applied in August and November 2013 were discussed by the EG during its meetings on 5 September and 12 November 2013. However, the Tribunal finds that there is no written record of the discussions and deliberations, including the final number of votes obtained by the Applicant to reflect the decision not to nominate the Applicant for any of the relevant posts.

72. The Tribunal considers that, as results from the IAAP's Terms of Reference read together with the UNDP Guidelines for the Selection and Appointment of Resident Coordinators of November 2009, in order to decide on the Applicant's formal nomination, the EG had the obligation to review her three latest performance appraisals, notably the ones for the previous three years: 2011, 2012 and 2013, which were then to be forwarded to the IAAP as supporting documentation if she was to be nominated. In the following part of the judgment, the Tribunal will further analyse if these there performance appraisals were made available to the EG.

2011 performance appraisal (1 June 2010 to 31 May 2011)

73. On 25 May 2012, the UNDG Team rated the Applicant's 2011 performance as RC in the UAE with "4" (meaning "Needs Development") and the Applicant received this appraisal on 10 June 2012. On 30 June 2012, within 20 working days of her receipt of the appraisal, the Applicant rebutted it. Such rebuttal must follow a two-stage process pursuant to the "Explanatory Note for the United Nations [RC/HC/DO] and [UNCT] Performance Appraisal Process for the 2012 Performance Year":

- a. Regional recourse stage—the RC/HC/DO could submit a request for reconsideration of the Regional UNDG Team appraisal to the Chair of her respective Regional UNDG Team within 20 working days following receipt of the UNDG Team final assessment and rating; and
- b. Final rebuttal stage—if the RC/HC/DO was not satisfied with the outcome after reconsideration by the UNDG Regional team, she had the option to file a rebuttal within 20 days of receipt of the UNDG Regional Team decision to the Director of DOCO.

74. On 12 September 2012, the Regional UNDG Team reviewed her 2011 performance appraisal and decided to change the final rating for the Applicant’s performance to a “3”, meaning “Fully Satisfactory”.

75. The Tribunal notes that, during their consultations in May 2012 at the Headquarters in New York, both UNDP Management and the Applicant agreed that she be moved to BDP in New York, starting from 1 September 2012 and that a 2011 performance appraisal would not be completed since her supervisor had already departed from UNDP. This decision has not been contested by the Applicant. Furthermore, the Tribunal notes that, in his message from 10 September 2012, the Assistant Administrator and Director Bureau of Management, confirmed to the Applicant that:

... the position to which you have been reassigned is at the D-1 level. Therefore your reassignment neither constitutes a demotion, nor a disciplinary sanction. On the contrary, this reassignment seeks to leverage your extensive experience in public administration at a time when the Organization is embarking on exciting new programmes in this area. We very much count on your support in this endeavor.

76. This statement appears to recognize that the Applicant’s entire performance with UNDP, including as RC in 2011, was satisfactory, and it was made before the final rating of the Applicant’s 2011 performance. In its final rating of fully satisfactory performance of 12 September 2012, the Regional UNDG Team confirmed this statement.

2012 performance appraisal (1 June 2011 to 31 May 2012)

77. On 18 June 2013, the UNDG Team conducted its review of the Applicant's 2012 performance as RC in UAE and subsequently gave her a rating of "4" ("Needs Development") noting "that, based on the performance in the UAE [the Applicant was] not recommended for future [RC] positions within the [O]rganization". The 2012 performance appraisal was sent to the Applicant for her comments on 3 July 2013.

78. On 29 July 2013, the Applicant filed a management evaluation request regarding her 2012 performance appraisal. In his response, the Management Bureau Director found that, since the Applicant requested re-consideration of performance appraisal and there was no final assessment by the UNDG Team, this appraisal was not final and did not therefore serve as a basis for any other decision. The Management Bureau Director further stated that there was no decision to exclude her from consideration for any vacant position to which she had applied.

79. On 30 July 2013, the Applicant requested the Chair of the Regional UNDG that a comprehensive reassessment be undertaken of her 2012 performance appraisal.

