



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2016/009  
Judgment No.: UNDT/2018/108  
Date: 2 November 2018  
Original: English

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**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ROSS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Bettina Gerber, UNOG

## **Introduction**

1. The Applicant is a former Senior Protection Officer with the United Nations High Commissioner for Refugees (UNHCR).
2. In his application filed on 1 February 2016, he is contesting the High Commissioner's decision to appoint an external candidate to the position of P-4 Senior Legal Officer, (Administration of Justice) Nairobi.
3. The Respondent filed a reply on 18 March 2016.

## **Procedural history**

4. The Tribunal held a case management discussion on 24 October 2017 following which it issued Order No. 178 (NBI/2017) on 31 October 2017 requiring the Respondent to file several documents related to the recruitment procedure, redacted to the extent necessary to protect the personal data of the candidates involved.
5. On 6 November 2017, the Respondent filed the requested documents *ex parte*.
6. On 15 November 2017, the Tribunal issued Order No. 195 (NBI/2017) directing the Registry to transmit all the *ex parte* documents filed by the Respondent on 6 November 2017 to the Applicant for his observations.
7. On 24 November 2017, the Applicant filed a rejoinder pursuant to Order No. 195 (NBI/2017).
8. In April 2018, the parties agreed that no hearing was necessary and that the case could be determined based on their pleadings and supporting documentary records.
9. On 3 and 31 May 2018 and 14 June 2018, the parties filed additional submissions.

## Facts

10. The Applicant was initially appointed to UNHCR in November 2008 as a P-3 Legal Officer (Human Resources) in the Legal Affairs Service (LAS) in Geneva. After serving two years in that capacity, the Applicant was transferred to a position of a Senior Protection Officer in Sudan. While serving in that position, the Applicant accepted a six-month temporary assignment as a P-3 Legal Officer in Nairobi. The Applicant then took a two year leave of absence from July 2013 until June 2015.<sup>1</sup>

11. Upon his return, the Applicant resumed service as a P-4 Senior Protection Officer in Rabat, Morocco.<sup>2</sup>

12. On 28 January 2015, the Principal Legal Adviser/Head, Legal Affairs Service (LAS), UNHCR, requested the UNHCR Budget Committee for an allocation of additional funds for the creation of a P-4 Senior Legal Officer, (Administration of Justice); a Legal Officer (P-3) post in Nairobi and an Executive Assistant (P3) post in Geneva as of 1 March 2015.<sup>3</sup>

13. In terms of the UNHCR recruitment system, at the times material to this application it was governed by the UNHCR Revised Policy and Procedures on Assignments (PPA), which foresaw the procedure as described below.

a. Managers provide the Division of Human Resources Management (DHRM) with the written operational context and the position profile requirements for the purposes of a matching exercise (para. 68(a) of the PPA). In the present case, LAS provided DHRM with the written operational context and the profile requirements on 30 April 2015.

b. UNHCR advertises vacancy announcements in bulk through bi-annual compendia of job openings issued in March and September of each year. If

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<sup>1</sup> Annex 1 to the reply.

<sup>2</sup> *Ibid.*

<sup>3</sup> Annex 2 to the reply.

additional positions become vacant, UNHCR issues a compendium which is added to the bi-annual compendia and invites staff members to express their interest (para. 10 of the PPA). DHRM, specifically APS, may advertise positions simultaneously internally and externally. Positions classified as “Expert” are open to external applicants who possess specialized skills not readily available internally (paras. 12 and 14 of the PPA). On 3 May 2015, UNHCR advertised the P-4 Senior Legal Officer (Administration of Justice), Nairobi post in its 2015 Spring Compendium. The Applicant applied for the position on 16 May 2015.<sup>4</sup>

c. The Job Description for that post indicated under the headings titled “Essential Minimum Qualifications and Professional Experience Required” and “Desirable Qualifications & Competencies the academic and professional competencies required for the post, which were:

**ESSENTIAL MINIMUM QUALIFICATIONS AND PROFESSIONAL EXPERIENCE REQUIRED**

- Advanced university degree (Master's degree or equivalent) in law with emphasis in the area of international law. A first-level university degree, in combination with the required work experience plus an additional two years of work experience may be accepted in lieu of the advanced university degree.
- Bar exam or equivalent qualification to practice law in at least one jurisdiction.
- Minimum 10 years (12 years for BA holders) of previous relevant work experience including a minimum of 7 years of progressively responsible professional experience.
- Advanced court advocacy skills and substantive litigation experience obtained as an Attorney in a law firm and/or a legal officer in an international organization.
- Experience in dealing with issues related to the internal justice system of the United Nations, knowledge of the jurisprudence of the UNDT and UNAT as well as organizational regulatory frameworks and policies.- In depth knowledge and

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<sup>4</sup> Annex 3 to the reply and section VII, para. 2 of the application.

experience of international law, including, international administrative law as practiced in international organizations (in particular in the United Nations).

- Thorough understanding of the UN system.
- Strong analytical skills and ability to conduct legal research on a range of complex and intricate issues.
- Excellent skills in drafting a broad range of documents of a legal nature, including legal opinions, pleadings, contracts and briefing notes.
- Demonstrated ability to provide oral briefings on complex legal issues to legal and non-legal audiences.
- Fluency in English and French (both oral and written).

#### DESIRABLE QUALIFICATIONS & COMPETENCIES -

- Experience with alternative dispute resolution mechanisms.
- Prior exposure to, and demonstrated competence in, the conceptual development of strategic HR approaches and corporate HR policies.
- Knowledge of the privileges and immunities of UN/HCR and its staff.
- Knowledge of the principles of international commercial law and contract law as applied by the UN.
- Knowledge of UN/HCR field operational realities.
- Solid computer skills, including good knowledge of databases<sup>5</sup>

d. Upon expiration of the deadline stipulated in the vacancy notice, DHRM is supposed to carry out a comprehensive matching exercise for appointments and assignments on the basis of established criteria. The matching exercise of eligible applicants to vacant positions is undertaken by CMSS/DHRM and APS/DHRM (paras. 65 and 66 of the PPA). As a first step, for positions advertised externally and for all “Expert” positions, after the closing date, APS determines the eligibility of the internal candidates. APS and

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<sup>5</sup> Reply – annex 3.

