



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/011

Judgment No.: UNDT/2013/144

Date: 19 November 2013

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

ASARIOTIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Bettina Gerber, UNOG

Introduction

1. By application registered on 21 March 2013 by the Geneva Registry of the United Nations Dispute Tribunal, the Applicant, a staff member of the United Nations Conference on Trade and Development (UNCTAD), contests:

a. a. The decision to select Mr. Rubiato for the D-1 post of Head of the Trade Logistics Branch of UNCTAD, effective 1 September 2012, advertised under job opening No. 11-ECO-UNCTAD SIDTED TLB-204438-R-GENEVA;

b. b. The decision not to include her on the roster of pre-approved candidates for similar functions in the context of the aforementioned job opening;

c. c. Failure on the part of UNCTAD to take action to ensure compliance with the pertinent rules on temporary assignment to a higher-level post.

2. She requests:

a. a. That the decision to select Mr. Rubiato as Head of the Trade Logistics Branch of UNCTAD be rescinded;

b. b. That her name be placed on a roster of pre-approved candidates for similar functions;

c. c. That she receive compensation for the material damage resulting from the decision not to select her and for the moral damage resulting from the distress she suffered due to the irregularities committed.

Facts

3. The Applicant entered the service of UNCTAD at the P-4 level on 9 December 2001. On 1 September 2005, she was promoted to the P-5 level and became Chief of the Policy and Legislation Section of the Trade Logistics Branch,

Division for Services Infrastructure for Development and Trade Efficiency (renamed the Division on Technology and Logistics (DTL) in early 2008).

4. Vacancy announcement 07-ECO-UNCTAD-416118-R-GENEVA (G) for the D-1 post of Head of the Trade Logistics Branch (hereafter “the disputed post”) was published on 26 November 2007. The Applicant applied for the post as a 30-day candidate on 24 December 2007.

5. Upon the retirement of the Head of the Trade Logistics Branch on 31 January 2008, the Chief of the Transport Section, Mr. Rubiato, was appointed Officer-in-Charge of the Branch on 1 February 2008, pending the selection of a new Head.

6. On 10 March 2008, the Applicant was interviewed for the disputed post. Four other internal 30-day candidates were also interviewed, including Mr. Rubiato.

7. On 15 June 2009, a new Director, DTL, was appointed.

8. On 15 July 2009, the Director, DTL, advised the Applicant that the disputed post would be re-advertised. However, this decision was subsequently reversed.

9. On 28 July 2009, a temporary vacancy announcement for a period of three to six months was issued for the disputed post, and the Applicant applied on 6 August 2009. She was interviewed, but the candidate who had served as Officer-in-Charge of the Branch since 1 February 2008 was selected. The Applicant was notified of this on 19 January 2010.

10. From February to April 2010, there was a second round of interviews for the disputed post as advertised in November 2007. On 3 November 2010, the interview panel's recommendations were presented to the Geneva Central Review Board.

11. By memorandum dated 7 April 2011, the Geneva Central Review Board informed the Under-Secretary-General for Management that despite additional information provided by the Director, DTL, it was not in a position to endorse the

recommendations made by UNCTAD, as the selection procedure had been flawed. It recommended that the post be re-advertised.

12. By e-mail of 3 May 2011, the Director, DTL, informed the Applicant that in response to a request from the Senior Review Group, vacancy announcement No. 07-ECO-UNCTAD-416118-R-GENEVA (G), issued on 26 November 2007 in Galaxy, would be cancelled and reissued in the new online recruitment platform, Inspira, and she invited the Applicant to apply.

13. On 26 August 2011, the post of Head of the Trade Logistics Branch was re-advertised under job opening No. 11-ECO-UNCTAD SIDTED TLB-204438-R-GENEVA. The competencies required for the post were professionalism, communication, judgement/decision-making, leadership and vision. The Applicant applied for the post in October 2011. She was deemed eligible along with 23 other individuals, none of whom was on the roster of candidates pre-approved for similar functions. The Applicant was selected for an interview, along with six other candidates.

14. On 2 May 2012, she sent an e-mail to the Human Resources Management Section of UNCTAD, drawing attention to the composition of the interview panel and to her wish to not be evaluated by the same panel members as previously.