80. On 4 September 2013, after reviewing the Applicant's written request for reconsideration of the 2012 performance appraisal, the UNDG Team decided to remove its recommendation not to consider the Applicant for future RC/RR positions from her performance appraisal but maintained the rating of "4". The Applicant was notified about the revised performance appraisal on the same day. She then had the right to file a rebuttal against this decision within 20 working days of receipt of the UNDG Team decision, which she did on 17 September 2013. On 13 August 2014, the Advisory Group maintained as final the rating of "4".

81. Taking note of the Applicant's statement that she did not request a management evaluation of the final decision from 13 August 2014 and that this decision is not part of the present application before it, the Tribunal is therefore to consider for the purpose of the present case that the final rating for the Applicant's 2012 performance appraisal is "4".

However, the Tribunal notes that solid evidence produced to the Tribunal in the present case, which existed and was available but was not reviewed and/or requested by the Advisory Group indicates that the Applicant's performance as RC in the UAE in the time period from 2010 to 2012 was highly appreciated by high-ranking officials from the United Nations and others. This includes:

- a. Letter dated 19 August 2010 from the Secretary-General to the Applicant in which he thanked her for her "professionalism and dedicated efforts during [his] recent transit through Abu Dhabi" ;
- b. Letter from the Deputy Chef de Cabinet and Special Adviser to the Secretary-General dated 24 August 2010 in which he expressed his "deep thanks" in connection with the Secretary-General's recent transit through the UAE;
- c. Letter dated 2 October 2012 from the Under-Secretary-General for the Department of Safety and Security in which he thanked the Applicant for her "Service as the [DO] in the UAE and Qatar and praised her "leadership", "commitment" and "seriousness";
- d. Letter dated 14 March 2012 from the Joint Special Envoy for Syria in which he thanked the Applicant "for the support and assistance during [his] recent trip to the region";
- e. Letter dated 12 August 2012 from the Minister of Foreign Affairs of the UAE to the UNDP Administrator in which he requested the Applicant's assignment as RC/RR in the UAE be prolonged based on the "fruitful partnership between the UAE and the UNDP";
- f. Undated letter from the Under-Secretary, Ministry of Economy, of the UAE to the new Regional Director and Assistant Administrator, RBAS, Ms. B, in which he "acknowledge[d] ... the leadership and vision of the UNDP [RR, the Applicant] and her tireless efforts and commitment to developing and finalizing the [Country] Programme" and "recognize[d] her strategic thinking and her support to us in identifying a new financing approach...";

g. The written statement of the former UNDP Director of the Regional Centre for Arab States, Cairo, Mr. PL, in which he stated that, during the session concerning the annual review of the Applicant's performance for 2011 that he had chaired, the Applicant's review had been finalized and her performance was rated with a "3" (meaning "Fully Satisfactory");

h. The written statement of a Security Associate in UNDSS in the UAE, Mr. A, in which he stated that the Applicant was "the most dynamic, capable, respected and appreciated RC/RR and DO we had";

i. The written statement of a Security Associate in UNDSS in the UAE, Mr. E, in which he, amongst others, commended the Applicant for her approach to resolving staff conflicts and relations with the Government of the UAE; The affidavit of the Director of Social Development Planning at the General Secretariat for Development Planning in Qatar, Mr. RL, in which he praised the cooperation with the Applicant as RR in the country;

j. The written statement of the Ambassador of the Sultanate of Oman to the UAE since 2007, Mr. Q in which highlighted the Applicant's "professionalism, confidence, and advanced diplomatic and leadership skills" and stated that he had "observed her tactfulness, discretion and remarkable competence in addressing sensitive issues as well as quick thinking and capability to finding solutions".

k. The Applicant's successor as RC stated that a report prepared by the Applicant and subsequently presented by him after her departure was a very well prepared document that he had nothing to add and/or change to it.

2013 performance appraisal (1 June 2012 to 31 May 2013)

82. The Tribunal notes that, on 26 August 2013, before her departure from UNDP, the Applicant's supervisor for the period September 2012 to August 2013 prepared a file referring to the Applicant's performance which included a scanned copy of the Applicant's job description for this period and a report from the Applicant dated 15 August 2013. The Applicant's performance appraisal as a Special Advisor in BDP at the D-1 level for the period

from September 2012 to August 2013, finalized on 24 October 2013, reflected that her performance had been outstanding and exceeding expectations in the different relevant areas of expertise.