CMSS short-list internal applicants in accordance with the matching criteria, that is, the minimum requirements set out in the job description. External applicants are short-listed by the Talent Outreach and Acquisition Section (TOAS), DHRS (paras. 71, 86(3) and 79(a) of the PPA respectively). In the present case, APS/CMSS conducted the initial screening of internal job applicants to determine their eligibility. Three eligible internal candidates were shortlisted, including the Applicant, specifically, the minutes of the DHRM matching meeting of 2 September 2015 state:

The candidate meets the requirements for this position, as per operational context and/or Job Description.<sup>6</sup>

Moreover, TOAS short-listed four external applicants in accordance with para. 71 of the PPA.

e. Once the pre-selection has been carried out, DHRM presents the short-list to the manager of the vacant position (Hiring Manager) for his/her views on their suitability. The Hiring Manager is requested to provide his/her views to DHRM in writing (para. 68(e) of the PPA). DHRM is not bound by the Hiring Manager's views but must nevertheless take them into account when conducting the matching exercise.

f. With respect to the Applicant, the Hiring Manager concluded that he did not meet the minimum requirements for the job opening:

[The Applicant] joined UNHCR from IOM in November 2008 as a Legal Officer (Human Resources) in the Legal Affairs Service in Geneva at the P-3 level. In November 2010, he was assigned to the position of Senior Protection Officer in Kassala, Sudan. At the end of his assignment in Sudan, he was temporarily reassigned as Legal Officer with PSFR, Division of

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<sup>6</sup> Respondent's reply to Order No. 178 (NBI/2018) – Annex 1, DHRM Shortlisting Matrix of 2 September 2015, at page 7.

External Relations in Nairobi for a period of 6 months, following which he took SLWOP in July 2013. [...]

Felix does not meet these essential requirements. While he worked under my supervision on HR and administration of justice matters when he was assigned to LAS, the new UN internal justice system was introduced in July 2009 and Felix took up his position as Senior Protection Officer in Kassala in November 2010, 15 months thereafter. While Felix referred to previous experience in IOM, this is of limited relevance as it was prior to the introduction of the new UN justice system, and IOM parti[ci]pates in the ILO Administrative Tribunal system, not the UN system. Since leaving LAS Felix he has no longer been involved in UN internal justice matters. Having very limited exposure to the new justice system and not having worked in this field for several years and taking into consideration the operational context, he is not considered a suitable candidate for this expert position.<sup>7</sup>

- g. The other internal candidate (other than the Applicant) was evaluated by the Hiring Manager as follows:

[Candidate] joined UNHCR in 2008 as an Associate Legal Officer in LAS based in Budapest at the P-2 level. Prior to that, he worked in the Legal Affairs Service from September 2006 to January 2008 as a consultant. In November 2010, he returned to the Legal Affairs Service in Geneva as Legal Officer, Human Resources and was appointed to the position in October 2011. He was promoted to the P-3 level in February 2014. This candidate participated in a number of emergency missions during this period, had a solid track record in LAS and works on a wide range of legal issues, with an emphasis on privileges and immunities, Human Resources policy and affiliate work force matters.[...]

[Candidate] does not meet these essential requirements. While [Candidate] has worked under my supervision on administration of justice matters, this has not been the main focus of his work, as reflected in his performance objectives and appraisals. In light of this, [Candidate] does not possess the required professional experience in this expert field to discharge the functions of the position of Senior Legal Officer (Administration of Justice), which is tasked with

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<sup>7</sup> *Ibid.*, at pages 6 and 7.

representing the Organization before the UNDT on an autonomous basis entailing significant reputational and financial risk to the Organization. He is therefore not considered as a suitable candidate for this expert P-4 position.<sup>8</sup>

h. Where the appointment of an external candidate is being considered, the external and internal applicants selected by the Hiring Manager are interviewed by a panel which comprises of at least three members, including the Hiring Manager or his/her designated representative, a designated representative of DHRM coordinated by APS and an expert in the same functional area (para. 71 of the PPA). Given that neither the Applicant nor the other internal candidate were deemed suitable by the Hiring Manager, only external candidates were invited for the interview.<sup>9</sup> (It is not ascertainable from the documents on record as to what happened to the candidature of the third internal candidate; it is clear, however, that this candidature was not ever further considered).

i. In the present case the Interview Panel comprised of Frits Bontekoe, Principal Legal Adviser/LAS, Elizabeth Brown, Senior Legal Officer/LAS, Sandra Muller, Senior Legal Officer/LAS and Angelita Cecere, Head, Vacancy Management Unit, DHRM. It evaluated the four candidates and recommended one. The candidates' qualifications are summarised as follows:

i. External candidate one was a Canadian lawyer and was the joint Officer-in-Charge of the United Nations Office of Staff Legal Assistance (OSLA). Prior to joining OSLA, this candidate was employed by the Federal Department of Justice in Canada as Crown Counsel from 2004-2011, where he litigated before federal courts and administrative tribunals, specializing in immigration and refugee law issues. The candidate has a law degree, a diploma in Police Sciences, two masters degrees in administrative law and public international law

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<sup>8</sup> *Ibid.*, at pages 8 and 9.

<sup>9</sup> Respondent's reply to Order No. 178 (NBI/2017), dated 6 November 2017, at para. 26.

respectively. The candidate was fully bi-lingual and able to work both in English and French and is also a mother tongue Russian speaker. He is a Canadian Lawyer admitted to the Canadian and Quebec Bar Associations.

ii. External candidate two was a Japanese lawyer and legal officer from UNESCO based in Paris and whose work included advising on administrative policy-making and application of administrative law, working closely with the Office of Internal Oversight Services (OIOS) of UNESCO and representing UNESCO at UNESCO Governing bodies since 2008. From 2011 to 2012 she was on a temporary appointment with the United Nations Mission in South Sudan as a Judicial Affairs Officer. In addition to her work experience, this candidate has a law degree and a diploma in international affairs and holds two masters degrees in public international law and international law respectively. This candidate was deemed not suitable because she received a significantly lower score in the interview than the other three candidates, had difficulties expressing [...], almost no legal advocacy or litigation experience and lacked experience in certain key areas. Her French, however, was considered excellent.

iii. External candidate three was a Canadian lawyer and is currently a Legal Officer in the United Nations Office of Staff Legal Assistance (OSLA) in New York since 2010. Prior to joining OSLA, the candidate was employed as a litigation lawyer and in the UK in a barrister's chambers carrying out appellate and trial advocacy, legal research and writing principally in the fields of intellectual property, competition law, administrative and constitutional law, civil procedure and evidence. In addition to his work experience, this candidate has a double degree in law and politics and philosophy and a masters degree in

international law. He scored the second highest in the interview but was deemed ineligible because his fluency in French was insufficient.

iv. External candidate four was a Dutch Lawyer working as an Administrative Law Specialist in UNICEF in New York since 2012, responsible for the preparation of legal opinions on human resources legal issues, representing UNICEF in proceedings before the UNDT, counselling UNICEF senior management on human resources (administrative and disciplinary) matters, drafting human resources policies and liaising with the United Nation Office of Legal Affairs on proceedings before the UNAT. The candidate was previously on secondment to IAEA'S Office of Legal Affairs in Vienna, as Legal Officer where he prepared written pleadings before the ILOAT and between 2009 and 2012 he worked for the United Nations Office of Staff Legal Assistance (OSLA). In addition to his work experience with several United Nations agencies, including as legal officer at the United Nations Secretariat, he was employed as legal assistant at a private law office in The Hague. He holds two master's degrees in international law and arts, respectively. He scored the third highest in the interview but was deemed ineligible because his fluency in French was insufficient.<sup>10</sup>

j. Against this background, the Applicant qualifications were:

A Master's degree in International Law and German Bar exam; three years experience as an Associate Legal Officer with the International Organization for Migration (October 2005 to October 2008), one year experience as an Associate Protection Officer with UNHCR (September 2004 to September 2005), two years as a Legal Officer in UNHCR's Legal Affairs Section (November 2008 to November 2010), 23 months' experience as UNHCR Senior Protection Officer (November 2010 to

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<sup>10</sup> Respondent's reply to Order No. 178 (NBI/2018) – Annexes 1 and 4, DHRM Shortlisting Matrix of 2 September 2015 and the Interview Report.

