



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

SMITH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Mariam Munang, OSLA

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 10 July 2015, the Applicant, an Air Transport Officer with a continuing appointment at the P-4 level, step IX in the UN Secretariat, Department of Field Support, Logistics Support Division, Air Transport Service, contests the decision to determine him ineligible for consideration for temporary job opening TJO/UNMISS/SCM/P5/2015/006 ("TJO") for the position of Chief Aviation Officer at the P-5 level with the United Nations Mission in the Republic of South Sudan ("UNMISS") and the related administrative decision to conduct the recruitment exercise without him in breach of Order No. 46 (NY/2016). The Applicant requests compensation for the damage to his professional reputation and for the loss of career prospects.

2. The Respondent contends that the application is without merit and should be dismissed.

Factual and procedural background

3. On 4 February 2015, the incumbent of the position was selected for an eight week temporary duty assignment to the UN Mission for Ebola Emergency Response ("UNMEER"). On 24 February 2015, the TJO was broadcasted internally within UNMISS via emails to UNMISS staff members and on the UNMISS Board. The TJO specified that it was not open to external candidates and expressly stated that "Subject to the funding source of the position, this temporary job opening may be limited to candidates based at the duty station".

4. On 2 March 2015, a colleague of the Applicant forwarded him the TJO and the Applicant applied the same day.

5. On 3 March 2015, an UNMISS staff member was selected for the position and on 10 March 2015, the selected candidate was informed of his selection to

the position of Chief Aviation Officer at the P-5 level, for a temporary period effective the date [he] assumes the functions at the [P-5] level”.

6. On 13 March 2015, the Applicant filed both a request for management evaluation and an application requesting suspension of action (“SOA”) of the decision that he is not eligible to apply to the position. On 13 March 2015, the Tribunal suspended, pending management evaluation, the decision that the Applicant was not eligible to be considered for the position.

7. On 12 April 2015, the deadline for the Management Evaluation Unit’s (“MEU”) response expired.

8. On 10 July 2015, the Applicant filed the present application with the Tribunal.

9. On 14 August 2015, the Respondent filed his reply.

10. On 17 August 2015, the Registry informed the parties that “[a]s per instructions from the duty Judge“ the case would join the queue of pending cases and no further submissions were to be filed until the case was assigned to a judge.

11. On 9 May 2016, the case was assigned to the undersigned Judge.

12. On 18 July 2016, by Order No.172 (NY/2016), the Respondent was instructed to file a copy of the MEU’s response, if any, and both parties were instructed to file by 25 July 2016 a jointly–signed statement informing the Tribunal a) if any additional written and oral evidence is necessary to be produced in the present case and, if so, stating its relevance, or if the case may be decided on the papers; and b) if the parties are amenable for an informal resolution of the case. In case the parties agree that no further evidence is requested and the Tribunal can decide the case on the papers before it, the parties were instructed to file their closing submissions by 1 August 2016.

13. On 25 July 2016, the Applicant filed a motion for extension of time to file a joint submission by 8 August 2016. By Order No.182 (NY/2016) issued on 27 July

2016, the motion was granted and the parties were instructed to file the documents by 8 August 2016 and their closing submissions by 15 August 2016.

14. On 8 August 2016, the parties filed a joint signed statement informing the Tribunal that they do not seek to adduce additional evidence and that the case can be decided on the papers. The parties further stated that they are amenable for an informal resolution of the case either through the Office of the Ombudsman or through *inter partes* discussions.

15. On 9 August 2016, by Order No 192 (NY/2016), the parties were instructed to inform the Tribunal if they would like to proceed with informal settlement negotiations either through the Office of Ombudsman or through *inter partes* discussions and what time limits are to be provided in this scope.

16. On 10 August 2016, the parties informed the Tribunal that they intended to proceed with informal settlement negotiations through *inter partes* discussions and requested the proceedings be suspended until 7 September 2016.