The EG's decision not to formally nominate the Applicant taken on its 5 September 2013 and 12 November 2013 meetings

83. During the 5 September 2013 meeting, the EG decided not to nominate the Applicant based on her August 2013 application. The Tribunal considers that, as results from the evidence, on 5 September 2013, only the 2011 performance appraisal was finalized and that the Applicant was granted a rating of “3”, meaning, “Fully Satisfactory”. The Applicant’s revised 2012 performance appraisal, was finalised a day before this meeting, notably on 4 September 2013, was subject, within 20 days thereafter, to a final rebuttal to the DOCO. The 2012 performance appraisal was therefore not final. UNDP, therefore, submitted the Applicant’s 2012 performance appraisal in a revised form to this meeting and did not state that the rebuttal process was still ongoing. The performance appraisal for 2013 was not available, having been finalized only on 24 October 2013.

84. The Tribunal notes that, on 12 November 2013, the Applicant’s 2011 and 2013 performance appraisals were finalised, while the rebuttal of the 2012 performance appraisal (filed on 17 September 2013, within 20 days from the date of notification on 4 September 2013) was still ongoing and only finalised on 13 August 2014. The same procedural irregularities regarding the relevance of the 2012 performance appraisal were made during the EG’s meeting on 12 November 2013.

85. The Tribunal considers that, as results from Part V of the UNDP Guidelines for the Selection and Appointment of Resident Coordinators of November 2009, if the candidate meets all the criteria in the checklist as per the post profile, the nominating entity may formally submit the nomination together with the supporting documentation to the IAAP, including the following: (a) the candidate’s curriculum vitae (including the candidate’s

performance appraisal rating for the previous three years); (b) competency development plans and annual progress report, if any (applicable to RC pool candidates with identified development needs based on the result of the RCAC); and (c) the completed country checklist. It results that a candidate who has a rating of “4” (needs development) is not, *per se*, to be excluded as not being qualified/suitable. Only when an RC receives an unsatisfactory performance (rating “5”), the regional UNDG Team, and therefore the UNDP EG can have serious reservations as to the staff member’s continued service as an RC/HC/DO and not to nominate him or her as an RC.

86. There is no evidence that the Applicant did not meet all the criteria in the checklist and, as mentioned above, the development needs identified in the 2012 performance appraisal were not by themselves an impediment for her to be nominated. However, as results from the evidence, the revised but not finalized 2012 performance appraisal had a decisive and disproportionate weight on the Applicant not being nominated by the EG for any of the relevant RC/RR positions. The EG only gave importance to the rating of “4” of the 2012 performance appraisal and not any of the other two relevant performance appraisals (2011 and 2013) that were to be taken into consideration and in which her performance, respectively, was rated at a “3” and as being “outstanding” and “exceeding expectations”. The fact that the 2012 performance appraisal was under rebuttal was not taken into consideration when the EG reviewed her as a potential nominee for the relevant RC/RR positions.

87. The Management Bureau Director stated in his written statement to the Tribunal that, during its meetings on 5 and 12 November 2013, the EG met and discussed the Applicant’s nomination to the IAAP and that he participated personally in both meetings (although by phone in the 12 November 2013 meeting). During the EG’s discussion on 5 September 2013 and 12 November 2013, the fact that the Applicant was based in New York at that time and the circumstances surrounding her move to New York, including her weak performance in the UAE, were brought to the EG’s attention. The EG members agreed that given her poor performance as RC/RR in the UAE she made a “very weak” UNDP candidate for future RC/RR positions and that she should not be among the nominees to the IAAP for the relevant

positions. During his oral testimony before the Tribunal on 11 March 2016, the Management Bureau Director confirmed these statements. However, the Tribunal considers that this contradicts his other and more favourable statements regarding the Applicant's performance in 2012 made on 10 September 2012 and 31 December 2012, as mentioned above, and is indicating that, in fact, even on 4 September 2013, the revised performance appraisal did no longer include the initial mention from 18 June 2013 "that based on the performance in [the UAE she] was not recommended for future [RC] position within the Organization". This decision continued to represent the UNDP's official position regarding her 2012 performance and that her move to the New York Headquarters was viewed as a result of her weak or poor RC performance than a sign of appreciation of the Applicant's experience.