July 2012 and July 2015 to October 2015) and six months' temporary assignment as a Legal Officer in UNHCR, Nairobi (January 2013 to July 2013).

He claimed experience in: providing legal advice on human resources matters especially management review requests; disciplinary cases and appeals to the UNDT; representing UNHCR at the United Nations working group tasked with the reform of the Staff Regulations and Rules; coordinating the implementation of the United Nations justice reform in UNHCR; advising the Director/DHRM on Human Resources policies; familiarity with issues of privileges and immunities, international commercial law and UNHCR's field operations; and fluency in French having studied in France and worked in French for many years and passed the United Nations language proficiency exam in French.<sup>11</sup>

k. Further to this assessment, in accordance with para. 68(i) of the PPA, DHRM recommends the appointment of the most suitable candidate. During the final recommendation meeting on 14 October 2015, DHRM recommended the selection of external candidate one. Regarding the Applicant, the DHRM noted that he did not possess "recent experience with the new United Nations Justice system which is required for the position."<sup>12</sup>

l. Following this, DHRM submits its recommendation to the Joint Review Board (JRB), a UNHCR body whose principal role is to ascertain that DHRM followed proper procedures in making its recommendation for appointment to the High Commissioner (para. 68(i), 97 and 98 of the PPA. If the JRB is satisfied that the process was fair and equitable, its recommendation is forwarded to the

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<sup>11</sup> Application, annexes 9 and 10. Cover letter accompanying his application for the vacancy in contention and the Applicant's UNHCR Fact Sheet.

<sup>12</sup> Respondent's reply to Order No. 178 (NBI/2018) of 6 November 2017 – Annex 5(1) – Joint Review Board Final Minutes dated 28 October 2015.

High Commissioner who has the ultimate authority to appoint or assign staff members to vacancies in the professional category (paras. 101 (a) and 137 (a) of the PPA).

m. DHRM's recommendation was presented to the JRB during its meeting on 28 October 2015. In their final minutes dated 28 October 2015, JRB observed as follows regarding the recruitment process:

The JRB noted the [hiring] manager's comment that one internal candidate, [Applicant], does not have recent experience with the new UN internal justice system. While it was considered that this is a weak argument, it was noted that this requirement is nevertheless included in the job description and the operational context.

It was also noted that three external candidates have been interviewed who don't have French skills, while the internal candidate, [Applicant], had not been interviewed. Two JRB members wondered whether it would appear to be inconsistent of the Board not to insist that the internal candidate be interviewed as had been the case for the previous item (item 29).

DHRM explained that the two situations were not identical, as the internal candidate that was interviewed for the Saudi Arabia Representative position had received a SPA as Acting Regional Representative since he had performed the functions of the position on a temporary basis, whilst in this case the internal candidate is not currently serving in these functions and, furthermore, does not have the recent litigation experience that is required. DHRM further clarified that there is no requirement to interview all internal candidates in the PPA, and that the only reason why the previous JRB session took a different position with regard to the item 29 was that the internal candidate was well viewed by the manager who confirmed that the staff member had been performing the functions of the post to his full satisfaction. The JRB further debated whether not interviewing an internal candidate when an external candidate is interviewed and then is subsequently recommended, constitutes a procedural flaw. While majority of members endorsed this recommendation, two members considered that there had been

a procedural flaw as the internal candidate was not interviewed.<sup>13</sup>

n. The recommendation, however was endorsed by the majority vote and on 6 November 2015, UNHCR announced the decision of the High Commissioner on appointments via a UNHCR broadcast email to all staff. An external candidate was appointed to the position.<sup>14</sup>

14. On 10 November 2015, the Applicant requested management evaluation of the contested decision to the UNHCR Deputy High Commissioner (DHC)<sup>15</sup> and, on 11 November 2015, he requested for suspension of action (SOA) of the decision. The SOA application was registered as Case No. UNDT/NBI/2015/130.<sup>16</sup>

15. On 13 November 2015, the DHC responded to the Applicant's management evaluation request confirming the original decision and explaining to him that he was not selected for interview because he was found not to meet all the essential minimum qualifications and professional experience required for the position. Specifically, he was informed:

According to your fact sheet and as confirmed in your request for management evaluation, you worked on administration of justice matters for three years with IOM and for two years with UNHCR's Legal Affairs Service. This falls short of the required minimum relevant work experience. I also find that your fact sheet does not demonstrate the required "advanced court advocacy skills and substantive litigation experience" stipulated as minimum requirements.<sup>17</sup>

16. The DHC also informed the Applicant that his application for the advertised position received full and fair consideration and that the Hiring Manager was not required, under para. 71 of the PPA, to invite him for an interview.

17. On 17 November 2015, the United Nations Dispute Tribunal (UNDT) struck

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<sup>13</sup> Annex 5(1) of the Respondent's *ex parte* filings of 6 November 2017.

<sup>14</sup> Reply, para. 8.

<sup>15</sup> Application, annex 2.

<sup>16</sup> Application, annex 3.

<sup>17</sup> Application, annex 4.

out the SOA application by Order No. 369 (NBI/2015) on the grounds that the contested decision was no longer the subject of an ongoing management evaluation.

### **Applicant's case**

18. The Applicant submits that the procedures applied were inherently arbitrary; moreover, internal competencies were breached as regards assessment of his eligibility. His right to a full and fair consideration was violated through wrong application of the criteria and using inappropriate criteria. He fulfilled all the eligibility requirements for the advertised position, both the essential and the desirable ones. His status as internal candidate was not respected, because as a perfectly suitable internal candidate, he should have at least been interviewed for the position.

19. This was due to the Hiring Manager acting with an ulterior motive. The position was created in Nairobi with a specific candidate in mind, the candidate that was subsequently recruited. Whereas he was eliminated from the selection process at an early stage of the selection process in order not to endanger the recruitment of this candidate.

20. Management evaluation procedures violated his right to due process. Moreover, following his request for management evaluation, several high-level officials in UNHCR subsequently conspired in order to defend the contested decision at all cost.