15. On 10 May 2012, the Applicant once again drew the attention of the Chief, Human Resources Management Section, to the composition of the interview panel, emphasizing that the Tribunal had just ruled in her favour in Judgement UNDT/2012/066, with regard to a selection process for the same post with the same hiring manager.

16. On 14 May 2012, the Chief, Human Resources Management Section, replied to the Applicant, acknowledging her message and stating that the panel's composition was in accordance with the regulations and that a Human Resources Officer of the United Nations Office at Geneva (UNOG) would participate on an ex officio basis.

17. The interview took place on 15 May 2012 with a panel consisting of Ms. Miroux, the hiring manager and Director of the Division; Ms. Molnar, Director of the Transport Division of the United Nations Economic Commission for Europe (ECE); Ms. Krylova, Chief of Branch in the UNCTAD Investment Division; and a Human Resources Officer, UNOG, participating on an *ex officio* basis.

18. The Applicant was not recommended for the post; only two candidates, including Mr. Rubiato, were recommended.

19. During her annual leave from 21 August to 12 September 2012, the Applicant was placed on sick leave from 29 August to 7 September 2012.

20. On 29 August 2012, the Geneva Central Review Board approved the selection process, and on 31 August 2012, the Secretary-General, UNCTAD, selected Mr. Rubiato for the post.

21. On 1 September 2012, an Inspira-generated e-mail message was sent advising the Applicant that she had not been selected for the disputed regular post.

22. On 18 September 2012, the Human Resources Management Section, UNCTAD, sent a message to all staff advising them of recent appointments, including that of Mr. Rubiato as Chief, Trade Logistics Branch.

23. On 31 October 2012, the Applicant submitted a request for management evaluation of the decision to select Mr. Rubiato; on 21 December 2012 she received a reply indicating that the contested decision was being upheld.

24. On 21 March 2013, the Applicant submitted the present application, and on 22 April 2013, the Respondent submitted his reply and produced documents considered to be confidential.

25. On 30 April 2013, by Order No. 48 (GVA/2013), the Tribunal ordered the transmission of certain documents to the Applicant, while asking her to preserve their confidentiality.

26. On 14 May 2013, the Applicant filed additional observations.

27. By Order No. 63 (GVA/2013) dated 27 May 2013, the Tribunal granted the selected candidate, Mr. Rubiato, access to all the documentation.

28. On 17 June 2013, the Respondent, as well as Mr. Rubiato, filed new observations. On 30 July 2013, the Applicant submitted additional observations.

29. By Order No. 114 (GVA/2013) dated 2 August 2013, the Tribunal set 16 August 2013 as the time limit for the parties in question to submit written pleadings; the Respondent submitted his final observations on that date.

30. On 20 August 2013, the Applicant submitted further observations.

31. By Order No. 137 (GVA/2013) dated 25 September 2013, the parties were summoned to a hearing scheduled for 6 November 2013 and the selected candidate was invited to participate. The hearing took place on that date, in the presence of the parties.

32. By e-mail dated 11 November 2013, the Applicant requested the Tribunal's permission to submit additional observations. By e-mail dated 12 November 2013, the Geneva Registry of the Tribunal informed the Applicant that the judge hearing the case had decided that at that stage of the proceedings, further observations from the parties would not be useful for resolving the dispute.

Parties' submissions

33. The Applicant's contentions are:

a. The decision not to select her for the post is marred by a number of irregularities, as is the decision to select Mr. Rubiato;

b. Mr. Rubiato, the selected candidate, was Officer-in-Charge for several years and was her First Reporting Officer throughout the selection processes for the disputed post, even though the Central Review Board, in a memorandum dated 7 April 2011, had expressed surprise at that state of affairs and had noted that UNCTAD should have taken measures to avoid a

situation where one candidate for a post was the reporting officer of another candidate. Nonetheless, nothing was done to avoid this situation;

c. By serving as Officer-in-Charge for several years, Mr. Rubiato gained an advantage over the Applicant with regard to knowledge about the post, solely because the Organization did not respect the rules limiting the length of appointments as officer-in-charge. After 364 days, any appointment in that capacity must be terminated. If the rules had been respected, the Applicant, as a qualified female candidate, would have had to be designated as Officer-in-Charge, which would have allowed her to familiarize herself with the disputed post;