88. Moreover, the Tribunal notes that, in the submissions filed before the Tribunal, the Respondent described the Applicant's revised 2012 performance appraisal maintained by the UNDG Team as "non-satisfactory as she did not meet expectations in nearly all her key results", which is inaccurate because the rating for unsatisfactory (which is equivalent to non-satisfactory) is a "5" and not a "4" as received by the Applicant. Also, the Tribunal is of the view that the words used to describe the Applicant's performance to the EG, notably "weak" and "poor" performance, created the perception that she had a fully unsatisfactory performance during her entire mandate as RC in UAE from 2010 to 2012. This perception, which is contradicted by the evidence on the record, had no real basis and the Applicant's suitability against the RC posts she applied for was not correctly assessed by the EG.

The Tribunal's conclusions regarding the EG's assessment of the Applicant as a potential nominee

89. The Tribunal considers that UNDP/the EG did not fully and fairly consider the Applicant's suitability for the relevant RC posts as the information presented to the EG was incomplete and incorrect as it primarily related to her 2012 performance appraisal, which had not been finalized at the given time, and thus the EG decisions were not based on all three relevant performance appraisals.

90. The Tribunal concludes that the decisions not to formally nominate the Applicant for the IAAP's further consideration for the RC positions for which she had applied in her August and November 2013 applications are unlawful for the reasons presented above. Consequently, the application filed by the Applicant before the Tribunal is to be granted in respect of these decisions and the relevant decisions of the EG on 5 September and 12 November 2013.

Relief

91. The Appeals Tribunal found in para. 48 of *Onana* 2015-UNAT-533 (see similarly also in *Luvai* 2010-UNAT-014) that the direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. This finding is applicable *mutatis mutandis* in the present case in that the direct effect of an irregularity can only result in the rescission of the EG's decisions not to nominate the Applicant for the RC posts for further consideration by the IAAP and the possible eventual selection by the Secretary-General.

92. However, the Tribunal notes that the Applicant did not request any of the non-selection decisions contested in the present case to be rescinded but rather requested a priority placement for any available RC/RR post and moral damages (“[p]riority placement in an available RC/RR post, and moral damages in the amount of two years’ full base pay plus costs”). In her closing submissions, the Applicant amended the request for compensation as follows:

- a. 12 months’ net-base pay in compensation for moral damages;
- b. Two years of net-base salary for her pecuniary losses; and
- c. USD20,000 in costs for the Respondent’s alleged abuse of process.

Priority placement

93. The Tribunal notes that at least one of the posts for which the Applicant had applied in November 2013 and reapplied in February 2014, by the time of the hearing in March 2016, no

candidates had been selected and this post may still be vacant. However, in her testimony, the Applicant did not confirm her interest in being nominated for the then vacant post in Saudi Arabia. Furthermore, as the Respondent cannot be obliged to place the Applicant against an RC/RR post (see the Dispute Tribunal's Statute, art. 10.5(a)), and the Tribunal is not to substitute the role of the EG in this regard (see similarly, *Frohler* 2011-UNAT-141, *Balinge* 2013-UNAT-377 and *Staedler* 2015-UNAT-347), the Applicant's request for priority placement is rejected.

Pecuniary damages

94. The Tribunal notes that the Applicant did not request any pecuniary damages in her application but only pleaded for such compensation in her closing submissions. As the Respondent therefore has had no opportunity to make submissions thereon, as such, she is now precluded from making any such claim. In any event, the Tribunal underlines that the Applicant has only the right to be fully and fairly considered for a post and not to be selected (see, for instance, *Luvia* 2014-UNAT-417) and that the breach of her right does not by itself entitle her to compensation for loss of income. Moreover, the Applicant indicated in the closing submissions that "for her pecuniary losses, she requests that her forced separation and loss of future earnings be compensated with two years of net-base salary, representing the time she had left before reaching mandatory retirement age", but this request rather appears to be related to the other Applicant's case before the Tribunal (Case No. UNDT/NY/2015/040) regarding her separation from service than to the present case as the alleged pecuniary losses were, if anything, then caused by her separation and not by the non-selection decisions contested in the present case.

95. The Applicant's request for two years of net-base salary in compensation for her pecuniary losses is therefore to be rejected.