Specific arguments of the Applicant are as follows:

#### *Arbitrariness and breach of competencies in the shortlisting for interviews procedure*

21. The shortlisting procedure under para. 71 of the UNHCR PPA is arbitrary. It neither determines who takes the decision whether external candidates are considered nor on what criteria this decision is taken if there are suitable internal candidates. Without objective criteria against which this decision can be measured, there is a total

lack of objectivity and transparency. Paragraph 71 of the PPA is thus arbitrary and any decision based on it and leading to the exclusion of internal candidates is also arbitrary.

22. The DHRM exercises discretion when determining whether candidates fulfil the essential minimum criteria of the job description, including interpretation of certain criteria that require a qualitative review such as “relevant work experience” and “advanced court advocacy skills and substantive litigation experience”. Following the CMSS assessment of his suitability, neither the Hiring Manager nor the DHC were subsequently competent to assess whether he did not fulfil all of the minimum qualifications. It is only after CMSS establishes this general suitability of candidates that the Hiring Manager is asked to provide his/her views on the suitability of the candidates shortlisted by CMSS. The Hiring Manager, however, is not asked to establish whether or not a candidate is suitable, but he/she is meant to assess each candidate’s level of suitability and compare the candidates’ suitability with each other. The Hiring Manager of the position was therefore not competent to assess the general question whether the Applicant was a suitable candidate or not. He should have never been excluded from the selection process on the basis of this statement by the Hiring Manager.

23. Despite the fact that candidates were interviewed in accordance with para. 71 of the PPA, the panel’s role was only to provide its views on the suitability of the candidates. It is DHRM that was meant to match candidates against the position – regardless of whether internal or external candidates were considered. From the minutes of the matching meeting it is obvious that no matching took place. Instead of comparing the candidates using the criteria outlined in para. 79(a) of the PPA, DHRM simply took over the assessment of the Hiring Manager and the panel.

#### *Fulfilment of eligibility requirements*

24. The Hiring Manager’s assessment that he was not a suitable candidate is vague with regard to what concrete criteria he does not meet. She appears to put in doubt two essential minimum criteria, namely, a minimum 10 years (12 years for BA holders) of

previous relevant work experience including a minimum of seven years of progressively responsible professional experience, advanced court advocacy skills and substantive litigation experience as an attorney in a law firm and/or a legal officer in an international organization. He, however, does possess more than 10 years of relevant work experience as well as advanced court advocacy and substantive litigation experience. The criteria of 10 years of “relevant” work experience does not require 10 years of experience on administration of justice matters as suggested by the DHC in her management evaluation. In this connection, not only the legal functions he held in the past were relevant for the position of Senior Legal Officer (Administration of Justice), but also the protection functions he held. Litigation in national courts in order to protect refugees from refoulement or defend them in criminal cases is a significant part of the everyday protection work of UNHCR. He coordinated the litigation assistance provided by UNHCR to refugees and IDPs as an Associate Protection Officer in Kosovo and as a Senior Protection Officer in Sudan. This litigation experience is very much relevant to the position at hand.

25. Moreover, the United Nations Secretariat rostered him as a pre-approved candidate for P-4 Legal Officer positions after he was interviewed for a similar position.

26. At least three of the four candidates do not meet all of the essential minimum qualifications and professional experience required by the job description, specifically:

- a. Candidate two lacks the required experience in dealing with issues related to the internal justice system of the United Nations which is a minimum requirement in the job description. The candidate only possesses experience with the ILOAT.
- b. Candidate three does not fulfil the criteria of fluency in English and French.

c. Candidate four does not fulfil the essential minimum criteria of a Bar exam or qualification to practice law in at least one jurisdiction. In addition, the candidate is not fluent in French.

d. It is questionable whether the selected candidate possessed the required minimum of seven years of progressively responsible professional experience.<sup>18</sup>

27. The fact that at least three out of the four external candidates that were interviewed did not fulfil all of the essential minimum qualifications and professional experience required for the position shows that the DHRM took a very broad interpretation of the minimum qualifications and professional experience when it shortlisted these candidates. The Hiring Manager was thus under an obligation to at least interview him together with the four external candidates in order to provide him with the fullest regard in the selection process as required by staff regulation 4.4 and para. 71 of the PPA.

28. The Organizational context cannot establish additional requirements to the job description. The requirements for the position are outlined under “Essential minimum qualifications and professional experience required” in the job description. The additional requirement of “thorough understanding of the jurisprudence of the United Nations Appeals and Dispute Tribunal” in the operational context is out of place. The operational context has been written after the job description and was done in order to further tailor the position to the pre-identified external candidate. In any event, he possesses the thorough understanding of the jurisprudence of UNAT and UNDT required by the Organizational context. To wit, he kept himself abreast of it and he possesses extensive experience with the International Labour Organization Administrative Tribunal (ILOAT) from the time when he worked as an Associate Legal Officer for the International Organization for Migration (IOM). He is very familiar

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<sup>18</sup> Applicant’s Rejoinder submission in accordance with Order No. 195 (NBI/2017) dated 24 November 2017.

with the old United Nations justice system and represented UNHCR in several cases in the old system when he was a Legal Officer (Human Resources) in UNHCR/LAS.

29. The DHC in her management evaluation gives a new interpretation of the requirement of 10 years of relevant work experience. Such retroactive re-interpretation of the word “relevant” by the DHC is arbitrary. In addition, this new and tight interpretation of “relevant” would have had to be applied to all candidates from the outset.

30. Contrary to what the Hiring Manager expressed in her views on his candidature, he possesses advanced court advocacy skills and substantive litigation experience obtained as an attorney in a law firm and/or as a legal officer in an international organization. Throughout his assignments in the legal offices of UNHCR and the International Organization for Migration (IOM), he represented the organizations in different tribunals. As a junior lawyer, he also worked as the representative of the prosecution in criminal court and regularly assisted a lawyer in civil cases.

31. The Hiring Manager stated that his experience with IOM is of limited relevance as it was prior to the introduction of the new United Nations justice system and IOM participates in the ILOAT system not the United Nations system. This does not consider that ILOAT’s jurisprudence forms part of the case law in the area of the law of international organizations and tribunals and other judicial institutions under the old and new United Nations justice system regularly have been referring to the jurisprudence of ILOAT. His experience working as Legal Officer with the IOM on ILOAT cases is thus not of limited relevance but it is very much of relevance.

*Application of incorrect criteria*

32. As stated in the minutes of the matching meeting,<sup>19</sup> the only reason why he was not matched to the position was because he did not have recent experience with the

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<sup>19</sup> Page 33 of Annex 1 to the Respondent’s submission of 6 November 2017, minutes of final recommendation meeting of 14 October 2015.

United Nations justice system. The job description for the post did not mention such a requirement. As DHRM based its decision not to match him to the position on a wrong assumption, this vitiated the overall matching process.

*Not been provided with fullest regard due to internal candidate*

33. According to staff regulation 4.4 and para. 71 of the PPA, fullest regard shall be had to the requisite qualifications and experience of persons already in the service of the United Nations. “Fullest regard” means more than just “regard”. The Organization had to make an extra effort when examining his candidature but did the exact contrary. The Hiring Manager invented an additional criterion and the Organization subsequently excluded him from the selection process and did not even interview him.