17. By Order No.198 (NY/2016), the Tribunal suspended the proceedings until 15 September 2015. On 15 September 2016, the parties filed a motion for further suspension of the proceedings. By Order No.216 (NY/2016) issued on 16 September 2016, the proceedings were suspended until 29 September 2016.

18. On 30 September 2016, the parties filed a joint submission informing the Tribunal that the settlement efforts were not successful and that they will file their closing submissions by 11 October 2016.

19. On 11 October 2016, the parties filed their closing submissions.

Applicant's submissions

20. The Applicant's principal contentions, submitted in his application, are as follows (footnotes omitted):

The Administration's exclusion of the Applicant's application was arbitrary and unfair; it was based on a complete lack of authority or on a provision which has never been duly promulgated

12. The Administration's exclusion of the Applicant's application was arbitrary and unfair and breached the Applicant's fundamental right as a staff member to be given full and fair consideration when applying for a post in the Organization.

13. ST/AI/2010/4/Rev.1 deals with temporary appointments. Under the sub-heading 'Eligibility of a staff member who has held or is holding a fixed-term, continuing or permanent appointment', Section 5.1 of ST/AI/2010/4/Rev.1 states that "[a] current staff member who holds a fixed-term, permanent or continuing appointment may apply for temporary positions of no more than one level above his or her current grade". Other than with respect to technical requirements and competencies, no other eligibility requirements relevant to the Applicant are mentioned in that Section or elsewhere in ST/AI/2010/4/Rev.1.

14. The Applicant evidently met this basic eligibility requirement. He holds a continuing appointment. He is currently at the P-4 level and is applying for a P-5 temporary position, one level above his current grade. Further, as noted above, the Applicant has in any event been rostered against the P-5 position of Chief Aviation Officer since July 2013.

15. Pursuant to Section 3.5 of ST/AI/2010/4/Rev.1:

The department/office will assess the candidates' applications in order to determine whether they are eligible, and whether they meet the minimum requirements, as well as the technical requirements and competencies of the temporary position.

16. In the present instance, the Applicant was determined to be ineligible solely on the basis that he was not at the time of his application a staff member at UNMISS. No (further) reasoning was provided to the Applicant and no reference was made as to the legal basis for this determination as to his purported ineligibility.

17. The determination was palpably unlawful. It finds no authority in ST/AI/2010/4/Rev.1 or in any other relevant Staff Rules or Regulations. Indeed, although his apparent ineligibility was communicated to the Applicant without elucidation, it may be assumed that the Administration was relying on the note on page 5 of the TJO which reads that, "[s]ubject to the funding source of

the position, this temporary job opening may be limited to candidates based at the duty station”.

18. Unlike the other notes contained at the end of the TJO, no authority is provided for this statement and there is no indication that it derives from a policy or procedure which has been properly promulgated. Pursuant to Section 1.2 of ST/SGB/2009/4, “[r]ules, policies or procedures intended for general application *may only be established* by duly promulgated Secretary-General’s bulletins and administrative instructions” (emphasis added). ...

...

20. The *practice* of UNMISS with respect to the TJO in question (and, perhaps, TJOs generally) was that only UNMISS staff could apply and be considered. The rule, as set out in Section 5.1 of ST/AI/2010/4/Rev.1, is that “[a] current staff member who holds a fixed-term, permanent or continuing appointment may apply for temporary positions of no more than one level above his or her current grade”. As per *Korotina*, the Administration’s practice cannot and must not be applied in cases of conflict with a rule.

21. In summary, the Administration’s exclusion of the Applicant’s application was thus arbitrary and unfair; it was based either on a complete lack of authority or on a provision in the TJO’s notes which has never been duly promulgated. In either case, the Administration had no lawful basis to exclude the Applicant from full and fair consideration for the post.