Moral damages

96. The Tribunal notes that art. 10.5(b) of the Dispute Tribunal's Statute was amended by the General Assembly in December 2014 and that the text introduced, as a mandatory new requirement, that the Dispute Tribunal may only award compensation "for harm, supported by evidence". This requirement is both substantive, because the compensation can only be awarded for harm, and procedural, because the harm must be supported by evidence.

97. In the *Black's Law Dictionary*, 6th Ed. (1990), "harm" is defined as "[a] loss or detriment in fact of any kind to a person resulting from any cause" (p. 718).

98. It results that, since art. 10.5(b) of the Dispute Tribunal's Statute makes no distinction between physical, material or moral harm, the provision is applicable to any types of harm and that the harm must be supported in all cases by evidence.

99. The Appeals Tribunal stated in *Gueben et al.* 2016-UNAT-692 that the amended text of art. 10.5(b) of the Statute is of immediate application because an award of damages takes place at the time the award is made and not at the time the application is filed. According to the Appeals Tribunal, "applying the amended statutory provision is not the retroactive application of law. Rather, it is applying existing law".

100. The Tribunal notes that, in *Asariotis* 2013-UNAT-309, the Appeal Tribunal stated that (emphasis in the original as well as added and footnotes omitted):

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.

37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

101. In accordance with the requirement of art. 10.5(b) of the Dispute Tribunal's Statute and para. 36(i) of *Asariotis*, this Tribunal is of the view that a breach of a fundamental nature can give rise to an award of moral damages only if the harm to the staff member is supported by evidence.

102. This Tribunal considers that the amended text of art. 10.5(b) of the Statute of the Dispute Tribunal is applicable in the present case as the application was filed in March 2014 and was pending when the amendment entered into force.

103. The Tribunal notes that, as results from the Applicant's testimony, after she was not nominated for any of the RC posts for which she applied in August and November 2013, she felt seriously stressed, depressed and humiliated, which also caused other serious health issues. Taking into consideration the particular circumstances of the present case, which have proven to have negatively affected her health and reputation, the Tribunal will award the Applicant USD3,000 in moral damages for each of the six RC position for which she applied in August and November 2013, notably a total of USD18,000. In the Tribunal's view, together with this judgment, this represents a reasonable and sufficient compensation for the non-pecuniary losses the Applicant suffered.

Costs

104. In her application, the Applicant requested “full reimbursement of legal fees she incurred since 2012” and, in her closing submissions, she specified this by requesting USD20,000 for the Respondent’s alleged abuse of process for prolonging and complicating the proceedings. The Tribunal notes that the Respondent respected all the Tribunal’s instructions, including deadlines, in the present case. As no evidence supports a finding of abuse of process in accordance with art. 10.6 of the Statute of the Dispute Tribunal, the Tribunal is not in a position to award any costs and this request is to be rejected. Furthermore, no evidence was submitted in relation to the amount and payment of legal fees.

Conclusion

105. In the light of the above, the Tribunal DECIDES that:

- a. The Application is granted in part;
- b. All claims regarding the Applicant’s non-selection for the RC posts for which she applied in April 2013, September and October 2013 are rejected as not receivable *ratione materia*;
- c. The substantive claims regarding the Applicant’s August and November 2013 applications are granted;
- d. The Applicant’s requests for priority placement, pecuniary damages and costs are rejected;
- e. The request for moral damages is granted in part. The Respondent is to pay the Applicant a total of USD 18,000 (USD3,000 for each of the six RC position for which she applied in her August and November 2013 applications). This sum is to be paid within 60 days after the judgment becomes executable, during which period the U.S. Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the U.S. Prime Rate until the date of payment.