34. UNHCR did not consider that he had a spouse and an 18 month old child who resided in Nairobi, the duty station of the position. According to para. 51 of the UNCHR PPA, the Organization is meant to give due consideration to his personal needs and provide him with opportunities to balance personal, professional and family life in the selection process but did not do so.

35. UNHCR did not take into consideration that his spouse worked for IOM in Nairobi. According to para. 81 of the UNHCR PPA, UNHCR was meant to assist them as a dual career couple in finding assignments in the same duty station.

*Deliberate violation of due process in management evaluation procedure: acting in haste*

36. The DHC decided on his request for management evaluation within three days. The aim of the quick management evaluation was thus to get rid of the SOA application pending before the Tribunal.

37. In her reply, the DHC also omitted parts of the Hiring Manager’s views. She only cited the Hiring Manager’s general statement that the candidate was required to have recent litigation experience. The DHC thus selectively used what supported her

aim in an attempt to hide information from him and keep him from immediately lodging an appeal and another SOA request.

38. The DHC thus abused the management evaluation procedure in order to cover up the flawed selection process and to ensure the recruitment of the selected candidate would go ahead unhindered. This constitutes a serious violation of his right to due process.

*Deliberate violation of due process: Blacked out minutes of the JRB*

39. Large parts of the minutes of the JRB meeting that he was provided with had been blacked out. These blacked out parts did not only contain personal information related to other candidates which would have justified blacking out. These blacked out parts concerned considerations of the JRB on the legality of the selection process. Such considerations were important for him to know in order to be able to determine whether he received full and fair consideration in the selection process. The Organization was trying to intentionally hide some of the discussions in the JRB from him. This constitutes a deliberate and serious violation of his right to due process.

*Manifest conflict of interest*

40. According to UNHCR's management evaluation procedure, the DHC is meant to seek the advice of LAS when evaluating the legality of a decision. The provision of legal advice by LAS on this case which concerns a decision in their own section constituted a manifest conflict of interest. In order to avoid such a manifest conflict of interest, UNHCR would have had to refer the case to another organization.

41. It is highly likely that the Senior Legal Officer and the Head of LAS were involved in providing legal advice. The Senior Legal Officer, however, was the Hiring Manager of the position and she was heavily involved in the selection process. As the Hiring Manager for the position, she was probably also part of the interview panel. The Head of LAS might have also been involved in the selection process. If these officials were involved in providing legal advice to the DHC and the Director of DHRM, this

would constitute a personal manifest conflict of interest and as such misconduct, if not serious misconduct.

42. As the management evaluation is itself not regarded as an administrative decision, egregious and deliberate violations of the most important principles of due process such as in this case must be able to be exceptionally reviewed together with the administrative decision under review.

43. Despite complaints to the UNHCR Inspector General's Office (IGO) and to the High Commissioner, the Respondent has not taken any action in order to investigate this manifest serious misconduct committed by one or several officials of the Respondent.

#### *Remedies*

44. To justify his plea for remedies, the Applicant makes the following submissions:

a. That he had a total net income of Euro 19.916 (EUR1,207 + EUR18,709) in the timeframe between 1 April 2016 and 31 December 2017. The Applicant estimates that his average monthly net income since 1 January 2018 was around the same level as in 2017.

c. Contrary to the Respondent's contentions that the non-renewal of his fixed-term appointment is subject to another proceeding currently pending before the UNDT, he submits that his fixed-term appointment would have been extended at the end of March 2016 in accordance with UNHCR's policies if he had been appointed to the position of Senior Legal Officer in Nairobi. This extension would have been granted under para. 19 of the policy on fixed-term appointments.

e. Regarding moral harm, he stands ready to provide oral testimony at a hearing if the Tribunal considers the affidavit as not sufficient evidence for the

moral harm suffered.

45. The Applicant prays the Tribunal to award him the following reliefs:
- a. Rescission of the decision and his reinstatement as the principal remedy.
  - b. Alternatively, he seeks compensation in the amount of three years' net base salary and pension contributions.
  - c. Additional compensation for loss of opportunity for career advancement.
  - d. Additional compensation for non-pecuniary harm.
  - e. The Applicant seeks interest at the applicable US Prime Rate regarding the alternative compensation as of the moment each monthly salary and pension fund contribution would have been due and regarding all other compensation and costs as of the moment the judgement becomes executable. The Applicant also requests the attribution of an additional 5% added to the US Prime Rate until the date of payment if the compensation and costs are not paid within 60 days from the day of the judgment.
  - f. The Applicant also requests the Tribunal to refer any identified instances of possible misconduct to the Secretary General for accountability enforcement.

### **Respondent's case**

*The Applicant was given full and fair consideration*

46. The selection process was conducted in accordance with para. 71 of the PPA. According to para. 71 of the Revised PPA, the Hiring manager has to present her views

in writing only with regard to the internal applicants short-listed. The suitability of the external candidates is only assessed through a written test and the interview.

47. UNHCR internal candidates do not have to complete a P11 form online in order to apply for vacancies. They only have to submit a motivation letter and information concerning internal candidates is taken directly from their fact sheet which is administered by the Organization. External candidates, however, have to fill in the P11 form and submit a motivation letter when applying for a post.

48. The Respondent further submits that in relation to the Applicant, the recruitment procedure was respected.

*No evidence of bias or improper motives*

49. The Applicant has failed to demonstrate bias or improper motives. There is no evidence to support the Applicant's allegation that the position was created with a specific candidate in mind or that he was eliminated from consideration so as not to endanger the recruitment of a specific candidate. The budget request for the creation of the position reflects that it was based on legitimate operational needs, including the increase in the number of disciplinary cases, requests for management evaluation and matters before the UNDT. Accordingly, this allegation is baseless. The Respondent refutes any statements that the Administration acted maliciously.

*The Applicant has no claim for damages*

50. The Applicant is not entitled to compensation because he was not eligible for the position. For the same reason, the Applicant had no chance of selection for the position and has suffered no harm as a result of the contested decision.

51. The Applicant was separated from UNHCR effective 31 March 2016 because his fixed-term appointment had expired. That decision is subject to another proceeding currently before the UNDT.

52. The Applicant has provided no supporting evidence of the stress and anxiety he claims to be suffering from.

### **Considerations**

53. There is always a rebuttable presumption that official acts have been regularly performed. If the management can even minimally show that an appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the appellant who must show through clear and convincing evidence that he/she was denied a fair chance of promotion or selection.<sup>20</sup>

54. The standard of review adopted in the Appeals Tribunal jurisprudence mandates the following issues for consideration: (a) whether the procedure as laid down in the [applicable rules] was followed; (b) whether the Applicant was given fair and adequate consideration; and (c) whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner.<sup>21</sup> Below the Tribunal will follow this test in addressing the Applicant's specific contentions.