d. She does not directly contest the appointment of the Officer-in-Charge in January 2010 but submits that a temporary vacancy announcement should have been issued in April/May 2011 after the cancellation of the selection process;

e. Given that she had long served as Chief of one of the three sections in the Trade Logistics Branch, she was *prima facie* a particularly strong candidate; yet the panel concluded that she only partially met three of the required competencies for the post, which proves that she was the victim of bias; as no written test was conducted, the interview was a particularly important part of the selection process;

f. Ms. Molnar was the only member of the panel who possessed sufficient subject matter expertise relevant to the disputed post. Neither Ms. Miroux nor Ms. Krylova had the necessary experience in the field of trade logistics. All members of the panel had previously been involved in the assessment of her competences for the same post and had participated in the selection of Mr. Rubiato as Officer-in-Charge, a function which he had already discharged for a period of 18 months, since 1 February 2008, contrary to the will of the General Assembly that staff members should not be placed temporarily against higher-level posts for periods longer than three months. The Central Review Board criticized the manner in which the previous selection processes for the same post had been conducted, in which

Ms. Miroux and Ms. Molnar had participated. Ms. Krylova participated in the assessment of Mr. Rubiato and the Applicant following the temporary vacancy announcement published in late 2009, and she approved Ms. Miroux's proposal to recommend Mr. Rubiato. Therefore, she should not have been selected as a member of the panel;

g. Although Ms. Miroux and Ms. Molnar were members of the panel which had determined in March 2010 that the Applicant fully met the required competency of communication and only partially met the required competencies of leadership and vision, in May 2012, a panel that included the same two members determined that she fully met the required competencies of leadership and vision, but only partially met the required competency of communication, which constitutes an inconsistency; the notes taken by the ex officio member of the panel show that the assessment made by the panel did not truly reflect her performance during the interview;

h. She was the victim of discrimination and bias, and the assessments given by the selection panel were contrary to those she received from different reporting officers in her performance evaluations from 2001 to 2007. They were also inconsistent with the evaluations made under the "360-degree feedback" process. The panel was mistaken in considering that the Applicant possessed only limited experience in implementation of technical cooperation projects. The panel erred by failing to take into account the significant responsibilities conferred upon her by the Organization which required excellent communication skills. The Organization entrusted her with important responsibilities when it designated her as its representative at intergovernmental meetings. Contrary to what has been claimed by the Respondent, ST/AI/2010/5 provides for the consideration of performance evaluations in selection processes;

i. In terms of professionalism and communication, the Applicant's competencies were markedly superior to those of Mr. Rubiato. The panel

was mistaken in its assessments and favoured Mr. Rubiato in the choice of questions asked;

j. The candidate selected was not eligible for the post as he was not a candidate in December 2011, nor at any time before 17 April 2012. The job opening for the disputed D-1 post was published on 26 August 2011 and the deadline for applications was 31 October 2011. In a document dated 19 December 2011, or more than six weeks after the application deadline had passed, the Respondent formally indicated that Mr. Rubiato had not reapplied for the post. Yet, during the Tribunal hearing on 17 April 2012, the Respondent admitted that Mr. Rubiato had submitted his application via the Inspira system in August 2011. The document produced, according to which Mr. Rubiato submitted his application on 31 October 2011, lacks probative value. It is not possible to determine with any certainty, based on Inspira records alone, who enters which information in Inspira and at what time. There are differences between the message received by Mr. Rubiato on 31 October 2011 and the one contained in annex 2 of the Respondent's observations;

k. Given her qualifications and the fact that she is a woman, she should have been selected as Officer-in-Charge; as a woman and a particularly qualified candidate for a high-level post, priority should have been given to her, in accordance with the stipulations of the General Assembly and the Secretary-General, and at the very least, she should have been included in the roster of pre-approved candidates for similar functions;

l. Ms. Miroux, when she had been selected in 2009 for the post of Director, DTL, had been recommended and selected because she is a woman, even though the panel determined that she only partially met some of the required competencies; the Respondent's application of administrative instruction ST/AI/1999/9 is therefore not consistent;