Observations

The Applicant's 2012 performance appraisal and the rebuttal process

106. On 13 August 2014, the Advisory Group maintained as final the rating of “4” (meaning “Needs Development”) of the Applicant’s 2012 performance appraisal, stating as follows:

... CONCLUSIONS

The sub-set of the UNDG Advisory Group found that:

- The Regional UNDO Team appraisal of the RC’s performance as laid out in the 2012 [performance appraisal, “PA”] document did not provide a sufficient amount of detail and argument as recommended in the UNDG explanatory note on the issue. In particular, the appraisal report did not include “elaborate descriptions of concerns and concrete recommendations for areas of improvement”, as is recommended in cases where a rating of “4” is assigned to a staff member for the first time (NB: the 2011 PA assigned initially a “4” to the RC, which was subsequently changed to “3”), making it difficult for the RC to concretely understand how performance could be enhanced in the future. The question whether a structured coaching and feedback process had taken place between the Regional UNDG Team and the rebutting RC remained inconclusive.
- The summary nature of the feedback provided by the Regional UNDG Team does not allow for an assessment as to the extent to which mitigating factors related to the strategic positioning of the UN in the specific country context or other pre-existing challenges were taken into account in the rating allocated.
- Based on the information provided in the interviews and the written material examined, the sub-set of the UNDG Advisory Group found all improved rating of “3 – fully met expectations” does not seem justifiable given the substantial concerns expressed by interviewees regarding the RC’s performance during the appraisal period. It is acknowledged that the absence of a valid One 180 Report by UNCT members for the RC may have led to a partially incomplete appreciation of the RC's overall performance.
- The subset of the UNDG Advisory Group agrees with the decision by the Regional UNDG Team (in response to the RC’s request for reconsideration) to remove the sentence in the 2012 PA that “The Regional UNDG Team notes that, based on the performance in UAE [the Applicant] is not recommended for future Resident Coordinator positions within the organization”, as such a statement would unjustly prejudge the outcome of any

training programme, the possibility for future improved performance by the rebutting RC, and would jeopardize unduly her career expectations.

- The UNDG Advisory Group endorses the above conclusions. Final note: The decision of the UNDO Advisory Group as endorsed by the UNDO Chair shall not be subjected to further appeal. However, administrative decisions stemming from any final performance appraisal that affects the conditions of service of a Staff member may be appealed in accordance with Staff Rule 11.1.

... **RECOMMENDATIONS**

- In light of the above, the sub-set of the UNDG Advisory Group recommends upholding the Regional UNDG Team's rating of "4-partially met expectations".

- The UNDG Advisory Group endorses the above recommendations.

Final note: The decision of the UNDO Advisory Group as endorsed by the UNDO Chair shall not be subjected to further appeal. However, administrative decisions stemming from any final performance appraisal that affects the conditions of service of a staff member may be appealed in accordance with Staff Rule 11.1.

107. The Tribunal considers it necessary to observe the following procedural irregularities related to the initial performance appraisal issued on 18 June 2013 and the rebuttal process, as reflected by the written and oral evidence presented in the present case. Taking into consideration the complexity of such process and to prevent similar proceedings in the future, the Tribunal underlines that the relevant evidence was available to the Advisory Group but it was not considered by it.

108. According to the "Explanatory note for the [United Nations RC/HC/DO] & [United Nations] Country Team performance appraisal process for the 2012 year", the October 2012 version, the 2012 performance appraisal must reflect a "mutual accountability for the achievement of results", and the completion of all elements of the appraisal process is mandatory. Additional input must also be collected from: the RC's annual report; the Office of Coordination of Humanitarian Affairs; the Department of Security and Safety; the Chief Executives Board; the One 80 reports as completed by the RC/HC/DO and the UNCT members; and the 2013 key planned results. The Applicant wrote to the UNDP Administrator on 28 August 2012, indicating that her departure from the UAE would affect important

projects, also noting the unique and difficult context of the UAE. The Applicant's leadership as RC was not correctly reflected, and the UNCT requested that the One80 online survey be reopened so they can enter their input.

109. The Tribunal underlines that the subset of the Advisory Group members (at the level of Assistant Secretary-General) to which the rebuttal case was assigned had to conduct a full and impartial review of the case and make a recommendation to be presented to the entire Advisory Group for endorsement. The review of the Applicant's performance required the Advisory Group members to:

- a. Compile a list of all persons to be interviewed and relevant documents;
- b. Focus primarily on the specific period covering the performance appraisal under rebuttal;
- c. Begin the interviews with the rebutting staff member (who should be the first to be interviewed);
- d. Continue with her/his supervisors (the Chair and the relevant members of the Regional UNDG Team) and the proposed witnesses;
- e. Explain the process to all involved; at the end of each interview, check with the interviewee as to whether s/he would recommend any other appropriate personnel who should be interviewed in order to:
- f. Ensure that all members of the Advisory Group participate in each interview together;
- g. During/after the interview, go through the conflicting issues (for instance, contradictions in self-assessment versus that of her peers and identify later contradictions with supervisor).
- h. Document all the reviews/interviews in writing, including the dates/times of events.

110. Pursuant to the ““Explanatory Note for the [RC]/[HC]/[DO] and [UNCT] Performance Appraisal Process” for the 2012 Performance Year”, the following clarifications/explanations were to be obtained by the Advisory Group members from the Applicant and her supervisors:

1. It is recommended to first speak with the rebutting staff member in order to obtain an explanation and full scope of the complaint:

- What is the precise complaint to the Advisory Group?
- What is the reason/justification for the complaint?
- What/who is involved?
- When did the facts happen?
- How did they happen?
- Where?
- Who does the staff member suggest Advisory Group members speak with?
- Is there any additional documentation to substantiate their case?

2. Issues for clarification/explanation by the staff member and the supervisor(s):

- Did the staff member work for more than one supervisor in the same unit over the course of the year (i.e. HC/DO)?
- Were performance assessments, made by other supervisors, taken into account by the Regional
UNDG Team?
- Did the supervisor(s) ensure that a performance/work plan was established for the staff member?
- Was it developed with, and clearly communicated to the staff member early enough in the year?
- Was there sufficient discussion of performance expectations between the supervisor and staff member early enough in the year in terms of outputs and deadlines or other assigned performance standards?
- Were the tasks assigned to the staff member given at a level of difficulty appropriate to the grade of the post?
- Was there appropriate guidance from the supervisor(s)?
- Was the staff member given sufficient advance notice of performance problems during the year through feedback by management in order that he/she she might have had a chance to correct them?
- Was there sufficient discussion of performance between supervisor and staff member at the year-end?

- Did the performance appraisal and rating take into account the performance of staff members who transferred to/from other RC functions in the course of the year?
- Were critical incidents sufficiently well documented and consistent with the rating as well as with the grade of the post? This could be particularly important in cases where the final rating is "4" or "5" and may affect the staff member's career/contractual status.
- Was the staff member's performance compared with that of other staff members? If so, to what extent, if any, did it affect the final evaluation or rating?
- Does the supervisor have any written documentation to justify the rating for the staff member's performance?

3. Issues for clarification by the supervisor(s).

- Did the Regional UNDG Team conduct its work in a manner that ensured consistency and fairness in evaluations and ratings? Was there consideration of circumstances beyond the staff member's control?
- Are the supervisor's comments consistent with the ratings given, and substantiated elsewhere in the performance appraisal?

Process of Review

In conducting the review, the Advisory Group members have access to all documents relevant to the issues raised in the rebuttal. These documents may include:

Performance appraisal being rebutted by the staff member (Signed version)

Previous performance appraisals of the staff member (if applicable)

1. Performance/Work plan
2. Job description
3. Documentation of any performance discussions
4. Notes to the file
5. Written warnings to the staff member
6. E-mails/documentation/correspondence (from the staff member's RC function or other functions associated with it, e.g. HC/DO)
7. Staff members written requests for review

111. The Tribunal further observes that, in the present case, extensive relevant written and oral evidence was provided by both parties regarding the rebuttal process, which was also ongoing at the time of the review made by the Advisory Group. The Advisory Group's 13 August 2014 decision, issued 11 months after initiating the process, reflects the Advisory

Group's findings in relation to the revised performance appraisal. However, the Tribunal observes that it was the role of the Advisory Group to cover all the identified procedural errors and written evidence to which they had access to, and it is not clear if the UNDG Team gave proper consideration to the circumstances beyond the Applicant's control. The documentation attached to the present application was available to the Respondent from 26 March 2014, and it should have been presented to the Advisory Group, but despite the inconsistencies identified in the section "findings" such evidence was not requested and important matters like the clarification of the circumstances related to her move to BDP in New York remained unclear.

(Signed)

Judge Alessandra Greceanu

Dated this 21st day of December 2016

Entered in the Register on this 21st day of December 2016

(Signed)

Hafida Lahiouel, Registrar, New York