*Whether the applicable procedure was followed: were rules and decisions based upon them arbitrary?*

55. The applicable policies in UNHCR for selection processes for positions in the international professional category at the P-1 to D-1 grade levels at the times material to this application are the UNHCR Revised PPA which came into force on 28 April 2015 and its amendment of 9 September 2015. The two documents only differ at para. 54 which has no significance to the present case. The key provision for the matter at hand is para. 71 of the PPA which stipulates:

71. For positions advertised externally and for all expert positions, after the closing date APS will determine eligibility of internal candidates.

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<sup>20</sup> *Verma* 2018-UNAT-829 citing *Rolland* 2011-UNAT-122, paras. 20-21 and 26; *Niedermayr* 2015-UNAT-603, para. 23, and *Staedtler* 2015-UNAT-547, para. 27.

<sup>21</sup> See for example *Loeber* 2018-UNAT-836, at para. 14.

APS and CMSS will short list internal applicants. The internal applicant short list will be presented to the manager for his or her views in writing no later than 10 days after having received the short list. The fullest regard shall be had, in filling expert positions and other external vacancies, to the requisite qualifications and experience of persons already in the service of UNHCR. External applicants will be shortlisted by the Talent Outreach and Acquisition Section (TOAS). Where the appointment of an external candidate is being considered, the applicants (external and internal) selected by the manager will be interviewed by a panel which shall comprise of at least three members, including the manager of the position or his or her designated representative, a designated representative of DHRM to be coordinated by APS, and an expert in the same functional area, if necessary from outside UNHCR. Written tests may be required.

56. The Applicant's position is that the shortlisting procedure under para. 71 of the PPA is arbitrary as there is no criteria determining who and in what circumstances decides whether the vacancy is to be open for external candidates. With this respect, as explained by the Respondent<sup>22</sup>, the decision is taken by DHRM, specifically APS, however paras. 12 and 14 of the PPA mandate opening the vacancy to external applicants where expertise required for the post is or not readily available in-house. The Tribunal considers that the regulation of the question in the PPA does not invite arbitrariness; rather, it establishes a defined parameter pursuant to which the decision will depend on whether the post is generic for the whole United Nations system (*e.g.*, finance, human resources) or typical for the UNHCR (*e.g.*, protection officer) or requires specific qualifications. The Tribunal has no doubt whatsoever that seeking external candidates for a job consisting of litigation before the UNDT was rational; it certainly mirrored the prevalent practice of candidate searches for legal officers in the United Nations international tribunals. Another aspect of the issue is that an internal candidate has the right to be given the "fullest consideration". He or she, however, has no right to have external candidates excluded from the competition, no matter the nature of the job advertised. A mere availability of "suitable" internal candidates does not bar the Organization's seeking the best candidates available internally and externally. Any possible overstepping the scope of discretion by the DHRM in opening

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<sup>22</sup> Respondent's reply to Order No. 178 (NBI/2017), at para. 14.

the vacancy externally may be considered in the aspect of efficiency and cost effectiveness of the recruitment process; the question of the right of individual internal candidates, however, does not arise.

*Whether the applicable procedure was followed: whether competence norms were breached*

57. It is the Applicant's contention that after the DHRM had decided his suitability neither the Hiring Manager nor the DHC were competent to re-assess whether he did, or did not, fulfil the minimum qualifications. The Tribunal considers that the issue requires a more nuanced view. First, it needs to be stressed that pre-screening carried out by the DHRM is based on the applications alone, as such this scrutiny is necessarily limited in depth.<sup>23</sup> Secondly, para. 71 of the PPA is based on the premise that not all pre-screened candidates need, or have the right, to be interviewed, therefore it grants the hiring manager an authority to select from among them a number of those who appear most promising and merit an interview. Having this as premise does not render the procedure arbitrary; rather it is a lawful concession on account of reality of the United Nations recruitments where, dependent on seniority, specificity and attractiveness of the post, there may be hundreds of candidates who *prima facie* fulfil the minimum requirements. A sheer number of the pre-screened candidates may demonstrate the need to carry out a further selection, for which purpose the hiring manager is presumably equipped with the technical and practical knowledge of the post's specificity; thus, the hiring manager may, for example, use further, narrower criteria.<sup>24</sup> A fundamental limitation on this authority is that the hiring manager may not derive from beyond the pre-screened pool. Another limitation stems from the duty to give "fullest consideration" to the internal candidates, as will be discussed *infra*. The Tribunal considers, in any event, that it is implied in the hiring manager's authority to

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<sup>23</sup> For comparison, see: ST/AI/2010/3 (Staff selection system) at section 7.1 - Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening

<sup>24</sup> Compare ST/AI/2010/3 at section 7.4 - The hiring or occupational group manager shall further evaluate all applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation.

select candidates for an interview that she or he may reject those whom he or she deems unsuitable, notwithstanding the positive result of the screening by the DHRM. These views of the hiring manager are not binding as to the minimal requirements question; they however, become *de facto* decisive as to whether the candidate is invited for an interview or eliminated from the further competition.

58. Further, the Tribunal disagrees with the Applicant's proposition that once DHRM determined the candidates' suitability in the initial screening exercise, this assessment would thenceforth be final and binding on the Organization, including in management evaluation by the Deputy High Commissioner. The Tribunal recalls that, absent a positive rule establishing otherwise, until the decision produces binding external relation (such as acceptance of an offer of appointment by the selected candidate) the administration is competent to reconsider and amend its own decision.<sup>25</sup> In particular, as concerns errors as to qualifications for an appointment, the Appeals Tribunal's jurisprudence took it even further in holding that an appointment of a candidate who does not meet the fundamental condition for an appointment is "invalid"<sup>26</sup>. Given, moreover, that the DHRM assess the candidates only based on data contained in their applications, it becomes clear that positive qualification in the initial screening is not binding on the DHRM itself or, even less so, on the organs competent to exercise further functional or hierarchical review of decisions taken in the selection and recruitment processes. The latter is indeed the core function of the Joint Review Board for selection processes and of the management evaluation in general.

59. Finally, the Applicant reproaches the DHRM for not having carried out a genuine matching exercise but instead having merely adopted the panel views. The Tribunal observes that the role of the DHRM vis-à-vis the panel is to review the interview process for correctness but not to replace the findings of the panel, which is comprised of experts and which hears the candidates directly as to the qualitative

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<sup>25</sup> See for example staff rule 11.4 (a) - "A staff member may file an application against a contested administrative decision, *whether or not it has been amended by any management evaluation ...etc*" as well as the body of jurisprudence on correcting mistakes.

<sup>26</sup> *Cranfield* UNAT 2013-UNAT-367, at paras. 44-47.

criteria, with its own ones. Absent apparent errors in the panel's evaluation, the DHRM was not precluded from adopting the panel's views. Besides, the Applicant cannot demonstrate *gravamen* to invoke this ground, as it might have only concerned the candidates who underwent the interview before the panel.