m. The provisions of section 9.4 of ST/AI/2010/3 were not respected. She was not included in the roster of candidates pre-approved for similar functions, while Mr. Rubiato, as selected candidate, was erroneously

included, as such he will have the opportunity to be chosen for future D-1 posts, to the detriment of the Applicant in future selection processes;

n. Mr. Rubiato's written submissions to the Tribunal cannot be considered as accurate because he is biased against her, as shown by his last evaluation of her performance;

o. The selection process did not respect the Human Resources Handbook. In particular, a shortlist of qualified candidates must be drawn up, whereas in the present case a longlist was established and was not produced by the hiring manager until 3 August 2012, or two and a half months after the interviews had taken place. Moreover, the Applicant was not informed before the interview of the names of the interview panel members.

34. The Respondent's contentions are:

a. The Secretary-General has a broad discretion in selecting candidates and the Tribunal cannot substitute its own assessment for that of the Secretary-General;

b. Given the presumption of legality of the administrative decision, the Applicant bears the burden of proving the illegality of the decisions she is contesting;

c. The Applicant's candidature received full and fair consideration. The interview panel determined that she only partially met the competencies of professionalism, communication and judgement/decision-making;

d. Regarding the competency of professionalism, the Applicant's replies to the panel's questions remained too general. With regard to the competency of communication, the panel found that the Applicant had not demonstrated listening skills; concerning the competency of judgement/decision-making, it found that she had difficulties in providing relevant examples and that her answers did not indicate clearly what the alternative options were and what factors she took into account in decision-

making. The fact that her performance evaluations and her "360-degree feedback" showed her to be an excellent staff member cannot replace the sovereign discretion of the interview panel;

e. Contrary to what the Applicant alleges, Ms. Miroux, Director, DTL, and therefore also responsible for the Branch, had the necessary subject matter expertise to be a member of the panel. At the February 2010 interview for the same post, Ms. Miroux and Ms. Molnar, along with another staff member, had already concluded that the Applicant only partially met the competencies of professionalism and judgement/decision-making. With regard to the other competencies, it is to be expected that different interviews will be evaluated differently when the panel's composition is not the same;

f. In accordance with ST/AI/1999/9, the Applicant did not have any priority for the post as a woman. Such priority is only given provided that a female candidate's qualifications meet the requirements of the post and are substantially equal to those of other candidates. Section 7.7 of ST/AI/2010/3 on the staff selection system does not establish any obligation to recommend a woman when no woman is deemed to be sufficiently qualified;

g. The fact that Mr. Rubiato is alleged to have been unlawfully appointed as Officer-in-Charge and to have unlawfully remained in the post cannot have prejudiced the Applicant with regard to the selection process, as the panel determined that she did not fully demonstrate all of the required competencies. A staff member's status as Officer-in-Charge for a given post in no way guarantees his or her selection for that post, and there is no rule prohibiting such a staff member from applying for the post;

h. Mr. Rubiato's application was received on 31 October 2011, well within the deadline indicated by the Inspira system, as confirmed by the documents in the case file. Moreover, whether or not Mr. Rubiato was eligible for the post has no bearing on the legality of the decision being contested, as the Applicant was not recommended;

i. The decision communicated to her on 19 January 2010 not to appoint her as Officer-in-Charge was the subject of a previous request for management evaluation and the Applicant is now time-barred from contesting it. Mr. Rubiato was appointed as Officer-in-Charge on 1 February 2008 and the Applicant did not contest the decision at that time. She did not challenge the decision to select him for the post following the temporary vacancy announcement either;

j. The Applicant's allegation that Ms. Miroux was wrongly recommended to the Central Review Board and selected as the Director, DTL, when she did not fulfil all of the competencies for the post, even if it were true, would have no bearing on the legality of the contested decision, since illegalities committed, if any, during the selection of other staff members do not give rise to any rights for her personally. Moreover, the fact that Mr. Rubiato was included on the roster of candidates pre-approved for similar functions has no bearing on the legality of the contested decision;

k. The Tribunal is requested to summon certain staff members to testify that the Applicant's candidature was fully and fairly considered.

35. The selected candidate's contentions are:

a. His professional competencies do not stem from his four-year incumbency of the post as Officer-in-Charge of the Trade Logistics Branch, but rather from his previous experience. The questions asked during the interview did not require any internal knowledge about the service;

b. The Applicant greatly overestimated her competencies and personal experience;

c. Contrary to what the Applicant alleges, his application was registered in the Inspira system on 31 October 2011 at 3.37 p.m.

Consideration

Receivability

36. The Applicant has challenged before the Tribunal, *inter alia*, the fact that Mr. Rubiato temporarily served as Officer-in-Charge, Trade Logistics Branch, UNCTAD, beyond the maximum period of six months stipulated in the temporary vacancy announcement published on 28 July 2009, and continued in that capacity until 1 September 2012, when he was selected for the post. She maintains that a new selection process for a temporary appointment should have been opened at least by 26 August 2011, when the job opening for the post of Head of the Trade Logistics Branch was re-advertised after the previous selection process was cancelled. The Respondent maintains that the Applicant is time-barred from challenging the decision to select Mr. Rubiato for the temporary vacancy as Head of the Trade Logistics Branch.

37. The documents in the case show that the Applicant, who had applied for the temporary vacancy as the Head of the Trade Logistics Branch in 2009, did not challenge the decision to select Mr. Rubiato for that function on the date on which the decision was taken. Although she maintains that in August 2011, Mr. Rubiato continued to unlawfully occupy the temporary position and that a new selection process should have been opened, neither at that time nor afterwards did she ask UNCTAD to open a new selection process. The Tribunal believes that only such a request on the part of the Applicant could have given rise to a negative administrative decision, whether implicit or explicit, for which she could have submitted a request for management evaluation and subsequently an application before this Tribunal.

38. The Applicant maintains that she is in fact challenging the implicit administrative decision not to open a selection process for a temporary vacancy following the cancellation and re-advertisement of the job opening for the regular post, hence that this request cannot be considered as time-barred, as she was not notified in writing of the decision being contested. The Tribunal finds the Applicant's reasoning incorrect, since an implicit administrative decision

inherently precludes notification in writing. Moreover, when, as in the present case, a staff member believes that the Administration, by its inaction, has allowed an unlawful situation to persist that potentially infringes on his or her rights, the persistence of this unlawful situation does not give a staff member the right to contest the situation at any time by directly submitting a request for management evaluation. The only legal recourse that is open to the staff member is a formal request to the Administration to put an end to this situation. In case of refusal, explicit or implicit, may arise an administrative decision subject to appeal. However, as stated above, no administrative decision was taken by the Administration, either of its own accord or at the request of the Applicant. The application must therefore be rejected, in so far as it seeks to obtain the rescission of a decision that does not exist.

Legality

39. The Tribunal finds that the second decision contested by the Applicant, namely the decision to select Mr. Rubiato for the D-1 post as Head of the Trade Logistics Branch, UNCTAD, and consequently not to select her, raises no questions with regard to receivability and can thus be considered immediately in terms of its legality.

40. The Tribunal must first examine the Applicant's contention that the selection process was tainted by irregularities. In fact, the Applicant maintains, without being contradicted by the Respondent, that she was not informed of the composition of the interview panel prior to the interview, contrary to the provisions of the *Instructional Manual for the Hiring Manager on the Staff Selection System (Inspira)* (hereafter "the Manual," available in English only), which stipulates in chapter 9.5 that "The invitation informs the applicant of the names of the assessors".

41. The reality of this lack of information has not been contested by the Respondent and results from the e-mail correspondence between the Applicant and her Administration. The Tribunal must therefore examine the consequences arising from this irregularity by taking into consideration, on the one hand, the

jurisprudence of the Appeals Tribunal, which has repeatedly stated that the Administration must respect its own rules, and, on the other, the fact that only a substantial irregularity may render an entire selection process unlawful.

42. The rule requiring the Administration to inform applicants of the names of the assessors is contained in the aforementioned Manual, a tool available to managers conducting selection processes. In order to determine the significance of this violation, the Tribunal must decide whether this irregularity deprived the Applicant of certain fundamental rights and could consequently have influenced the outcome of the selection process in question. Clearly, the sole objective of the Manual's author in stipulating the obligation to inform candidates of the names of the assessors on the interview panel was to allow candidates, if necessary, to draw the Administration's attention, prior to the interview, to potential conflicts of interest between panel members and candidates, and thus to allow for the replacement of one or more panel members.