The Administration’s failure to consider the Applicant was also contrary to both Article 101(3) of the Charter and the promotion of staff mobility required by the General Assembly

22. Further, the Administration’s attempt to limit a job opening – even a temporary job opening – to staff members within a specific mission is inconsistent not only with the Staff Rules and Regulations, but also with the UN Charter, which expects the Secretary-General to recruit people in accordance with Article 101(3). This states that:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

23. Limiting the selection of Applicants even to be considered for the post only to UNMISS staff members is inconsistent with this expectation. It is also expressly contrary to the intended promotion of staff mobility, as requested by the General Assembly, and the Organization's desire to encourage staff to serve in non-family missions or duty stations (as reflected in the relaxed lateral moves requirements for such candidates at the P-4 level).

The unlawfulness of the Administration's actions was established by Meeran J. when ordering a Suspension of Action and is reinforced by the Administration's decision to proceed with the recruitment exercise in breach of that Order

24. The prima facie unlawfulness of the contested administrative decision was established by Meeran J. in his Order on Suspension of Action of 13 March 2015. Meeran J. reasoned as follows:

As a current staff member with a continuing appointment and one who is on a roster for such a position, the Applicant is eligible to apply for such a post absent a cogent reason why he should not. The rather curt reply provides no explanation as to why the restriction of the temporary job opening is to UNMISS staff only.

The Applicant is a staff member at the Department of Field Support in New York. It would appear that the Human Resources Officer may have mistakenly read the note quoted at para. 3 to mean that the temporary job opening is restricted to candidates already based at the duty station when in fact such a restriction would only be applicable if funding was an issue. Even if it turns out subsequently that such an issue arises, it would be necessary for the Administration to justify the restriction. Accordingly, the exclusion of the Applicant satisfies the legal test the decision appears to be prima facie unlawful.

25. The analysis of Meeran J. is both apposite and telling. The law requires that administrative decisions must be made based on proper reasons and the Administration has the duty to act fairly, justly and transparently in dealing with its staff members, including in matters of appointments, separation, and renewals. As explained above, in the present case no reasonable basis can be discerned for the decision not to consider the Applicant for the advertised TJO. It was arbitrary and unfair, finds no basis in law and cannot be accepted as a legitimate exercise of policy.

26. In addition, the Applicant notes with concern that such initial unlawfulness has been compounded by the Mission's apparent decision to proceed with recruitment against the TJO, in breach of this Honourable Tribunal's Order on Suspension of Action. Such a decision would constitute a further striking example of the fundamental unlawfulness which has characterised the Administration's conduct throughout the recruitment exercise.

Respondent's submissions

21. The Respondent's principal contentions, submitted in his reply, are as follows:

21. On 24 February 2015, in accordance with section 3.4 of STIAI/2010/4.Rev. 1 and Section 3.2 of STIAI/2003/3, taking into account the operational requirements of the mission, the TJO was advertised internally within UNMISS, via internal email and the mission's bulletin board, providing eligible staff within UNMISS the opportunity to compete for the Position. Consistent with Section 3.4 of ST/AI/2010/4.Rev.1, the TJO was posted for the period of one week.

22. It would have been impractical and a misuse of resources to advertise the TJO Organization-wide and open the Position to non-mission staff. The Position was for a temporary period, six months, while the incumbent was on temporary duty assignment with UNMEER. Importantly, the Position was broadcast internally to UNMISS staff in order to ensure the effective and efficient delivery of services, given the demands and requirements of the Aviation Section within UNMISS. The Organization determined that as a result of its requirements, an internal temporary assignment was the better course of action to fill the Position (*D'Hellencourt*, UNDT/2010/018). This would result in the internal assignment of a pre-qualified staff member, who could begin work as soon as possible and without the requirement of obtaining a visa to travel to Sudan, which can take months and sometimes over a year. Furthermore, in comparison to advertising a TJO Organization-wide, such as used on iSeek, an internal TJO for the Position would require much less time in the search and selection of a qualified staff member.

The TJO specified that it was limited to internal candidates

23. As stated, pursuant to Section 3.4 of ST/AI/2010/4.Rev.1, the Administration may limit the circulation of a TJO to the intranet and/or other means, such as email, within the duty station concerned. Further, "if deemed necessary and appropriate" the Administration may also advertise the TJO externally, beyond the duty station concerned. In this case, the Administration specified in the TJO that it

was not open to external candidates and limited the circulation of the TJO within UNMISS.