60. The Applicant's arguments on the scores of inherent arbitrariness and breach of competences under para. 71 of the PPA accordingly fail.

*Whether the applicable procedure was followed: normative content of the "fullest consideration"*

61. Regarding the "fullest regard" under staff regulation 4.4 and para. 71 of the PPA, as affirmed recently by the Appeals Tribunal, it is not an entitlement of the staff member solely by virtue of being an internal candidate to be given priority consideration for a post<sup>27</sup>. "Fullest regard" will rather denote an obligation to consider the internal candidate in the selection process by default, until she or he has been firmly disqualified from further competition. In the practical sense, this would mean, among other, an obligation on the part of the hiring manager to include the pre-screened internal candidate in a short list for interview where his or her qualifications are *prima facie* comparable to others on that short list.

62. Whereas normally the hiring manager's selection as to whom to interview is widely discretionary and not subject to immediate review by the DHRM, or JRB, these bodies are also responsible for implementing the "fullest regard" imperative. This may mean correcting any misjudgement by the hiring manager. Last, the finding of unsuitability of an internal candidate should be justified in writing. Where the internal candidate is found suitable but not recommended, the justification should demonstrate how the recommended candidate was clearly superior.

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<sup>27</sup> *Verma* 2018-UNAT-829, at para. 25.

*Whether the Applicant was given fair and adequate consideration: the application of the evaluation criteria*

63. Even though the minutes of the DHRM final recommendation meeting of 14 October 2015<sup>28</sup> state as the reason for not matching the Applicant only that he had not had recent experience with the United Nations justice system, it transpires from the full minutes that the manager's views were broader than this and rejected the Applicant – albeit indeed vaguely – for the want of the essential minimum criteria, namely, a minimum 10 years of previous relevant work experience, advanced court advocacy skills and substantive litigation experience and knowledge of UNDT and UNAT jurisprudence. The hiring manager's decision having been a premise excluding the Applicant from further competition, the question is whether these criteria were properly applied by her.

64. What constitutes “relevant” experience is a qualitative judgment where, as in this case, it has been put in the job description without any qualification. One may only infer that relevance was meant to be read together with the other requirement, that of skills and litigation experience as *Attorney in a law firm and/or a legal officer in an international organization*. The broad way of expressing the criterion of “relevant experience”, however, causes that the appropriateness of assessment of on this score may require comparative evaluation relative to experience of other applicants.

65. It seems that the Hiring Manager mainly discarded the Applicant's early experience in IOM in Kosovo, because the IOM jurisdictionally falls under ILOAT, as well as his work experience after LAS as protection officer in South Sudan, and on this basis also inferred the lack of advanced court advocacy skills and substantive litigation experience. By itself, this finding and the inference of the lack of skills may not be unreasonable. In creating the short list for the interview, the hiring manager's assessment, as discussed above, may differ from the one applied in pre-screening, just as he or she may apply more stringent criteria of “relevance”, dependent on the richness

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<sup>28</sup> Page 33 of Annex 1 to the Respondent's submission of 6 November 2017.

of the pool from which the “most promising” are picked. In the present instance, for the interview purpose, the hiring manager had the authority to apply the 10 years of relevant experience requirement in a narrow manner, for example, to mean strictly experience in the administration of justice. The point is, however, whether she applied it consistently and not discriminatorily.

*Whether the criteria were applied in a fair and non-discriminatory manner*

66. Considering the profiles of the shortlisted candidates, there appears to be no rational reason to disqualify the experience of the Applicant while shortlisting external candidate two, whose work only “included” advising on administrative policy-making and application of administrative law and whose parent organization UNESCO, just like IOM, also falls jurisdictionally under ILOAT. If the Hiring Manager extended a benefit of doubt as to the relevance of experience of external candidate two, the same benefit should have applied to the Applicant, who was an internal candidate entitled to expect the “fullest regard” and thus, a chance to tell the panel about the details of his experience in person. Likewise, the disqualification of the other internal candidate by the hiring manager for the fact that litigation was not the main focus of his work, would have been justifiable in a situation where all the shortlisted candidates had unquestionable substantive experience in litigation. This is true especially given that the pre-screened pool was quite limited and there was no logistical issue in interviewing all the pre-screened candidates.

67. The Tribunal notes, moreover, that the latest criterion negatively assessed by the hiring manager, knowledge of the jurisprudence, cannot be determined in the negative based on the application alone, and should not have been used to disqualify the Applicant without testing.

68. In conclusion, the criterion has not been properly applied and the Applicant did not receive the fullest regard due to him as an internal candidate.

69. The Tribunal, on the other hand, does not agree with the Applicant's argument based on disqualification of the other candidates who had been interviewed. Just as with the question of "relevant experience", also the criterion of "fluency in English and French, oral and written" is, in this case, qualitative. Reliance on the candidates' certificates or assertion on the command of the language presupposes that some of the candidates may be invited for an interview who turn out to not meet the requisite fluency. The Applicant's contention that there was a procedural irregularity in inviting candidates subsequently disqualified on the score of fluency in French is thus untenable.

*Whether the Applicant was given fair and adequate consideration: the use of inappropriate criteria*

70. Indeed, in the job opening for the advertised position the requirement of "recent experience with the new UN internal justice system" is not listed there under the headings titled "Essential Minimum Qualifications and Professional Experience Required" and "Desirable Qualifications & Competencies".

71. In this connection, the Tribunal observes that it does not transpire clearly from the final matching minutes whether the DHRM, in putting forward their recommendation, had been persuaded by the Hiring Manager's views as to the initial unsuitability of the Applicant or made its own determination accepting only part of the hiring manager's views. Either way, the DHRM accepted as its own view that the "recent experience" was a necessary requirement for the position without basis for it. With some hesitation, so did the JRB.<sup>29</sup>

72. In conclusion, both the DHRM's and JRB's decisions were based on an inappropriate criterion. These bodies also failed to give the Applicant the "fullest regard" by not calling a fresh interview.

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<sup>29</sup> See JRB Final Minutes dated 28 October 2015 – Annex 5(1) of the Respondent's reply to Order No. 178 (NBI/2017).

*Ulterior motive*

73. The Tribunal recalls that the burden of proving any allegations of ill motivation or extraneous factors rests with the Applicant.<sup>30</sup> The Tribunal finds that the Applicant failed to provide any element leading it to conclude that the assessment was marred by an ulterior motive, including that the successful candidate had been upfront chosen. In the prevailing circumstances, most likely, the lack of fair consideration resulted from error of judgment.

*Remedy*

74. The Tribunal will now, therefore, consider what the legal effects of the breach of the Applicant's procedural rights are.

75. The direct effect of a procedural 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. Where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.<sup>31</sup> There must be a causal link between an irregularity in procedure and non-promotion.<sup>32</sup> The same would hold, *mutatis mutandis*, in relation to a selection exercise.