43. It is clear that by depriving the Applicant of this information, the Administration prevented her from contesting the choice of panel members. This was therefore an infringement on her rights, notwithstanding the absence of a rule requiring the Administration to comply with such a request for the replacement of panel members.

44. The Tribunal must now consider whether the Applicant would have asked for a change in the panel's composition, had she been informed of the names of her assessors in time. Clearly, the e-mail correspondence between the Applicant and UNCTAD regarding this subject reveals the significance that the Applicant attached to the panel's composition. In fact, by e-mail of 1 May 2012, UNCTAD informed the Applicant that the interview would be conducted by a panel of United Nations staff members, without providing any additional details. On 2 May 2012, the Applicant sent a message to Ms. Nilssen, the Officer-in-Charge, Human Resources Management Section, UNCTAD, drawing her attention to the fact that she had already been interviewed several times for the post; that there were ongoing proceedings before this Tribunal; that if the interview panel was composed of the same members as for previous interviews, this would present a

problem; and, consequently, that she wished to know what arrangements could be made to address her concerns. A message from the Administration dated 9 May 2012 confirmed that the panel would be composed of United Nations staff members. On 10 May 2012, the Applicant sent a message to Ms. Natacha Koval, Human Resources Management Section, UNCTAD, once again drawing attention to the selection process and recalling that this Tribunal, in its judgment *Asariotis* UNDT/2012/066 of 9 May 2012, had just awarded her compensation following a case in which the same hiring manager had been involved. On 14 May 2012, Ms. Natacha Koval, Human Resources Management Section, UNCTAD, replied only that she had taken note of the issues raised in the Applicant's most recent message, that the composition of the interview panel was in accordance with the administrative instruction governing the staff selection system and that a Human Resources Officer, UNOG, had been designated as an *ex officio* member of the panel.

45. These messages, and the Applicant's statements at the hearing, show that although the Applicant drew the Administration's attention to the fact that she did not wish to be interviewed by the same panel members who had interviewed her previously for the same post, the names of the panel members were never formally communicated to her, as such depriving her of the possibility to contest the composition of the panel. The Tribunal therefore finds that one of the Applicant's fundamental rights was violated.

46. The Tribunal must now decide whether the violation of this right could have influenced the outcome of the selection process. Given the documents in this case and the statements made by the Applicant at the hearing, the Tribunal is certain that if the Applicant had been informed of the panel's composition, she undoubtedly would have requested the replacement of one or more of its members. Next, the Tribunal must consider whether there was a reasonable chance that UNCTAD would have acquiesced to a request for the replacement of one or more panel members. In order to evaluate that probability, the Tribunal must assume that such a replacement request would have been examined by a well informed, and impartial authority, which would be concerned with establishing a

selection panel that was free not only from conflicts of interest but also from any appearance of conflict of interest.

47. The interview panel was composed of Ms. Miroux (D-2), the hiring manager for the post and Director of DTL in which the disputed post was located; Ms. Molnar (D-1), Director, Transport Division, ECE, and Ms. Krylova (D-1), Chief of Branch, Investment Division; UNCTAD, and finally a Human Resources Officer, UNOG, participating on an *ex officio* basis.

48. As the *ex officio* panel member does not pass personal judgement on the candidates, the choice of that member could not have influenced the evaluation of the Applicant. With regard to the choice of Ms. Miroux, as she was the hiring manager for the post, her presence as chair of the panel appears reasonably justified and is moreover regarded as usual in the aforementioned Manual. Consequently, the Tribunal finds that if the Applicant had contested Ms. Miroux's presence as chair of the panel, it is unlikely that the latter would have been replaced, even though she participated in several previous selection processes, all of which resulted in the recommendation of Mr. Rubiato.

49. Ms. Molnar, like Ms. Miroux, had previously been a member of the panel that interviewed the Applicant on 30 March 2010 for the post of Head of the Trade Logistics Branch; in that process, Mr. Rubiato was recommended rather than the Applicant, although the process was later cancelled after the Central Review Board concluded that some of the candidates' evaluations had been flawed.

50. Ms. Krylova, Chief of Branch at UNCTAD, had been a member of the panel chaired by Ms. Miroux that in 2009 had recommended Mr. Rubiato as Officer-in-Charge against the temporarily vacant post of Head of the Trade Logistics Branch, for which the Applicant had also applied.

51. In the Tribunal's view, the foregoing facts suggest that if the Applicant had been informed of the composition of the interview panel at the time of her invitation to the interview, she evidently would have requested the replacement of all the members of the panel, and that, especially in view of the observations made

by the Central Review Board during a previous process, a reasonable manager would have acceded to her request, at least with regard to Ms. Molnar and Ms. Krylova.

52. Therefore, the irregularity committed by not informing the Applicant resulted in irregularities in the composition of the interview panel itself, as the presence of at least two of its members could justifiably create the appearance of a conflict of interest, contrary to the provisions of chapter 9.2 of the Manual.

53. The irregularity committed by not informing the Applicant also resulted in the conduct of the candidates' interviews by an improperly constituted panel. thus, the aforesaid irregularity was such as to vitiate the entirety of the process which resulted in the selection of Mr. Rubiato and the rejection of the Applicant's candidature.

54. In view of the foregoing, it is not necessary for the Tribunal to examine the Applicant's other contentions. The Tribunal accordingly rescinds the decision to appoint Mr. Rubiato as Head of the Trade Logistics Branch at UNCTAD as from 1 September 2012.

Damages

55. The above rescission means that the Administration must begin a new selection process to replace the one deemed to be unlawful. If at the conclusion of the new process the Applicant is selected for the disputed post, she shall not suffer any material damage, as the Administration shall reconstitute her career as though she had been appointed to the post on 1 September 2012.

56. Nonetheless, pursuant to article 10, paragraph 5, of the Tribunal's statute, the Respondent may, instead of respecting the rescission ordered above, elect to pay compensation to the Applicant covering the material damage suffered by her as a result of non-compliance with the Tribunal's decision.

57. In order to determine the compensation amount, the Tribunal must be guided by two elements, namely on the one hand the nature of the irregularity

which constitutes the basis for the rescission of the contested decision, and, on the other hand, the likelihood that the Applicant would have been recommended for a promotion if the irregularity had not been committed (cf. *Solanki* 2010-UNAT-044; *Mezoui* 2012-UNAT-220; *Appleton* 2013-UNAT-347).

58. In the current circumstances, and given the entirety of the case file and, in particular, the number of candidates invited to an interview in May 2012, the Applicant had a one-in-seven chance of being appointed to the disputed post. Bearing in mind the difference in salary and the career prospects that the Applicant would have had if she had been selected, the Tribunal sets the compensation to be paid to her for the material damage suffered at USD 8,000.

59. With regard to the moral damage suffered by the Applicant, she described in detail during the hearing all the anxiety that the irregular process has caused her since May 2012, especially as she continues to work with Mr. Rubiato, the selected candidate, who thus became her First Reporting Officer. While the Applicant admits that this anxiety did not force her to take sick leave, she maintains that her quality of life has been severely affected, as her attending physician has noted. The Tribunal is convinced that her distress is real and has decided to award her USD 6,000 in consequence.

Conclusion

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

- a. The decision to select Mr. Rubiato for the post advertised as job opening No. 11-ECO-UNCTAD SIDTED TLB-204438-R-GENEVA is rescinded;
- b. If, rather than complying with the Tribunal's ruling, the Administration elects to pay compensation, it shall pay the Applicant the equivalent of USD 8,000 for material damage and USD 6,000 for moral damage;

- c. If the Administration elects to comply with the rescission ordered by the Tribunal, it shall pay the Applicant the equivalent of USD 6,000 for moral damage;
- d. The above compensation 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 per cent shall be added to the United States prime rate until the date of payment;
- e. All of the Applicant's other pleas are rejected.

(Signed)

Judge Jean-François Cousin

Dated this 19th day of November 2013

Entered in the Register on this 19th day of November 2013

(Signed)

René M. Vargas M., Registrar, Geneva