24. Furthermore, TJO provided that subject to the funding of the position the TJO “may be limited to candidates based at the duty station”. As stated above, the reason for limiting the circulation of the no in this case was to ensure the prudent use of resources and to ensure a prompt recruitment in circumstances where there was a need to fill specific short-term requirements. For this reason, the TJO was not circulated Organization-wide.

25. In these circumstances, there is no merit to the Applicant's claim that he was entitled to apply for the Position. The TJO specified that recruitment was limited to internal candidates and it was circulated by management internally. The Applicant was not an internal candidate.

The selection decision for the Position was taken before the Applicant requested the SOA

26. The selection decision for the Position was implemented on 10 March 2013, three days before the Applicant submitted his request for the SOA (R/I and R12) (Article 2 of the Statute of the Dispute Tribunal.

Burden of proof

27. The Applicant claims that the contested decision has damaged his “professional reputation and [caused] enduring loss of career prospects”. The record demonstrates that the TJO for the Position was advertised internally within UNMISS and that the Applicant and all other staff were notified that it was limited to internal candidates. There can be no damage to his professional reputation when it is known that the recruitment was limited to UNMISS staff. It is no reflection on his professionalism or integrity that he was employed at Headquarters, not UNMISS, at the time of the issuance of the TJO.

Consideration

Applicable law

22. ST/AI/2010/4/Rev.1 (Staff selection system) states, in relevant parts:

Section 3

Temporary job opening, selection and appointment process

Temporary job opening

3.1 When a need for service for more than three months but less than one year is anticipated, a temporary job opening shall be issued by the programme manager.

3.2 While the decision to issue a temporary job opening for a need for service for three months or less is made at the discretion of the programme manager, any extension beyond three months shall require the issuance of a temporary job opening.

3.3 The temporary job opening shall include a description of the qualifications, skills and competencies required and reflect the functions of the post, using to the greatest possible extent the database of generic job profiles maintained by the Office of Human Resources Management. Each temporary job opening shall indicate the date of posting and specify a deadline by which all applications must be received.

3.4 Temporary job openings shall be posted for a minimum of one week on the Intranet or be circulated by other means, such as e-mail, in the event that an Intranet is not available at the duty station concerned. A temporary job opening may also be advertised externally if deemed necessary and appropriate.

Evaluation, selection and appointment or assignment

3.5 The department/office will assess the candidates' applications in order to determine whether they are eligible, and whether they meet the minimum requirements, as well as the technical requirements and competencies of the temporary position. Such assessment will be undertaken through a comparative analysis of the applications. The assessment may also include a competency-based interview and/or other appropriate evaluation mechanisms, such as written tests, work sample tests and assessment centres. Following a competitive process, the head of department/office shall make the selection decision, up to and including the D-1 level.

...

Section 5

Eligibility

Eligibility of a staff member who has held or is holding a fixed-term, continuing or permanent appointment

5.1 A current staff member who holds a fixed-term, permanent or continuing appointment may apply for temporary positions no more

than one level above his or her current grade. However, a current staff member who holds an appointment at the G-6 or G-7 level may also apply to temporary positions in the Professional category up to and including the P-3 level, subject to meeting all eligibility and other requirements for the position as set out in section 3.4 above....

Eligibility of a staff member who has held or is holding a temporary appointment

5.3 A staff member holding a temporary appointment shall be regarded as an external candidate when applying for other positions, and may apply for other positions at any level, subject to section 5.7 below and staff rule 4.16 (b) (ii). Therefore, a staff member holding a temporary appointment in the General Service or related categories may only apply to positions within those categories.

5.4 The provisions of this section are also applied, *mutatis mutandis*, with respect to a staff member who holds a temporary appointment in another entity applying the United Nations Staff Regulations and Rules and who applies for a temporary position with the Secretariat.

Receivability framework

23. 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.

24. 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.

25. 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 personae

26. The Applicant is a current staff member (Air Transport Officer) at the P-4 level in the UN Secretariat, Department of Field Support, Logistic Support Division, Air Transport Service, holding a continuing appointment and therefore the application is receivable *ratione personae*.

Receivability ratione materiae

27. The Applicant is challenging the decision to determine him ineligible for consideration for a temporary job opening for the position of Chief Aviation Officer, P-5 level with UNMISS and the related administrative decision to conduct the recruitment exercise without him in breach of Order No. 46 (NY/2016), which are administrative decisions subject to a management evaluation request. The Applicant filed a management evaluation request before the MEU on 13 March 2015 within 60

days from the date of notification—3 March 2015 and therefore the application is receivable *ratione materiae*.

Receivability ratione temporis.

28. The Tribunal notes that the Applicant filed the present application on 10 July 2015, within 90 days from the date when the deadline for the Management Evaluation Unit's response expired—12 April 2015 thereby rendering the application receivable *ratione temporis*.

Issuance of the TJO

29. The Tribunal notes that, as stated by the Respondent on 4 February 2015, the incumbent of the position was selected for an eight weeks temporary duty assignment to UNMEER and on 24 February 2015, the TJO for the position was broadcasted internally with UNMISS, via email to all staff members and on the UNMISS's Board.

30. The Tribunal observes that there is no information provided regarding the starting date of the temporary assignment of the incumbent of the position with UNMEER and that the TJO was issued 20 days after his selection.

31. Pursuant to secs. 3.3 and 3.4 of ST/AI/2010/4/Rev.1 it is mandatory ("shall") for the TJO to: 1. include a description of the qualifications, skills and competencies required; 2. reflect the functions of the post; 3. indicate the date of posting and specify a deadline by which all the applications must be received; 4. be posted for a minimum one week on the intranet or to be circulated by other means, such as e-mail, in the event that an intranet is not available at the duty station concerned.

32. The TJO for the P-5 Chief Aviation Officer mentioned the following elements: the duty station, Juba, the duration of the TJO, 6 months, the estimated start date, 10 March 2015, the fact that the TJO was not open to external candidates, the duties and responsibilities, the required qualifications and expressly included

notes explaining that “A current staff member who holds a fixed term, permanent or continuing appointment may apply for temporary positions not more than one level above his or her grade [...]. A staff member holding a temporary appointment shall be regarded as an external candidate when applying for other positions”, that “Subject to the funding source of the position, this temporary job opening may be limited to candidates based at the duty station” and that “The expression ‘Internal candidates’ shall mean staff members who have been recruited after a competitive examination under staff rule 4.16 or after the advice of a central review body under staff rule 4.15.”

33. The Tribunal notes that, even if the temporary duty assignment was less than three months (eight weeks), the programme manager exercised his discretion to issue a temporary job opening. It appears that on 24 February 2015 the temporary duty assignment of the incumbent of the post was expected to be extended beyond three months, a situation in which the issuance of a temporary job opening for the post was mandatory (“shall”) according to section 3.2 of ST/AI/2010/4/Rev.1 and this aspect was reflected in the duration of the TJO—6 months starting from 10 March 2015. The temporary job opening was to be advertised on iSeek.

The Applicant’s eligibility for the TJO

34. Section 5.1 of ST/AI/2010/4/Rev.1 states the mandatory and cumulative conditions regarding the eligibility for temporary appointments of a current staff member to hold a fixed term, permanent or continuing appointment and the temporary position to be no more than one level above his or her current grade.

35. The Tribunal considers that it is uncontested that on 2 March 2015, when the Applicant applied for the P-5 level TJO, he was an Air Transport Officer in the UN Secretariat/DFS New York at the P-4 level with a continuing contract (as evidenced by the letter of appointment signed on 11 November 2014) and that he was selected for his post through a competitive examination.

36. It results that the Applicant, who was holding a continuing appointment and applied for a position one level above his current grade, was eligible to apply for the TJO.

37. On 3 March 2015, the Applicant was informed by Ms. DM of UNMISS that “this position is open to UNMISS staff only”. The Tribunal find’s the decision not to consider the Applicant eligible for the post because he was not an UNMISS staff member unlawful for the following reasons:

a. The Applicant was a staff member holding a continuing appointment and therefore he was an internal candidate according with the notes included in the TJO which reflected the mandatory provisions of ST/AI/2010/4 Rev.1. The TJO mentioned that the TJO is open to internal candidates, and the Tribunal considers that the TJO was therefore opened to ALL internal candidates, including the Applicant and not only to those from UNMISS. The fact that the Applicant was serving as a staff member with another UN entity (UN Secretariat) when he applied for the TJO is not changing his status as an internal candidate. Only a staff member holding a temporary appointment in another UN entity was to be considered an external candidate vis-a-vis the TJO.

b. The Applicant, as an internal candidate, was eligible to apply and to be fully and fairly considered for the temporary post. The TJO mentioned that “subject to the funding source of the position, this temporary job opening may be limited to candidates based at the duty station”. However, the Tribunal finds that there is no evidence on the record regarding the funding source of the position and that such imposed or could have imposed a limitation of the TJO only to the UNMISS staff members.

38. The Tribunal underlines that, as determined by the consistent jurisprudence of the United Nations Dispute and Appeals Tribunals, a staff member has no right to be selected for a post, but does have the right to be fully and fairly considered for it.

39. In the present case the Tribunal concludes that the decision to consider the Applicant ineligible for the TJO taken against the mandatory legal provisions regarding temporary appointments mentioned above is unlawful and breached the Applicant's right to be fully and fairly considered for the post.

40. Regarding the related contested decision to continue the recruitment exercise without him after the issuance of an Order for suspension of action, the Tribunal notes that on 13 March 2015 the Applicant filed an application for suspension of action requesting the suspension of the decision to refuse to determine the Applicant eligible for the post. The Tribunal issued Order No.46 (NY/2015) on 13 March 2015 granting the request for suspension of action and suspending the contested decision pending management evaluation.

41. In this Order the Tribunal stated:

12. As a current staff member with a continuing appointment and one who is on a roster for such a position, the Applicant is eligible to apply for such a post absent a cogent reason why he should not. The rather curt reply provides no explanation as to why the restriction of the temporary job opening is to UNMISS staff only.

13. The Applicant is a staff member at the Department of Field Support in New York. It would appear that the Human Resources Officer may have mistakenly read the note quoted at para. 3 to mean that the temporary job opening is restricted to candidates already based at the duty station when in fact such a restriction would only be applicable if funding was an issue. Even if it turns out subsequently that such an issue arises, it would be necessary for the Administration to justify the restriction. Accordingly, the exclusion of the Applicant satisfies the legal test the decision appears to be prima facie unlawful.

Urgency

14. The closing date for the temporary job opening was 2 March 2015. The Administration will now be engaged in the process of examining the applications and once an appointment is made it will be too late for the Applicant to be considered. Even if he were to file a substantive claim, it will be too late for him to be properly and fairly considered for appointment since there would be no vacancy.

Irreparable damage

15. The Applicant is in the fortunate position of being on the roster for such a post. It is not unreasonable to suppose that he would stand a good chance of being favourably considered. If another candidate is selected, the loss of opportunity of advancing his career by performing duties at a higher grade will be lost for an indeterminate period and may never arise in the foreseeable future. In this regard, the Tribunal notes the Applicant's assertion that within the Organization, there are only six P-5 posts for technical aviation specialists. The Tribunal finds that this test is satisfied.

42. The Tribunal notes that the Respondent indicated in his submissions in the present case that the selection process was finalized on 10 March 2015 and that the above mentioned order on suspension of action was issued after the implementation of the selection decision. However, there is no evidence on the record that after receiving the notification of the selection decision on 10 March 2010 the selected candidate accepted the post. Consequently, there is no evidence on the record that the selection decision was effectively implemented on 10 March 2015. It is clear only that the selection process was finalized on 10 March 2015 and that the selection decision was still “subject to the approval of SPA panel“ on the date when it was transmitted to the selected candidate.

43. The Tribunal concludes that the contested decision not to find the Applicant eligible for the TJO and the related decision to continue the selection process are unlawful and breached the Applicant's right to a full and fair consideration for the temporary post.

Relief

44. The Tribunal notes that the Applicant indicated in his application (footnotes omitted):

28. The consequences arising from the Applicant's non-selection include damage to professional reputation and enduring loss of career prospects. The Applicant, who has been a P-4 for over ten years and has received uniformly excellent appraisals throughout his career (as reflected in the performance evaluations he received during his

application for a continuing appointment (Annex A17) has been significantly harmed by having his opportunity for professional growth and career advancement so limited.

29. In particular, it should be noted that there were at the time of the Applicant's request for Management Evaluation only six P-5 posts for technical aviation specialists in the entire Organization and that figure is currently being reduced to three P-5 posts as a result of DFS structural reform involving supply chain management. The natural corollary to this is that opportunities for promotion to that level are extremely rare, and getting rarer. Additionally, the TJO in UNMISS would have provided the Applicant with an invaluable opportunity to broaden his experience and skills base, including, for example, in the field of supply chain management. Experience of supply chain management, which is simply not available to Air Transport Officers in New York, offers a significant advantage in terms of career development.

30. In *Korotina*, this Honourable Tribunal considered the position of a staff member being considered ineligible for a temporary position. Ebrahim-Carstens J. in that case accepted the Applicant's submission that she be awarded pecuniary damages calculated on the basis of the difference between the salary she actually earned and that she would have earned had she been appointed to the temporary vacancy in question. The Applicant requests that the same principle be applied in this case; namely, that he be awarded pecuniary loss on the basis of the difference between the salary he would have earned at the P-5 level and that he earned as a P-4 for a period of six months. That pay should include: (i) the monetary value of all related benefits and entitlements which would have been payable in the Mission; and (ii) retroactive interest calculated in accordance with the principles laid out in *Korotina*.

45. The Tribunal considers that, unlike in *Korotina* where the staff member was found ineligible after being interviewed, short listed and recommended for the temporary post, in the present case the Applicant was considered ineligible at the beginning of the selection process.

46. The Tribunal underlines that the Applicant had the right to be fully and fairly considered for the post and not to be selected and there is no evidence on the record that the Applicant, if considered for the post as an eligible candidate, would have been short listed, recommended and finally selected for the temporary post. The Administration created no expectation to the Applicant prior the selection

process in the sense that he was to be the selected candidate. Therefore the Applicant is not entitled to receive pecuniary compensation of 6 months difference in salary between the P-4 position occupied and the P-5 temporary position for which he applied as a result of violation of his right to be fully and fairly considered for the post and this request is to be rejected.

47. Regarding the request for moral compensation for loss of his professional reputation the Tribunal considers that there is no evidence that the Applicant's professional reputation was actually affected. However his prospects for career development and opportunities for professional growth were reduced due to the specificity of the post of Chief Aviation Officer. The Applicant stated that currently the total number of such posts is now down to three comparing with five posts existing at the date of the publication of the TJO and this statement was not contested by the Respondent.

48. The Tribunal will grant in part the Applicant's request for moral damages and considers that the amount of USD1,500 together with the present judgment represents a reasonable and sufficient compensation for the loss of career prospects determined by the contested decision denying his eligibility for the TJO.

Conclusion

49. In the light of the foregoing The Tribunal DECIDES:
- a. The Application is granted in part.
 - b. The Tribunal finds that the UNMISS Administration unlawfully excluded the Applicant from being considered for the TJO.

(Signed)

Judge Alessandra Greceanu

Dated this 17th day of January 2017

Entered in the Register on this 17th day of January 2017

(Signed)

Hafida Lahiouel, Registrar, New York