76. The Tribunal cannot arrive at the conclusion that had the Applicant been selected for an interview, he would have automatically been selected for the position in question. As such, there is no relevant causality between the procedural violation suffered and the remedies of rescission or a compensation equalling the value of the post for which the Applicant had not been selected. There is no relevant causality for reinstating the Applicant in the post previously held. All the Tribunal can do in this

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<sup>30</sup> *Obdeijn* 2012-UNAT-201; *Jennings* 2011-UNAT-184; *Azzouni* 2010-UNAT-081 and *Asaad* 2010-UNAT-021.

<sup>31</sup> *Bofill* 2011-UNAT-174, para. 28.

<sup>32</sup> *Dualeh* 2011-UNAT-175, para. 17.

case is to hypothetically place the Applicant at the point where there is no breach of selection procedure, i.e., in a group of candidates selected for interview.

77. Did the Applicant have a significant chance to be selected for the advertised position had he been interviewed? A total of four candidates were interviewed. In the absence of the procedural irregularity, the Applicant would then have had a one in five theoretical chance of being selected for the advertised position. To estimate how the real probability of selection would have been cannot be established by exact science: clearly, the selected candidate was very strong; the Applicant could have prevailed over the external candidate two in terms of relevant experience; it is, however, unknown how he would have performed in French - in the end, success in an interview is also a question of luck.

78. To quantify the financial value of such loss of opportunity the Tribunal turns to the Appeals Tribunal jurisprudence. The case relied upon by the Applicant, *Nikolarakis*<sup>33</sup> has not produced a resolution on the question of calculation of the damages. In turn, in *Zhao, Zhuang and Xie*<sup>34</sup> a compensation of USD4,000 was confirmed for a candidate who had been found to have had fair chances to be selected for a P-5 post and the same was awarded by way of moral damages. In *Asariotis*<sup>35</sup> USD8,000 of compensation was confirmed for a candidate who had 1/7 chance for being selected to a D-1 post and the same amount by way of moral damages. Considering the grade of the post in question and the 1/5 chance among candidates competing in the “finals”, the Tribunal finds it appropriate in this case to award USD5,000 as compensation for the loss of opportunity.

79. Regarding the claim for moral damages, the Tribunal notes the parties’ exchange on the position taken by the Appeals Tribunal in *Kallon*<sup>36</sup> pursuant to which granting remedy for moral damages may no longer be ascertained by the evidence from

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<sup>33</sup> 2018-UNAT-832.

<sup>34</sup> 2015-UNAT-536.

<sup>35</sup> 2015 UNAT 496.

<sup>36</sup> 2017-UNAT-742.

the person concerned alone, but requires “corroboration by independent evidence”. The Tribunal notes, nevertheless, that evidentiary matters have thus far been regulated on the statutory level<sup>37</sup>, whereas jurisprudential developments do not afford sufficient notice to the addressees, especially given that the effect of the majority holding in *Kallon* on evidentiary requirements is not obvious.<sup>38</sup> As a practical matter, the main source of evidence for moral damage is always the person concerned, whereas the Applicant had no reason to secure “independent corroboration” at the time when he was filing his application. It would be, therefore, permissible to rely on the affidavit filed by the Applicant, which is “evidence” in the sense of art.5 b of the UNDT Statute, and the Tribunal’s own experience and knowledge of human psyche as to the occurrence of a moral damage such as would normally be suffered under the circumstances. The proposed live testimony from the Applicant would not have any additional import.

80. The Tribunal considers that being rejected without an interview causes stress and vexation, but also is a fact of life for staff members in the increasingly competitive working environment of the United Nations. While indeed improper criteria have been applied by the DHRM and JRB, this is not a breach of right of a fundamental nature, given that at the core of the Applicant’s rejection lay rather a subtle error in the assessment by the hiring manager. In the totality of the circumstances, the Tribunal finds, therefore, that the amount of USD4,000 and this Judgment constitutes a sufficient appropriate remedy for the moral harm.

*Due process violations in the management evaluation procedure*

81. The Applicant has alleged due process violations during the management evaluation process. Specifically, he raises that the DHC did not instantly provide him

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<sup>37</sup> See art. 5(b) of the Statute of the UNDT, as amended by resolution 71/266 adopted on 23 December 2016, the Dispute Tribunal may award compensation “for harm, *supported by evidence*, which shall normally not exceed the equivalent of two years’ net base salary of the applicant (emphasis added).”

<sup>38</sup> For the question of temporal application of the *Kallon* jurisprudence see also *Haq & Kane* UNDT/2018/099 at 107.

with the documentation on the selection process; moreover, the Respondent whitened out extremely relevant passages from the minutes of the JRB.

82. The Applicant's submissions on this score fail for the following reasons: The UNDT Statute and Rules of Procedure do not grant it the power to review the procedure applied in the management evaluation. The management evaluation is not an adversarial dispute with an attendant package of due process rights. Unilateral review of documents is commonplace. Non-disclosure of essential documents is of course problematic when it impedes informed filing of an application and access to temporary injunction under art.10.2 of the UNDT Statute, which is regrettable. The latter option, however, is not available for non-promotion cases. The late disclosure of documents, therefore, may only be remedied within the proceedings on the application of the merits before the UNDT. An example of how such procedural remedy works is that the Applicant did obtain proper access to the JRB minutes for pleading his case before the Tribunal. The Tribunal notes, however, that the disclosure of the full minutes of the JRB did not have a decisive impact on the judgment – the Tribunal made its determination on the propriety of the selection processes in evaluating the outcome of the JRB deliberation, and not the vote distribution therein.

83. The Applicant pleads that the Tribunal use the referral powers under art. 10.8 of the UNDT Statute. It is the Applicant's case that persons who were involved in the selection process later also advised the DHC in the management evaluation procedure and the Director of Human Resources in the SOA procedure and that this would constitute a manifest conflict of interest. The Tribunal notes that its powers under art. 10.8 of the Statute, as implied by the reference to "cases", concern matters transpiring from the decision under review, where the need for accountability is apparent on the facts established. It does not empower the Tribunal to embark on investigating peripheral matters. As to such matters an aggrieved applicant may avail himself of internal control mechanisms – which this Applicant, on his own admission, did.

## **Conclusions**

84. In the view of the foregoing, the Tribunal decides:

- a. The Respondent shall pay to the Applicant compensation for material damages connected to the loss of opportunity in the amount of USD5,000 and for moral damages in the amount of USD4,000;
- b. The above amounts shall bear interest at the United States prime rate with effect from the date on which this Judgment becomes executable until payment of the said compensation. If the sum is not paid within 60 days from the date on which this Judgment becomes executable, an additional 5% shall be added to the United States prime rate until the date of payment; and
- c. All other pleas are rejected.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 2<sup>nd</sup> day of November 2018

Entered in the Register on this this 2<sup>nd</sup> day of November 2018

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi