



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

SIMMONS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Programme Budget Officer at the P-3 level, contests the 5 March 2013 decision of the Office of Human Resources Management (“OHRM”) to cancel Job Opening number 13-FIN-DM-OPPBA-24760-R-NEW YORK (“JO 24760”) for the post of Programme Budget Officer at the P-4 level (“the Post”), in the Office of Programme Planning, Budget and Accounts (“OPPBA”), Department of Management following the 12 February 2013 decision of the then Assistant Secretary-General, Controller (“ASG/C”) to do so, and to fill the Post by laterally transferring Ms. CP, a P-4 level staff member from the Department of Management.

2. The Applicant also contests in her application the Administration’s failure “to give full, fair and timely consideration to [her] candidacy to fill several vacancies for P-4 Programme Budget Officer as follows [vacancy announcement, “VA” # 422344, 10-FIN-DM-OPPBA-15424 ... 11-FIN-DM-OPPBA-21967, 11-FIN-DM-OPPBA-20766 ... ”.

3. The Applicant requests that she be provided adequate compensation for delays and failure to provide full, fair and timely consideration to her candidacy in respect to Job Opening numbers 10-FIN-DM-OPPBA-15424, 11-FIN-DM-OPPBA-21959, and 11-FIN-DM-OPPBA-20766. She also requests two years’ net base salary as compensation for the cancellation of JO 24760 and “adequate” financial compensation for the adverse effects of the decision on her morale and professional reputation. Finally, she requests that the Respondent give priority to her rostered candidacy within the Programme Planning and Budget Division (“PPBD”) of OPPBA.

Facts

4. By email dated 17 November 2011 from the Office of the Director, PPBD, the Applicant was informed that her application for a Programme Budget Officer position at the P-4 level had been unsuccessful (Job Opening number 10-FIN-OPPBA-15424-R-NEW YORK). However, she was also advised that “your name is placed on a roster of pre-approved candidates for potential consideration, within a timeframe of three years for women ... as of 01-DEC-2011 for future job openings with similar functions at that level at the United Nations Secretariat”.

5. In an email dated 4 May 2012, the Chief, Staffing Unit A, OHRM responded to a query from the Applicant and confirmed that the Applicant had “rostered status” in connection with her previous application for the Programme Budget Officer position at the P-4 level.

6. JO 24760 was advertised on Inspira with a posting period of 29 August to 11 November 2012 for a Programme Budget Officer at the P-4 level.

7. The Applicant applied for the Post on 31 August 2012.

8. By memorandum dated 12 February 2013 to the Executive Officer of the Department of Management, the then ASG/C, as the head of OPPBA, requested the cancellation of JO 24760 and the lateral transfer of Ms. CP to the advertised post.

The memorandum stated:

The purpose of this memorandum is to request cancellation of Job Opening 24760, which was advertised for a P-4 Programme Budget Officer in service I of the Programme Planning and Budget Division (PPBD) and to laterally transfer [Ms. CP], P-4 Programme Budget Officer, Office of Director, PPBD, to the advertised post.

...

In view of the demands of servicing the General Assembly during the main part of the sixty-seventh session and the subsequent workload related to the preparation of the proposed programme budget for the

biennium 2014-2015, Service I has not yet begun the evaluation of applicants for the job opening.

I have now decided to laterally move [Ms. CP] P-4 Programme Budget Officer in the Office of the Director PPBD to the vacant position. The staff member, the Chief of Service I (the Hiring Manager) and the Director of PPBD agree to the transfer.

9. On 1 March 2013, the Applicant enquired with the Director, OPPBA as to the status of JO 24760, as it had been several months since it had closed and Inspira still showed that the Applicant's application was under consideration.

10. By email dated 5 March 2013, the Executive Office, Department of Management, requested that the Chief, Staffing Unit A, Strategic Planning and Staffing Division ("SPSD"), OHRM, cancel JO 24760, "which will be filled through a lateral reassignment which was approved by the Controller on 12 Feb[ruary]". By return email the same day, the Chief, Staffing Unit A, SPSD, OHRM confirmed that JO 24760 had been cancelled.

11. On the same day, the Applicant received an automated email from OHRM thanking her for her application and informing her that the job opening had been cancelled.

12. On 9 July 2013, a personnel action was approved and the 12 February 2013 decision to laterally transfer Ms. CP to JO 24760 was implemented by a lateral reassignment of Ms. CP, effective from 1 July 2013 until 31 December 2013.

Procedural background

13. On 8 March 2013, the Applicant filed a request to the Management Evaluation Unit ("MEU"), seeking management evaluation of:

- (i) abuse of discretionary authority, retaliation, obstruction of [her] opportunities for career advancement;
- (ii) the decision to cancel job Vacancy 13-FIN-OPPBA-24760-R-New York in order to prevent consideration of [her] candidacy to fill the subject advertised post;

- (iii) the decision to use the vacant post unlawfully for a lateral move of an existing P4; and
- (iv) the continued unfair and incomplete consideration of [her] candidature.

14. On 11 March 2013, the Applicant filed an application for suspension of action pending management evaluation with the Dispute Tribunal. The Applicant sought to suspend the decision to cancel JO 24760, to fill the Post, and to deny her candidacy full and fair consideration. In Order No. 70 (NY/2013), dated 15 March 2013, the Tribunal (Judge Ebrahim-Carstens) found that “due to the implemented cancellation of the job opening, of which all the candidates were apparently notified, the decision to carry out the comparative review process can no longer be suspended” and rejected the application for suspension of action.

15. The application on the merits was filed on 13 June 2013.

16. On 28 June 2013, the Applicant filed a motion requesting the disclosure of documents from the Respondent relating to JO 24760 and the recruitment process for a number of other vacancies.

17. The Respondent filed his reply to the application on 17 July 2013 contending that the application is without merit.

18. By Order No. 322 (NY/2013), dated 25 November 2013, the Duty Judge (Judge Ebrahim-Carstens) granted the parties leave to file “any additional submissions, including any request for further documents they seek to produce or to be produced, including, in the latter case, a reasoned explanation as to their relevance”.

19. On 29 November 2013, the MEU responded to the Applicant’s request for management evaluation. The MEU found that the decision to cancel JO 24760 and to fill the post through a lateral transfer was lawful and notified the Applicant that the Secretary-General had decided to uphold the decision. The MEU’s response

included the following relevant information relating to the decision by the ASG/C to cancel JO 24760 and to transfer Ms. CP (emphasis added):

The Controller states that, as no progress was being made to fill the job opening, she decided to cancel the job opening and to fill the post via lateral transfer. The Controller states that the staff member who was transferred to the post had previously expressed interest in moving laterally within the Division. *The Controller notes that this staff member did not apply for the job opening as it was part of her functions to create the job opening.*

20. On 3 December 2013, the Applicant filed her response to Order No. 322 (NY/2013). She sought to expand the scope of the present case to encompass an additional submission arising from her unsuccessful application for a Programme Budget Officer position at the P-4 level advertised under Job Opening number 13-FIN-DM-27499-R-NEW YORK (“JO 27499”). In addition, in response to the Respondent’s submission that the Applicant could only pursue her allegations of abuse of authority and retaliation based on the outcome of a complaint filed under the Secretary-General’s bulletin on harassment, the Applicant cited a number of informal attempts she had made in the past to resolve the issues she raises in her application. She further noted that, since filing her application, she had filed a harassment complaint with the Ethics Office on 17 September 2013. The Applicant also reiterated her request for further documentation from the Respondent and stated that she did not wish for the Tribunal to hold a hearing in this case.

21. By Order No. 337 (NY/2013) dated 10 December 2013, the Duty Judge (Judge Greceanu) instructed the Respondent to file a response to the Applicant’s 3 December 2013 submission. On 15 January 2014, the Respondent submitted that the Tribunal should reject the Applicant’s additional claims as inadmissible.

22. On 4 July 2014, the present case was assigned to the undersigned judge.

23. On 9 October 2014, by Order No. 274 (NY/2014), the Tribunal rejected the Applicant’s request for the Tribunal to consider the additional claims set out in her response to Order No. 322 (NY/2013). The Tribunal observed that it is only after

a new application has been filed that the Tribunal may consider joining cases, and only if it finds that there is a direct legal connection between the claims or that they have a common legal cause. The Tribunal also rejected the Applicant's motion for disclosure of further documents, finding that documents relating to recruitment processes that took place before JO 24760 became vacant were not relevant to the present case. The parties were ordered to file their closing submissions by 24 October 2014. Both parties duly complied.

Applicant's submissions

24. The Applicant's principal contentions may be summarized as follows:
- a. The job opening was canceled only to accommodate the lateral move of Ms. CP to the vacant post;
 - b. Ms. CP's involvement in previous recruitments for P-4 Programme Budget Officer VA 422344, 10-FIN-DM-OPPBA 15424, 11-FIN-DM-OPPBA 21967, 11-FIN-DM 20766, including the Applicant's post while Ms. CP was a P-3 applying also for some of the mentioned P-4 posts), and in the recruitment for the cancelled job opening, created a breach and a conflict of interest by giving her an unfair advantage;
 - c. The cancellation of JO 24760 was ultra vires, disproportionate and based on an improper use of authority. The then ASG/C disregarded relevant factors such as the fact that the Applicant is an internal roster candidate for a P-4 Programme Budget Officer already vetted by the Central Review Board and ready to take up functions and perform duties and responsibilities at that level. She also took into consideration irrelevant considerations such as the activities of the Fifth Committee. The decision is unlawful because it clearly violated sec. 2.5 of ST/AI/2010/3;

d. The cancellation of the vacancy was not legitimate and the discretionary authority was abused, representing another attempt to sabotage her career despite the favorable judgments in previous selection/promotion cases brought by her before the Dispute Tribunal. As a result, another opportunity for her career advancement had been blocked, creating irreparable damages and violations to her due process and contractual rights.

Respondent's submissions

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

a. The Applicant's allegations of abuse of authority and retaliation are not receivable because she did not submit a complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority);

b. The Applicant's claim against the MEU decision is not receivable. While the findings of a management evaluation may be reviewed by the Dispute Tribunal in the context of a challenge to an underlying administrative decision, they do not form an independent administrative decision subject to appeal. A response or lack of response to a request for management evaluation is not an administrative decision within the meaning of art. 2 of the Dispute Tribunal's Statute;

c. The decision to cancel JO 24760 was lawful and reasonable. The ASG/OHRM has the delegated authority to manage the recruitment of staff, which includes the issuance and cancellation of job openings;

d. JO 24760 was cancelled because of operational reasons. The then ASG/C was not in a position to evaluate the applications to the Post due to a heavy workload. In light of the demands, the office of the ASG/C was of

the view that the best way to carry out the required functions for the position was to laterally transfer Ms. CP. This was within the lawful and reasonable discretion of the ASG/C to manage and allocate human resources within her office;

e. The lateral transfer was lawful and the decision was made in accordance with the Staff Regulations and the relevant administrative issuances. The burden is on the Applicant to demonstrate that the lateral transfer of Ms. CP violated her rights. She has not done so;

f. The Applicant bears the burden of proof in establishing that extraneous considerations tainted the contested decisions. She has not met that burden;

g. The Applicant's claim that she lost the opportunity to be promoted to a higher level post has no merit. There is no legal basis for the Applicant to claim that she should have been selected from the roster, without further testing or competency-based interviews, simply because of her experience.

26. The Respondent submits that there is no basis to compensate the Applicant and requests that the Tribunal dismiss the application.

Considerations

Applicable law

27. Staff regulation 4.2 of ST/SGB/2012/1 provides:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity ...

28. Staff rule 4.8(a) provides:

(a) A change of official duty station shall take place when a staff member is assigned from one duty station to another for a period exceeding six months or when a staff member is transferred for an indefinite period.

29. Staff rule 11.2 of ST/SGB/2013/3 provides:

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

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. ...

30. ST/AI/2010/3 (Staff selection system) provides, in relevant parts:

Section 1 **Definitions**

The following definitions apply for the purposes of the present instruction:

...

(k) *Head of department/office*: official appointed by the Secretary-General to lead a department, office, regional commission or other major organizational unit of the Secretariat who is directly accountable to the Secretary-General in the exercise of the functions set out in section 5 of ST/SGB/1997/5 (as amended by ST/SGB/2002/11);

...

(m) *Hiring manager*: the official responsible for the filling of a vacant position. The hiring manager is accountable to his/her head of department/office to ensure the delivery of mandated activities by effectively and efficiently managing staff and resources placed under his or her supervision and for discharging the other functions listed in section 6 of ST/SGB/1997/5 (as amended by ST/SGB/2002/11);

...

(o) *Internal applicants*: serving staff members holding an appointment under the Staff Rules, other than a temporary

appointment, who have been recruited after a competitive process under staff rule 4.15 (review by a central review body) or staff rule 4.16 (competitive recruitment examination) ... ;

(p) *Job opening*: vacancy announcement issued for one particular position or for a set of job openings;

(q) *Lateral move*: movement of a staff member to a different position at the same level for the duration of at least one year. The new position may be in the same or a different department or office, in the same or a different duty station and in the same or a different occupational group. Inter-agency loans or other movements to and from other organizations of the United Nations common system are recognized as “lateral moves”. Within the same department or office, a lateral move will normally involve a change in functions with or without a change of supervisor. When the supervisor remains the same, there will be a lateral move if the responsibilities are substantially different, for example, if there is a different area of responsibilities or a change in the departments/offices serviced by the staff member. A change in supervisor without a change in functions does not represent a lateral move. Temporary assignments of at least three months but less than one year, with or without special post allowance, shall also qualify as a lateral move when the cumulative duration of such assignments reaches one year;

...

(w) *Roster*: a pool of assessed candidates reviewed and endorsed by a central review body and approved by the Head of Department/Office/Mission who are available for selection against a vacant position. Roster candidates may be selected without referral to a central review body;

(x) *Selection decision*: decision by a head of department/office to select a preferred candidate for a particular position up to and including the D-1 level from a list of qualified candidates who have been reviewed by a central review body

(y) *Temporarily vacant position*: position blocked for a specific period of time for the return of a staff member on temporary assignment, mission assignment, special leave, secondment or loan.

(z) *Vacant position*: position approved for one year or longer that is not blocked for the return of a staff member on temporary assignment, mission assignment, special leave, secondment or loan.

Section 2

General provisions

2.1 The present instruction establishes the staff selection system (the “system”) which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.

2.2 ... The system provides for the circulation of job openings, including anticipated staffing needs in missions through a compendium of job openings [footnote omitted] and specifies the lateral mobility requirement applicable for promotion to the P-5 level.

2.3 Selection decisions for positions up to and including the D-1 level are made by the head of department/office/mission, under delegated authority, when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. If a list of qualified candidates has been endorsed by the central review body, the head of department/office/mission may select any one of those candidates for the advertised job opening, subject to the provisions contained in sections 9.2 and 9.5 below. The other candidates shall be placed on a roster of pre-approved candidates from which they may be considered for future job openings at the same level within an occupational group and/or with similar functions.

...

2.5 Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body ...

2.6 This instruction sets out the procedures applicable from the beginning to the end of the staff selection process. Manuals will be issued that provide guidance on the responsibilities of those concerned focusing on the head of department/office/mission, the hiring manager, the staff member/applicant, the central review body members, the recruiter, namely, the Office of Human Resources Management (OHRM), the Field Personnel Division of the Department of Field Support, executive offices and local human resources offices as well as the occupational group manager and expert panel. Should there be any inconsistency between the manuals and the text of the present instruction, the provisions of the instruction shall prevail.

Section 3

Scope

3.1 The system shall apply to the selection and appointment of all staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the Staff Rules at the G-5 and above levels in the General Service category, TC-4 and above

in the Trades and Crafts category and S-3 and above levels in the Security Service category as well as to staff in the Professional and above categories and to the Field Service category for positions established for one year or longer, irrespective of the functions or source of funding. The process leading to selection and appointment to the D-2 level shall be governed by the provisions of the present instruction. For positions at the D-2 level, the functions normally discharged by a central review body shall be discharged by the Senior Review Group, prior to selection by the Secretary-General.

3.2 The system shall not apply to the following:

...

(l) Lateral movements of staff by heads of department/office/mission in accordance with section 2.5 above.

...

4.1 Immediate and anticipated job openings for positions of one year or longer shall be advertised through a compendium of job openings. The compendium shall include both position-specific job openings and generic job openings. The compendium shall be published electronically and shall be updated regularly.

4.2 Position-specific job openings shall be included in the compendium when:

(a) A new position is established or an existing position is reclassified;

(b) The incumbent separates from service;

(c) The incumbent is selected for another position under the provisions of this instruction or as a result of a lateral reassignment by the head of department/office within that department or office.

4.3 Generic job openings shall be issued in the compendium for the purpose of creating and maintaining viable rosters of qualified candidates for immediate and anticipated job openings, identified through workforce planning, in entities with approval to use roster-based recruitment, such as peacekeeping operations, special political missions and other field operations. Generic job openings shall contain information on the location of current and anticipated job openings and a clause making reference to the generic nature and roster purpose. Where such entities deem it necessary, position-specific job openings may also be issued to advertise job openings.

4.4 The hiring manager or occupational group manager shall be responsible for creating the job opening and for promptly requesting

the inclusion of its announcement in the compendium, with the assistance of the executive or local human resources office.

31. ST/AI/2010/3/Amend.1 of 29 June 2012 (amending sections 9.4 and 9.5 of the staff selection system) provides:

2. Section 9.4 is replaced by the following text:

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories and the Field Service category. Following the selection decision, roster candidates shall be retained in a roster indefinitely or until such time the present administrative instruction is amended. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening without reference to a central review body.

3. Section 9.5 is replaced by the following text:

9.5 Qualified candidates for generic job openings are placed on the relevant occupational roster after review by a central review body and may be selected for job openings in entities with approval for roster-based recruitment. The roster candidate shall be retained on an occupational roster indefinitely or until such time the present administrative instruction is amended. Should an eligible roster candidate be suitable for the job opening, the hiring manager may recommend his/her immediate selection to the head of department/office/mission without reference to the central review body.

4. The provisions of sections 9.4 and 9.5, as amended by the present instruction, shall be applicable to all placements on a roster resulting from a selection process initiated on or after 22 April 2010.

32. ST/AI/2010/4/Rev.1 (Administration of temporary appointments) provides in relevant parts:

Section 1
General

1.1 The purpose of the temporary appointment is to enable the Organization to effectively and expeditiously manage its short-term staffing needs. As stated in General Assembly resolution 63/250, “temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates”.

...

Section 2

Use and duration of temporary appointments

2.1 Pursuant to staff rule 4.12 (a), a temporary appointment may be granted for a single or cumulative period of less than one year to meet seasonal or peak workloads and specific short-term requirements and shall have an expiration date specified in the letter of appointment.

2.2 A temporary appointment may be granted for specific short-term requirements that are expected to last for less than one year at the time of the staff member’s appointment, such as:

(a) To respond to an unexpected and/or temporary emergency or surge demand involving, for example, a natural disaster, conflict, violence or similar circumstances;

(b) To meet a seasonal or peak work requirement of limited duration that cannot be carried out by existing staff members;

(c) To temporarily fill a position whose incumbent is on special leave, sick leave, maternity or paternity leave or on assignment;

(d) To temporarily fill a vacant position pending the finalization of the regular selection process;

(e) To work on a special project with a finite mandate.

2.3 A temporary appointment shall not be used to fill needs that are expected to last for one year or more.

...

Section 3

Temporary job opening, selection and appointment process

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

3.2 While the decision to issue a temporary job opening for a need for service for three months or less is made at the discretion of the

programme manager, any extension beyond three months shall require the issuance of a temporary job opening.

...

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

...

3.7 The selected candidate shall be offered a temporary appointment unless he/she already holds another type of appointment, in which case the following rules apply:

(a) Candidates holding a permanent or continuing appointment will retain their permanent or continuing appointment and will be assigned to the position to be temporarily encumbered;

(b) Candidates holding a fixed-term appointment will retain their fixed-term appointment and will be assigned to the position to be temporarily encumbered for a period not exceeding the duration of their fixed-term appointment.

33. The Hiring Manager's Manual – Manual for the Hiring Manager on the Staff Selection System (October 2012) ("the Hiring Manager's Manual") states, in relevant parts (emphasis in original):

If you plan on designating the creation of the job opening to another Hiring Manager, proceed to add the Hiring Manager to the hiring team before submitting the job request.

6.3 Assign an Alternate Hiring Manager

Prior to submitting the job request for approval to the Staffing Table Manager, as the primary Hiring Manager you can delegate the creation of the job opening to an alternate, assistant or another member of your team.

You, as the primary Hiring Manager retain full responsibility for all actions taken by the other members of your team and have final approval authority of the job opening.

...

6.10 Modifying or Cancelling a Published Job Opening

Should changes be requested in a job opening already published and/or if you wish to cancel the job opening for other reasons, you must provide a detailed written justification explaining the reasons to the Senior Recruiter. A new job opening has to be created.

The following rules apply when considering to cancel a published job opening:

1. The **Hiring Manager** shall make every effort to accurately reflect the requirements of the job opening in the job posting and evaluation criteria, before posting the opening.
2. Changes to a 'draft' or 'pending approval' job opening are allowed while the approval process is still in progress. The approving parties may return or "push-back" the case to each other, as appropriate, for additional review and changes, before reaching the final approval and posting by the **Recruiter**.
3. Changes to a published job opening are not allowed [footnote omitted]. However, should changes be requested to a published job opening, the **Hiring Manager** must provide a detailed written justification explaining the reasons for changes to the **Senior Recruiter**. The **Senior Recruiter** will cancel the job posting and if applicable, the **Hiring Manager** will create a new job opening with the necessary changes. The **Recruiter** will inform all applicants who have applied of the cancellation of the posting and if applicable, re-advertisement.
4. When the request to fill a position is withdrawn during the approval process of the job requisition, the job requisition can be cancelled (denied) by the **Senior Recruiter**, at the request of the **Hiring Manager** or the **Staffing Table Manager**.
5. When the position becomes no longer available after the job opening has been published, the **Hiring Manager** must provide a detailed written clarification for the reasons of cancellation to the **Senior Recruiter**. The **Senior Recruiter** will cancel the job posting and the **Recruiter** will inform all applicants who have applied, if any.
6. In the event the assessment panel concludes that none of the applicants were found suitable for the position, the assessment of the applicants will be properly recorded in *inspira* by the **Hiring Manager**. The **Hiring Manager** will then submit to the **Senior Recruiter** a request to cancel the job opening, along with a detailed written justification explaining the reason why none of the applicants were found suitable.
7. The **Hiring Manager** shall be aware that a job opening cannot be cancelled as long as there is one (1) suitable candidate on

the recommended list who has passed the assessment exercise. In this respect, reference is made to a judgment made in the UN Tribunal on cancellation of a vacancy announcement [footnote reads: “UNDT – Judgment No.: UNDT/2010/153, Case No.: UNDT/NBI/2009/04”].

34. The Recruiter’s Manual – Manual for the Recruiter on the Staff Selection System (October 2012) (“the Recruiter’s Manual”) states, in relevant parts (emphasis in original):

4.1 Recruitment Planning

1. *Inspira* is used to advertise vacant positions for one year or longer, irrespective of the source of funding or type of functions, in the following categories:
 - General Service category at the G-5 and above levels
 - Trade and Crafts category at the TC-4 and above levels
 - Security Service category at the S-3 and above levels
 - Professional and higher categories at all levels
 - Field Service category at all levels.

These positions are filled through the issuance of a job opening on *inspira*.

2. Notwithstanding the above, positions at the P-1 and P-2 levels are recruited primarily through competitive examinations (G to P or Young Professionals Programme (YPP) (previously the NCRE) or Language Competitive Examination (LCE)) and the subsequent managed reassignment programme for Junior Professionals. Appointments of staff may also take place through voluntary lateral reassignment initiatives and *Heads of Departments/Offices* retain the authority to transfer staff members within their departments to vacant positions at the same level without the advertisement of a job opening in *inspira* [footnote omitted].
3. Entities with approval to use roster-based recruitment publish generic job openings for the purpose of creating and maintaining viable rosters of qualified candidates for immediate and anticipated vacancies, including vacancies for less than one year. Position-specific job openings are also advertised by such entities.

- a. The entities with approval to use roster-based recruitment to fill project-related positions in the field are: Department of Field Support (DFS), United Nations Office on Drugs and Crime (UNODC), Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Human Settlements Programme (UN-HABITAT), United Nations Environment Programme (UNEP) and the Office of the High Commissioner for Human Rights (OHCHR). The intent is to ensure that these entities are able to fulfil their mandates in a timely manner. The use of the roster-based option does not apply to established positions in the field such as representative and programme management officers.

...

6. The **Hiring Manager** is responsible for initiating the job opening process in *inspira* through the selection of a base document and completion of the job details section. The **Staffing Table Manager** and **Senior Recruiter** may provide assistance in this process.
7. The **Hiring Manager** is responsible for creating the job opening in a timely manner and promptly requesting the inclusion of the job opening in the compendium. The **Recruiter** may provide assistance in this process.
8. Job openings which 160 days after initiation do not record any progress, (i.e. movement through the various stages of the recruitment process) will be cancelled. In this case, the **Hiring Manager** will have to create a new job opening and start the process all over again.

...

4.3.2 Posting the Job Opening

Job openings are posted by the **Recruiter** once all the approvals have been received. Job openings will normally be posted for the following number of days:

- G - General Service job openings will be posted for 30 calendar days
- P - Professional and higher job opening will be posted for 60 calendar days

Posting periods will be reduced in the event of roster selection. Extension of the posting periods is restricted to instances of system updates.

4.3.3 Post Job Opening Activities

Taking into account the deadline dates for job openings as outlined in the Setting Job Opening Deadline section and the fact that eligible applications are released on a daily basis in a dynamic manner, i.e. during or shortly after the deadline date of job openings, timelines are presented below in a sequential manner with the responsible roles for each stage highlighted. As soon as the **Recruiter** releases the applicants to the **Hiring Manager**, the **Hiring Manager** will begin the evaluation of the academic, work experience and language qualifications against the requirements set out in the job opening and evaluation criteria. This dynamic release of applications and early start of the evaluation process will speed up the process. Notwithstanding the evaluation of applications, knowledge-based tests and/or other assessment methods, including competency-based interviews, may only be conducted after the deadline date of the job opening and after the release by the **Recruiter** of all eligible applicants for a particular job opening to the **Hiring Manager**. The target calendar days to achieve these tasks are: ...

...

5.13 Cancel and Re-advertise the Job Opening

1. The **Hiring Manager** shall make every effort to accurately reflect the requirements of the job opening in the posting information and evaluation criteria, before posting the opening.
2. Changes to a “*draft*” or “*pending approval*” job opening are allowed while the approval process is still in progress. The approving parties may return or ‘*push back*’ the case to each other, as appropriate, for additional review and changes, before posting by the **Recruiter**.
3. Changes to a published job opening are not allowed. This prohibition includes any extension of the posting period, excepting instances of a technical upgrade to the system which would render *inspira* unavailable over 24 hours. However, should changes be requested to a published job opening, the **Hiring Manager** must provide a detailed written justification explaining the reasons for changes to the **Senior Recruiter**. The **Senior Recruiter** will cancel the job opening and if applicable, the **Hiring Manager** will create a new job opening with the necessary changes. The **Recruiter** will inform all applicants who have applied of the cancellation of the job opening and, if applicable, re-advertisement.
4. When the request to fill a position is withdrawn during the approval process of the job opening, the job opening can be

cancelled (denied) by the *Recruiter* or *Senior Recruiter*, at the request of the *Hiring Manager* or the *Staffing Table Manager*.

5. When the position becomes no longer available after the job opening has been published, the *Hiring Manager* must provide a detailed written clarification for the reasons of cancellation to the *Senior Recruiter*. The *Senior Recruiter* will cancel the job opening and the *Recruiter* will inform all applicants who have applied of the cancellation

35. The Department Head's Manual – Manual for the Department Head on the Staff Selection System ("Department Head's Manual") (April 2012) provides in relevant parts:

Chapter 8: Roster Management

...

8.1 General

1. Rosters are a pool of candidates who have been endorsed by a *Central Review body* for a particular job opening but not selected, and who have indicated an interest in being considered for selection for a future job opening with similar functions at the same level.
2. These candidates, who, in connection with a previous application for either a generic or a specific job opening, have undergone a rigorous competency and knowledge-based assessment and vetting process conducted by an *Assessment Panel* may be selected without referral to a *Central Review body*.
3. Rostered applicants are considered read, willing and able for positions with similar functions and requirements (work experience, education, languages, competencies and skills). From among this pool, available roster applicants can be attached to newly advertised position-specific job openings for consideration. Entities with approval for roster-based recruitment may decide to select a roster applicant without having to advertise the new vacant position. In this case, a review by the *Central Review body* is not required, since the rostered applicant is already vetted, hence speeding up the recruitment process.
- ...
5. To manage rosters and ensure sufficient number of available applicants in relevant rosters and to maintain the accuracy of the applicants availability and contact information, the processes

described in the following section outlines the necessary steps that **Recruiters** and **OGMs** need to engage to retain this pool of qualified applicants expeditiously available for placement.

Receivability and scope of the case

36. The Applicant contests the administrative decisions of OHRM from 5 March 2013 to cancel JO 24760 following the 12 February 2013 request for cancellation from the ASG/C and the 12 February 2013 decision of the ASG/C to laterally transfer another staff member to the vacant post. The Applicant filed a request for management evaluation of both of these decisions to the MEU on 8 March 2013 (see para. 13 above), within 60 days of the date that she was notified of the decisions, 5 March 2013 and 6 March 2013, respectively.

37. On 13 June 2013, the present application was filed before the Dispute Tribunal, within 90 days from the day when the MEU's response was supposed to be communicated to the Applicant. Therefore, the Tribunal finds that the parts of the application contesting the decisions to cancel JO 24760 and to transfer another staff member to the Post are receivable. On 29 November 2013, the Under-Secretary-General for Management informed the Applicant of the outcome of her MEU request, namely that the Secretary-General had decided to uphold the contested decisions.

38. The Applicant also contests in her application the Administration's failure "to give full, fair and timely consideration to [her] candidacy to fill several vacancies for P-4 Programme Budget Officer as follows VA# 422344, 10-FIN-DM-OPPBA-15424 ... 11-FIN-DN-OPPBA-21976, 11-FIN-DM-OPPBA-20766". The Tribunal notes that there is no evidence on the record that the Applicant filed request(s) for a management evaluation of these contested decisions.

39. In accordance with the mandatory provisions from staff rule 11.2(a) and (c), a staff member who wishes to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of employment, *shall* as a first step, submit to the Secretary-General in writing a request for

a management evaluation of the administrative decision within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

40. Pursuant to these provisions and the consistent jurisprudence of the Dispute Tribunal and Appeals Tribunal (see *Christensen* 2013-UNAT-335 and *Wamala* 2013-UNAT-300), an application filed before the Dispute Tribunal without the Applicant having previously requested a management evaluation before the MEU is not receivable.

41. Therefore, the Tribunal considers that the appeal against the non-selection decisions for a P-4 Programme Budget Officer “VA# 422344, 10-FIN-DM-OPPBA-15424 ... 11-FIN-DM-OPPBA-21976, 11-FIN-DM-OPPBA-20766” is not receivable.

42. The Tribunal notes that, on 3 December 2013, the Applicant filed a response to Order No. 322 (NY/2013) in which she included an additional submission in relation to the non-selection decision for a Programme Budget Officer post at the P-4 level advertised under Job Opening number 13-FIN-DM-OPPBA-27499-R-New York (“JO 27499”) and a harassment complaint filed with the Ethics Office as part of this judicial review. By Order No. 274 (NY/2014) dated 9 October 2014, the Applicant’s request to consider these two new additional claims as part of the present case was rejected.

43. As set out in the application and circumscribed by Order No. 274 (NY/2014), the issue for consideration in the present case is the 5 March 2013 OHRM decision following the 12 February 2013 request by the ASG/C to cancel JO 24760 and to laterally transfer Ms. CP to the Post. The additional claims set out in the Applicant’s submission dated 3 December 2013— i.e. relating to the non-selection decision for the post advertised under JO 27499 (the former post of Ms. CP) and the harassment complaint filed with the Ethics Office—are not part of this judicial review. Other decisions, acts or omissions of the Administration in its dealing with the Applicant

included in the application will only be taken into account as part of the factual context of the case.

44. JO 24760 was advertised on Inspira with a posting period of 29 August to 11 November 2012. The Applicant applied for this position on 31 August 2012.

45. On 12 February 2013 the then ASG/C decided to request cancellation of JO 24760 and to laterally transfer Ms. CP to the advertised post. On 5 March 2013, OHRM approved the request and cancelled the job opening. The Applicant was notified on 6 March 2013. The Tribunal considers that the contested decision mentioned above has two components:

- a. The 5 March 2013 OHRM decision to cancel the job opening for the Post following the 12 February 2013 ASG/C decision to request the cancellation of the job opening; and
- b. The 12 February ASG/C decision to laterally transfer Ms. CP to the Post.

The role of the hiring manager in creating the job opening for the Post

46. The Tribunal notes that sec. 4.4 of ST/AI/2010/3 states that the hiring manager is responsible for *creating* the job opening and for promptly requesting the inclusion of the announcement in the compendium, with the assistance of the executive or local human resources office. In accordance with sec 5.1.4 of the Recruiter's Manual, the hiring manager "completes a job request, prepares evaluation criteria, drafts the Job Opening and submits it to the Staffing Table Manager". Section 5.1.1 of the Recruiter's Manual states that "the Recruiter, upon request from the Hiring Manager, may assist the Hiring Manager during the creation of job openings in line with the instruction provided in this chapter".

47. The Tribunal considers that these provisions are mandatory and the hiring manager is the only person who has the right and the duty to create the job opening.

In case s/he needs support in creating the job opening, a request for assistance may be addressed to the recruiter—the executive or local human resources office. The Tribunal considers that the purpose of these provisions is to protect the integrity and objectivity of the selection process.

48. Staff regulation 1.2(e) states that “by accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view”. It follows that when staff members discharge their functions, they should only act in the interests of the Organization and not in their own interest. The Tribunal considers that this is one of the main reasons why only the hiring manager and, if requested, staff members from OHRM (executive or local office) are to be involved in the creation of a job opening—to ensure not only the fairness of the selection process, but also the credibility of the process, which must always be perceived as objective. The Tribunal considers that another reason that the hiring manager has the entire responsibility for creating the job opening is to protect the right of all eligible staff members to be considered for the vacant post. The involvement of other staff members in creating the job opening may preclude them from applying for the post in order to preserve the integrity of the staff members involved, the fairness of the selection process, and the rights of other applicants.

49. The Tribunal notes that there are no specific provisions in ST/AI/2010/3 to recognize the hiring manager’s discretion to decide to have a hiring team, in which situation what is the procedure for it; who can be appointed as member(s) of the team; what are the eligibility criteria and the incompatibilities of its member(s); who can be the alternate Hiring Manager and in which situations s/he can be designated; what are their competencies and responsibilities, etc.

50. The Tribunal considers that sec. 6.3 of the Hiring Manager’s Manual contradicts sec. 4.4 from ST/AI/2010/3, because it gives the hiring manager the discretion to decide to have a hiring team and to designate his function to create the job opening to other persons, like an alternate hiring manager, assistant or other member of his team.

51. The Tribunal considers that until the Administration addresses these inconsistencies through an amendment to the Hiring Manager's Manual and/or to sec. 4.4 from ST/AI/2010/4, it is recommended that in cases where the Hiring Manager decides that a hiring team is required, s/he can establish such a team, which should be officially announced in order to maintain the fairness of the selection process. The proposed members, before accepting to be part of the hiring team should confirm to the hiring manager that they are not interested in applying for the future job opening and should be informed by the hiring manager that they will be no longer eligible for a transfer, appointment/assignment or lateral move to the vacant post. The Tribunal considers that these steps, being part of the selection process, should be set out in a written procedure.

52. The Tribunal notes that, in the present case, there is no evidence on the record to indicate that the Hiring Manager decided to have a hiring team and that he delegated his function to create the job opening advertised through JO 24760 to Ms. CP, as a member of the hiring team, before submitting the job request. After the job opening was created and published, Ms. CP decided not to apply for the Post, given that part of her official functions was the creation of the job opening for the Post.

The rostering of the Applicant

53. In the present case, the Applicant applied for the position of Programme Budget Officer at the P-4 level as advertised through Job Opening number 10-FIN-OPPBA-15424-R-NEW YORK. On 17 November 2011, she was informed by OHRM that she was not the selected candidate, but that she had been placed on a roster of pre-approved candidates for potential consideration within a time frame of three years, beginning 1 December 2011, for future job openings with similar functions at that level at the UN Secretariat. Her status was confirmed on 4 May 2012.

54. Sections 9.4 and 9.5 of ST/AI/2010/3 were amended by ST/AI/2010/3/Amend.1 of 29 June 2012 to state that all staff members placed on

a roster for either a position-specific or generic job opening, as a result of a selection process initiated on or after 22 April 2010, would be retained on that roster indefinitely. Prior to the amendment, candidates who were placed on a roster for either a position-specific or generic job opening were to be retained on that roster “for a period of two years for male candidates and three years for female candidates after the first day of the month following the selection decision”. ST/AI/2010/3/Amend.1 also eliminated the previous mandatory requirement for a decision to select an external candidate over an internal roster candidate to be justified in writing and approved by OHRM. The amendments came into effect on 29 June 2012. Therefore, from 29 June 2012, the Applicant is to remain a roster candidate indefinitely or until an amendment to ST/AI/2010/3/Amend.1 is passed. Therefore, she was on the roster on 31 August 2012, when she applied for the Post and after the cancellation of JO 24760 on 5 March 2013.

The staff selection system versus lateral moves/lateral assignments and transfers

55. In *Korotina* UNDT/2012/178 (not appealed), the Tribunal stated as follows:

As the Tribunal stated in *Villamorán* UNDT/2011/126, at the top of the hierarchy of the Organization’s internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General’s bulletins, and administrative instructions. Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (*Tolstopiatov* UNDT/2010/147, *Ibrahim* UNDT/2011/115, *Morsy* UNDT/2012/043).

Just as a staff rule may not conflict with the staff regulation under which it is made, so a practice, or a statement of practice, must not conflict with the rule or other properly promulgated administrative issuance which it elaborates (Administrative Tribunal of the

International Labour Organization, Judgment No. 486, In re Léger (486)). It is also important to highlight that a distinction must be made between matters that may be dealt with by way of guidelines, manuals, and other similar documents, and legal provisions that must be introduced by properly promulgated administrative issuances (*Villamorán, Valimaki-Erk* UNDT/2012/004).

56. Section 2.1 of ST/AI/2010/3 (Staff selection system) states:

The present instruction establishes the staff selection system (the “system”) which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.

57. Section 2.6 of ST/AI/2010/3 states:

This instruction sets out the procedures applicable from the beginning to the end of the staff selection process. Manuals will be issued that provide guidance on the responsibilities of those concerned focusing on the head of department/office/mission, the hiring manager, the staff member/applicant, the central review members, the recruiter, namely, the Office of Human Resources Management (OHRM), the Field Personnel Division of the Department of Field Support, executive offices and local human resources offices as well as the occupational group manager and expert panel. Should there be any inconsistency between the manuals and the text of the present instruction, the provisions of the instruction shall prevail.

58. It results that ST/AI/2010/3 (Staff selection system) establishes the procedures applicable to the staff selection process (sec. 2.6). The Department Head’s Manual and the manuals for the Applicant, the Hiring Manager, the Recruiter and the Central Review Bodies, were issued in accordance with sec. 2.6 of ST/AI/2010/3. The Tribunal considers that the issuance of these manuals was mandatory under sec. 2.6, which states that “[m]anuals *will* be issued that provide guidance (emphasis added)”, and that the steps set out in these manuals are therefore mandatory and form part of the procedures applicable from “the beginning to the end” of the staff selection process. The Tribunal considers that these guidelines must be respected during the entire staff selection process, except where there is an inconsistency between the text of the manuals and the text of ST/AI/2010/3. In these circumstances, the text of ST/AI/2010/3 will prevail.

59. In each of the manuals for the Hiring Manager, Recruiter, and Central Review Body, there is a similar provision, set out in sec. 1.1 of each manual, which states that the respective manuals serve as “a comprehensive step-by-step guide on the staff selection process”.

60. The Tribunal considers that, in accordance with the above-mentioned provisions, the manuals for the Hiring Manager, Recruiter and Central Review Body are all comprehensive step-by-step guides on the staff selection process, which means (in accordance with the definition of the word “comprehensive” in the *Oxford English Minidictionary* (Oxford University Press, 1995) and the *Webster’s New World College Dictionary* (Wiley Publishing, Inc., 2010)) that they are including/dealing with all or many of the relevant details of the staff selection process. Further, the Tribunal considers that, once adopted and published on Inspira, these manuals, which establish in detail the steps to be followed in the selection process, must be respected by the Administration.

61. In *Gordon* UNDT/2011/172, para. 24 (not appealed), the Tribunal reiterated that, when the Administration chooses to use a procedure, it is bound to fully comply with it (see also *Mandol* UNDT/2011/013, para. 39 (not appealed); *Applicant* UNDT/2010/211 (not appealed); *Eldam* UNDT/2010/133 (not appealed)).

62. Section 2.1 from sec. 2 (General provisions) of ST/AI/2010/3 (Staff selection system) states that the administrative instruction establishes the staff selection system, which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat. The first and second sentences of sec. 2.3 establish the general rule that selection decisions for positions up to and including the D-1 level are made by the head of department/office/mission under delegated authority, when the Central Review Body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures has been followed. If a list of qualified candidates has been endorsed by the Central Review Body, the head of department/office/mission may select any one of these candidates for the advertised job opening subject to the provisions from sec. 9.2 and 9.5 of ST/AI/2010/3.

63. The last sentence from sec. 2.3 of ST/AI/2010/3 states (emphasis added):

The other candidates *shall* be placed on a roster of pre-approved candidates from which they may be considered for future job openings at the same level within an occupational group and/or with similar functions

64. “Roster” is defined in para. (w) of sec. 1, the definitions section of ST/AI/2010/3, as “a pool of assessed candidates reviewed and endorsed by a central review body and *approved by the Head of Department/Office/Mission* who are *available* for selection against a vacant position without referral to a central review body (emphasis added)”.

65. Section 17.1 of the Recruiter’s Manual and sec. 15.1 of the Hiring Manager’s manual define “rosters” as follows:

Rosters consist of candidates who have been endorsed by a **Central Review body** for a particular job opening and who have indicated an interest in being considered for selection for a future job opening within the same job code. A job code is defined by the following parameters: specific job family, category/level, functional title and roster type.

These candidates, who, in connection with a previous application for either a generic or a specific job opening, have undergone a rigorous competency and knowledge-based assessment and vetting process conducted by an **Assessment Panel** may be selected without referral to a **Central Review body**.

Rostered applicants are considered ready, willing and able for positions with similar functions and requirements (work experience, education, languages, competencies and skills). Roster applicants can express their interest in newly advertised position-specific job openings for consideration by submitting their updated PHP and cover letter via inspira. Entities with approval for roster-based recruitment may decide to select a roster applicant without having to advertise the new vacant position. In this case, a review by the **Central Review body** is not required, since the rostered applicant is already vetted, hence speeding up the recruitment process.

66. Section 3.1 of the Recruiter’s Manual and the Hiring Manager’s Manual each state that “[t]he process of creating a job opening begins when the **Hiring Manager**

identifies one or more positions that need to be filled (emphasis in original)” and that the process of creating a job opening *ends* when:

- Entities with approval for the roster-based recruitment select a roster candidate without having to advertise the new vacant position. In this case, a job opening must be created to record the need to fill the vacancy, but the job opening does not need to be published.
- The Recruiter [OHRM] publishes the job opening so interested applicants can apply for consideration.

67. Section 4.1 of the Hiring Manager’s Manual and Recruiter’s Manual state that Inspira is used to advertise vacant positions for one year or longer, irrespective of the source of funding or type of functions, in certain situations for Professional and higher categories at all levels. Section 4.1.2 of each of these manuals states that (italics added, bold italics in original):

Appointments of staff may also take place through *voluntary* lateral reassignment initiatives and ***Heads of Departments/Offices*** retain the authority to transfer staff members within their departments to vacant positions at the same level without the advertisement of a job opening in *inspira* [footnote omitted].

68. Section 10.4 of ST/AI/2010/3 states (emphasis added):

If the selected candidate fails to take up the functions within the specified time frames for personal reasons or vacates the position within one year, the head of the department/office may select another candidate from the list endorsed by the central review body with respect to the particular job opening, or in the case of peacekeeping operations or special political missions, from the roster within the same occupational group. If no such candidate is available, *the head of the department/office may select another candidate from the roster **or** recommend the position be advertised in the compendium if no roster candidate is found to be suitable.*

69. Section 2.5 of ST/AI/2010/3 states:

Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the

same level without advertisement of the job opening or further review by a central review body.

70. Section 3.2 of ST/AI/2010/3 states that the staff selection system shall not apply to, *inter alia*:

...

(k) Movement of staff previously appointed in accordance with staff rules 4.15 or 4.16 who have agreed to participate in voluntary reassignment programmes. The Assistant Secretary-General for Human Resources Management shall decide on the reassignment of each staff member, without reference to a central review body. The programmes, aiming to stimulate the development of staff, are strictly voluntary. Such movement shall be limited to incumbents of positions approved for inclusion in a voluntary lateral reassignment programme and shall not affect the application of the normal rules governing promotion or selection of staff for job openings;

(l) Lateral movements of staff by heads of department/office/mission in accordance with section 2.5 [of ST/AI/2010/3]”.

71. The Tribunal considers that the last sentences from sec. 2.3 (relating to rosters) and sec. 2.5 (relating to transfers) of ST/AI/2010/3 establish two exceptions from the general rule of filling vacant positions through the advertisement of a job opening on Inspira. These exceptions—immediate selection from the roster or a transfer decided by the head of department—represent expedited procedures to fill a vacant post.

72. The Tribunal also considers that, as results from sec. 3.1 of the Hiring Manager’s and the Recruiter’s manuals, and sec. 2.5 of ST/AI/2010/3, the selection process can end during the creation of the job opening by the hiring manger, and before s/he decides to recommend to the Recruiter to publish (advertise, post) the job opening in the compendium in Inspira, when the head of department decides:

a. To select a qualified roster candidate following the hiring manager’s direct and immediate recommendation of one or more pre-approved candidates from the roster; or

b. To transfer “without the advertisement of the job opening” to the vacant post another staff member at the same level, if there is such a voluntary request or agreement from him/her.

73. In *Nwuke* UNDT/2013/160, the Tribunal stated that lateral moves may be seen as an expedited method of recruitment akin to the use of pre-screened rosters. However, a lateral move is a discretionary measure that must be used in accordance with the established procedural rules and must not be arbitrary or motivated by factors inconsistent with proper administration. The Tribunal considers that these findings are applicable also to transfers.

74. This Tribunal is of the view that, because secs. 2.1 to 2.3 of ST/AI/2010/3 refer to the selection system, including the roster, and sec. 2.5 refers to transfer, which is excluded from the scope of the staff selection system, in accordance with sec. 3.2(1), the hiring manager and the head of department must give priority and exercise their discretion firstly by implementing the roster system right from the beginning of it, deciding if any pre-approved candidate from the roster (who is reviewed and endorsed by a central review body and has been approved by the head of department) can be immediately and directly recommended and selected for the post. It is only if no such recommended candidate is selected for the post by the head of department that s/he has the discretion to transfer an interested staff member to the vacant post.

75. Further, the Tribunal is of the view that the drafters of the staff selection system policy had the intention of creating a stable and competitive system to select and promote staff members to vacant posts, which should be the generally applicable system. Otherwise, filling vacant posts through a transfer would create a chain of other vacancies and the system created by ST/AI/2010/3 can be circumvented and/or blocked.

76. If, during the creation of the job opening, the hiring manager considers that there is no suitable and/or available candidate on the roster to be recommended and

a transfer is not an appropriate option for the head of department, the job opening is published on Inspira.

77. The Tribunal notes that while the procedural steps for selection from the roster *after the publication of the job opening* are detailed and covered by the manuals, there are no procedural steps provided for the first option in secs. 3.1 and 17.1 mentioned in the Hiring Manager's and Recruiter's manuals, respectively, when the selection process ends *during the creation of the job opening, by the hiring manager recommending, and the head of department selecting a roster candidate without having to advertise the new vacant position.*

78. In the present case the record shows that after JO 24760 was created by the Hiring Manager, the Recruiter published it on Inspira for the period 29 August to 11 November 2012. The Tribunal considers that the following conclusions can be drawn from the fact that the vacant post was published on Inspira and from the content of the vacancy announcement:

- a. The job opening was for a position of one year or longer;
- b. The Hiring Manager (Chief of Section I, OPPBA) did not recommend to the head of the department any of the roster candidate(s) pre-approved (including the Applicant) before the publication of the job opening. There is no evidence to support the Applicant's statement that from the 191 applicants, she was the only roster candidate;
- c. The Head of Department (ASG/C) did not decide to transfer a P-4 staff member within the department, including before the publication of the job opening 24760 and the Tribunal finds that there is no evidence that Ms. CP expressed her will for a lateral transfer before or after the creation and the publication of the JO 24760 or during the posting period, as stated in the contested decision.

The decision to cancel the job opening for the Post

79. Section 6.10 (Modifying or Cancelling a Published Job Opening) of the Hiring's Manager's Manual states:

Should changes be requested in a job opening already published and/or if [the hiring manager] wish[es] to cancel the job opening for other reasons, [s/he] must provide a detailed written justification explaining the reasons to the Senior Recruiter. A new job opening has to be created.

80. Section 4.1.8 of the Recruiter's Manual states (emphasis in original):

Job openings which 160 days after initiation do not record any progress, (i.e. movement through the various stages of the recruitment process) will be cancelled. In this case, the *Hiring Manager* will have to create a new job opening and start the process all over again.

81. Section 6.10 of the Hiring Manager's Manual requires the hiring manager to provide a detailed written justification if he or she wishes to cancel a job opening. Section 4.1.8 states that if there is no progress 160 days after the initiation of a job opening, that job opening "will" be cancelled. The Tribunal considers that sec. 6.10 of the Hiring Manager's Manual and sec. 4.1 of the Recruiter's Manual are relevant in the present case and that there is no manifest contradiction between these provisions and ST/AI/2010/3 (Staff selection system).

82. The Tribunal notes that the Applicant filed an application for suspension of action pending management evaluation on 11 March 2013 and the Respondent's reply was filed on 14 March 2013. The 12 February request to cancel the job opening was implemented on 5 March 2013 and an automatic notification was sent to all candidates through Inspira. The announcement stated:

Thank you for submitting your application for the Programme Budget Officer (24760) position in the office of Programme, Planning, Budget and Accounts.

The recruitment for this position has been cancelled. Please note that it may be re-advertised under different Job Opening at a later date. ...

83. The explanation provided for the cancellation in the memorandum of the then ASG/C dated 12 February 2013 was:

Job opening 24760 was advertised in Inspira for the period 29 August to 11 November 2012 to fill a vacant post of Programme Budget Officer at the P-4 level in Service I of PPBD (IMIS post no. 56843). In view of the demands of servicing the General Assembly during the main part of the sixty-seventh session and the subsequent workload related to the preparation of the proposed programme budget for the biennium 2014-2015, Service 1 has not begun the evaluation of applicants for job opening.

84. On 12 February 2013, when the then ASG/C requested the cancellation of the job opening, 167 days had passed without any progress through the different stages of the recruitment process. Therefore, the request to cancel JO 24760 complied with sec. 4.1.8 of the Recruiter's Manual, which states that a job opening "will" be cancelled if no progress is made after 160 days. The ASG/C's memorandum to the Executive Office of the Department of Management dated 12 February 2013 also contained a detailed written justification as required by sec. 6.10 of the Hiring Manager's Manual.

85. The Tribunal considers that the then ASG/C's decision to request the cancellation of the job opening was based solely on the fact that more than 160 days had passed since the initiation of the job opening without any progress through the different stages of the recruitment process. The Applicant submitted that the vacancy was cancelled solely to accommodate the lateral transfer of Ms. CP and that the real reason for the decision was to "sabotage" her candidacy. There is no evidence to suggest that the decision to cancel the job opening was made exclusively to accommodate a lateral transfer for Ms. CP. There is also no evidence to suggest that, in making the decision, the ASG/C intended to sabotage or block the Applicant from being promoted. Finally, there is no evidence that the decision to request the cancellation of the job opening was tainted by any bias, prejudice, discrimination, abuse of authority or any other extraneous factors, as claimed by the Applicant. The Tribunal finds that the decision to cancel the job opening was a lawful exercise

of the Respondent's discretion based on the reasoned request for cancellation made by the ASG/C.

The decision to laterally transfer Ms. CP to the vacant post

86. The Tribunal notes the comments provided by the ASG/C to the MEU, as quoted in their decision dated 29 November 2013, which indicates that Ms. CP did not apply for the post (emphasis added):

The Controller states that, as no progress was being made to fill the job opening, she decided to cancel the job opening and to fill the post via lateral transfer. The Controller states that the staff member who was transferred to the post had previously expressed interest in moving laterally within the Division. *The Controller notes that this staff member did not apply for the job opening as it was part of her functions to create the job opening.*

87. On 12 February 2013, the then ASG/C decided to request cancellation of JO 24760 and to laterally transfer Ms. CP to the advertised post. The memorandum stated: "I have now decided to laterally move [Ms. CP] ... to the vacant position". As results from the decision, the staff member, the Chief of the Service I and the Director of PPBD agreed to the transfer. On 5 March 2013, the Executive Office, Department of Management requested that OHRM cancel JO 24760 stating that it "will be filled through a lateral reassignment which was approved by the Controller on 12 Feb[ruary] 2013". The announcement for cancellation was published on the same day.

88. The Tribunal underlines that it is a general principle of contract law that any change of a bilateral and consensual contract, including the employment contract, must be agreed by both parties.

89. A change of the employment contract can refer to the following elements: the duration of the contract, place of work, type of work, working conditions, salary, working time, and resting time.

90. A change of the employment contract usually consists of a temporary or permanent change of the location and/or type of work and can be determined by the need for a better organization of the work or social-economic necessities, but also by personal interests of the employees.

91. The employment contract can be modified:

a. Consensually by the agreement of the parties or unilaterally by the employer. The consensual agreement to modify the contract, which is the general rule, has no restrictions but must respect the general principles of law, which are against any imposed unlawful transactions and/or restrictions to the employee's essential elements of contract—the location of work, type of work and salary. As an exception from the general rule, the employer can only unilaterally decide without the consent of the employee to temporarily modify the location and type of work in the interest of the Organization, for a better organization of work, as a disciplinary measure for example a demotion, or as a protection measure for staff members' health benefit;

b. In relation to the type of work and/or location of work in the same or different organizational units, duty stations, missions or occupational groups;

c. Temporarily or permanently.

92. The Tribunal notes that three different legal terms were used to describe Ms. CP's change of post: lateral transfer, lateral move and lateral reassignment.

93. Section 2.1 of ST/AI/2010/3 states:

The present instruction establishes the staff selection system ("the system") which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.

94. Section 2.2 of ST/AI/2010/3 states (emphasis added):

The system provides for the circulation of job openings, including anticipated staffing needs in missions *through a compendium of job openings* [footnote omitted] and specifies the lateral mobility requirement applicable for promotion to the P-5 level.

95. As results from secs. 1.1, 2.1, 2.2, 2.3, 3.1, 3.6 and 3.7 from ST/AI/2010/4/Rev.1 (“Administration of temporary appointments”), the purpose of a temporary appointment is to enable the Organization *to effectively and expeditiously* manage its *short staffing needs* and it may be granted for a single or cumulative period of *less than one year*. The temporary appointment must (“shall”) have an expiration date specified in the letter of appointment, *must (“shall”) not be used* to fill needs that are expected to last for one year or more and, when a need for service for more than three months but less than one year is anticipated, a temporary job opening shall be issued by the programme manager. The selected candidate shall be offered a temporary appointment unless s/he already holds another type of appointment. Candidates holding a permanent or continuing appointment *will retain* their permanent or continuing appointment and *will be assigned* to the position to be temporarily encumbered. Candidates holding a fixed-term appointment *will retain* their fixed-term appointment and *will be assigned* to the position to be temporarily encumbered for a period not exceeding the duration of their fixed-term appointment.

96. Section 1(q) of ST/AI/2010/3 defines a lateral move, to which ST/AI/2010/3 does not apply in accordance with sec. 3.2(1), as (emphasis added): “movement of a staff member to a different position at the same level for the duration of at least one year. ... Temporary assignments of at least three months but less than one year, with or without post allowance *shall* also qualify as a lateral move when the cumulative duration of such assignments reaches one year”. Lateral movements of staff by heads of department/office/mission can be taken in accordance with sec. 2.5.

97. It results that in all situations which involve recruitment, placement, promotion or mobility of staff within the Secretariat under ST/AI/2010/3 or a transfer, lateral move and/or a lateral assignment, a job opening must be created.

98. In accordance with sec 3.2(b) and (l) of ST/AI/2010/3, the staff selection system is also not applicable to lateral movements of staff made by a head of department/office/mission in accordance with the discretion set out in sec. 2.5 of ST/AI/2010/3 or to temporary appointments. The Tribunal finds that ST/AI/2010/4/Rev.1 (Administration of temporary appointments) is also not applicable to lateral movements. Therefore, the Tribunal considers that currently there is no legal and transparent legal procedure established for lateral moves and transfers, they continue to be exempted together with transfers from the *staff* selection procedure and to be important parallel procedures.

99. Section 2.5 from ST/AI/2010/3 states (emphasis added):

Heads of departments/offices retain the authority to *transfer* staff members within their departments or offices, including to another unit of the same department in a different location, to *job openings* at the same level *without advertisement of the job opening* or further review by a central review body. Heads of mission retain the authority to transfer staff members, under conditions established by the Department of Field Support, within the same mission, to *job openings* at the same level without advertisement of the job opening or further review by the central review body.

100. The Tribunal also notes that the relevant applicable law mentioned above is using contradictory terminology. The Tribunal considers that the last sentence from sec. 1(q) of ST/AI/2010/3, which entered into force on 22 April 2010: “lateral move: movement of a staff member to a different position at the same level for the duration of at least one year ... temporary assignments of at least three months, but less than one year ... shall also qualify as a lateral move” is in contradiction with sec. 2.3 of ST/AI/2010/4 Rev.1, which entered into force on 26 October 2011, and states: “a temporary appointment shall not be used to fill needs that are expected to last for one year or more” (the same rule is applicable to the temporary assignments). Therefore, currently there are in force two mandatory provisions which are annulling each other.

101. Moreover, there is no definition of the following used terms: “appointment”, “recruitment”, “movement”, “transfer”, “assignment” and, consequently, “lateral

transfer”, “lateral move”, “lateral appointment/assignment”. There is also no specific mention and/or distinction regarding the nature of such change(s) of the position, functions, supervisor, responsibilities, department/office, duty station and/or of the occupational group. Also, there is no provision to establish if the head of department can take discretionary measures based only on a voluntary request from an interested staff member(s), like in the case of a lateral reassignment or transfer, as indicated in section 4.1 from the Hiring Manager’s and Recruiter’s manuals, or s/he can exercise this discretionary authority without the consent of the staff member in certain situations mentioned in para. 92 above.

102. The Tribunal notes that in the case of a temporary assignment, which is unclear if it is identical to a lateral assignment, a selected staff member who already has a permanent or continuous appointment will retain this status and will be assigned to the position to be temporarily encumbered. The Tribunal considers that it is unclear if, in the case of a lateral move, a staff member with a permanent or continuous appointment is also retaining this status or not for its duration (one year or longer), taking into consideration the elements included in the definitions for “vacant position” and “temporary vacant position” in ST/AI/2010/3.

103. The Tribunal underlines that there are essential legal distinctions between a “temporary assignment”, a “lateral move” and a “transfer” of an employee, which are determined by the duration of such a measure, the change of the type and/or location of work, and the parties’ involvement. While a temporary assignment and lateral move are having a limited/temporary duration, are discretionary unilateral changes made by the employer, and do not require the staff member’s consent, a transfer is permanent, and requires the consent of the heads of the two different employers, together with the voluntary request or consent of the concerned staff member. They represent two different legal concepts with different legal effects on the contractual status of the staff member.

104. The Tribunal notes that the confusion between lateral move and lateral transfer still persists even if in *Kozlov and Romadanov* UNDT/2011/058 (not

appealed), issued on 30 March 2011, after ST/AI/2010/3 entered into force, the Tribunal noted at para. 59:

It may be helpful to differentiate distinct terminological concepts of “lateral transfer” under ST/AI/2002/4, Annex I, sec. 1(a) and footnote (a), versus “lateral move” for mobility purposes (ST/AI/2002/4 “Definitions”—Lateral moves, versus the required selection procedures for internal vacancies (see ST/AI/2002/4 “Definitions”—Internal candidacies)). It is clear from ST/AI/2002/4 that a lateral transfer under Annex I, sec. 1(a), is not the same as a lateral move.

The Tribunal considers that the above mentioned aspects must be clarified by the Administration, who is expected to adopt as soon as possible new provisions to define all the concepts and unify the terminology and to establish the area of applicability of the lateral moves and transfers in order to avoid any future confusion among the decision-makers and the staff members concerned in accordance with the unicity of the Organization.

105. Also the Tribunal underlines that loans are different from secondments and is unclear if they are both to be considered lateral moves or not.

106. In *Parisi* UNDT/2014/062 (not appealed), the Tribunal stated:

40. ... A secondment is a movement of a staff member from one organization (releasing organization) to another (receiving organization) in the interest of the receiving organization for a fixed period of time during which the staff member will normally be paid by, and be subject to, the staff regulations and rules of the receiving organization. ...

41. ... A loan is a movement of a staff member from one organization to another for a limited period, during which he will be subject to the administrative supervision of the receiving organization, but will continue to be subject to the staff regulations and rules of the releasing organization.

107. It appears from sec. 1(q) of ST/AI/2010/3 that they are to be considered as lateral moves and ST/AI/2010/3 is also not applicable to these important changes of the employment contract.

108. The Tribunal considers that secs 1(q) and 3.2(l) of ST/AI/2010/3, according to which a lateral move, and implicitly a temporary assignment, can be taken based on sec. 2.5, are exceeding sec. 2.5. As presented above, a transfer is a permanent modification of a contract, while a lateral move and temporary assignment are temporary changes. The Tribunal concludes that a lateral move cannot be at the same time a temporary and permanent modification of the employment contract. In this sense, staff rule 4.8 (ST/SGB/2013/3) makes a clear and mandatory distinction between assignment and transfer and states: “a change of official duty station shall take place when a staff member is assigned from one duty station to another for a period exceeding six months or when a staff member is transferred for an indefinite period”.

109. The Tribunal concludes that the head of department retains discretion only to transfer a staff member to a vacant post, at the same level as the one of the transferred staff member as clearly stated by sec. 2.5, and this discretion cannot be extended or expanded for temporary modifications such as lateral moves and/or temporary assignments, since these changes are not transfers.

110. The Tribunal considers that, after its cancellation, a job opening does not exist anymore, and consequently cannot be filled through a transfer, a lateral move or a lateral reassignment. A new job opening must be created by the hiring manager, which represents a new selection during which the head of the department can again exercise his discretion and decide, before the publication of the job opening in Inspira, if he will select a recommended, qualified, pre-approved roster candidate or if s/he will decide to fill the post in accordance with sec. 2.5 from ST/AI/2010/3, or through a lateral move (one year or longer)—section 3.1 and 17.1 from the manuals. If the job opening is temporary, then a temporary job opening must be created by the hiring manager (less than one year), and the same steps may be followed to end the selection process before the publication of the temporary job opening.

111. Consequently, such a measure is unlawful if the transfer is to a vacant post for which a job opening was not created or no longer exists. The existence of the job

opening is a required condition not only for transfers, but also for temporary appointments/assignments in accordance with sec. 3.1 (“Temporary job opening”) from ST/AI/2010/4/Rev.1. Also, if the vacant post is to be filled through a lateral move, a job opening is also required to be created to record the need to fill the vacancy.

112. In the present case, the record shows that a decision was made on 12 February 2013 to laterally transfer Ms. CP to a job opening which existed only until 5 March 2013 when it was cancelled. Despite the clear language from the decision, the Executive Office, Department of Management referred, on 5 March 2013, to a lateral reassignment of Ms. CP to the vacant post, which is less than one year. There is no evidence on the record that a new job opening or temporary job opening was created by the Hiring Manager between 5 March and 1 July 2013. Therefore, Ms. CP was transferred to a post for which a new job opening was not created.

113. Further, the Tribunal notes that the decision from 12 February 2013 was issued based on the agreement of the staff member (Ms. CP), the Chief of Service I, and the Chief of OPPBA and the Tribunal finds that since these elements are specific to a transfer, the real will of the parties was for a lateral transfer, which is permanent in nature. That is why a job opening was advertised for the post of Ms. CP post (job opening 24479), which was considered vacant and another staff member was selected for it.

114. However, it was only four months later, on 1 July 2013, that the reassignment of Ms. CP was effectively implemented, and she was only assigned temporarily to the vacant post, for six months only. This occurred only after the selection process for her previous post was finalized. The selected staff member for her previous P-4 post started his work on the same date: 1 July 2013.

115. The Tribunal concludes that the decision to laterally transfer Ms. CP to the vacant post is unlawful for the following reasons:

- a. The decision was made before the official cancellation of the job opening;
- b. After the vacancy was cancelled, the Hiring Manager did not initiate a new selection process by creating, as required, a new job opening and the transfer was implemented as a lateral reassignment for which a temporary job opening was not created;
- c. The Head of the Department did not exercise her discretion vis-à-vis the pre-approved roster candidates for the post, before she decided to fill the vacancy by a lateral transfer/move of Ms. CP based on the agreement of Ms. CP, the Hiring Manager, and the Head of Department, PPBD;
- d. Ms. CP had been involved in creating the job opening. She was effectively transferred to the post on 1 July 2013, more than four months after the decision was taken, and after the present application was filed before the Tribunal on 7 June 2013.

116. The Tribunal finds that the Applicant's fundamental right to be fairly considered for the Post, after the cancellation of the job opening, was breached and the Administration's decision to fill a vacant post through lateral transfer represented an arbitrary use of its discretion conferred by section 2.5 of ST/AI/2010/3.

Damages

117. The Tribunal underlines that in the present case, the closing submissions were filed by the parties on 24 October 2014, before the General Assembly voted for an amendment to art. 10.5 of the Dispute Tribunal's Statute by Resolution A/RES/69/203 on 18 December 2014. Consequently, the Tribunal finds that the version of art. 10.5 that applied prior to the enactment of the amendment is the relevant provision applicable in this case.

118. The Tribunal notes the Applicant requested in her application:

... adequate financial compensation for delays, and failure to provide fair, full and timely consideration for the previous exercises 15424, 21959, 20766 and for the cancellation of vacancy 24769 [sic] for which [the Applicant] was rostered against without justification;

Adequate financial compensation for adverse effect on morale and professional reputation as well for the damage incurred.

Compensation of (2) years net salary for cancelling the vacant post because [she] was the only rostered internal candidate.

The Applicant also requested that the Respondent be ordered to give priority to her “internal rostered candidacy” within PPBD/OPPBA.

119. In *Frohler* UNDT/2010/135, the Tribunal held that in order to obtain compensation, it is not enough for an applicant to claim that a procedural irregularity was committed during a selection process, s/he should also establish that this irregularity caused her/him a direct prejudice. The Applicant must therefore prove that, if no irregularity had been committed, s/he had a serious chance of being selected for the Post. Similarly, in *Tsoneva* UNDT/2010/178, *Vangelova* 2011-UNAT-172, *Akyeampong* UNDT/2010/189 and *Bofill* UNDT/2010/190, the Tribunal held that, apart from the compensation granted in accordance with art. 10.5 of its Statute, in cases of non-promotion, it will only grant compensation for moral damage if it considers that the Applicant would have had the chance of promotion had no irregularity been committed.

120. In *Lauritzen* UNDT/2010/172 and *Znamenski* UNDT/2010/208, the Tribunal recognized that the Secretary-General has wide discretion over the organization of work, but such discretion is not unfettered; it is subject to the Tribunal’s supervision (*Assad* 2010/UNAT/021). While the Tribunal cannot substitute its judgment for that of the Secretary-General regarding the appropriate organization of work, it must verify that a decision in this respect was not made for unlawful reasons.

121. As follows from the above considerations, the request for cancellation of JO 24760 was accompanied by written reasons. There is no evidence that the Applicant

was the only roster candidate from the 191 applicants. Also there is no evidence that the cancellation of the job opening had an adverse effect on her morale and professional reputation. The Applicant has the status of a pre-approved roster candidate indefinitely and there is no evidence that JO 24760 was cancelled to personally target the Applicant and not to select her for the Post. The Tribunal considers the cancellation of JO 24760 to have been lawful and that it did not affect irreparably the contractual rights of the Applicant since it was announced that the post may be re-advertised.

122. As established by the jurisprudence of the Appeals Tribunal, a staff member has no right to be selected for a post, but has the right to receive full, fair and timely consideration for a post, and this right has a fundamental nature.

123. The Tribunal considers that the Administration's failure to restart the selection process by creating a new job opening after JO 24760 was cancelled, affected the Applicant's right to receive full, fair and timely consideration for the Post and the re-advertisement of the Post was delayed for eight months because of the lateral transfer. The delay in implementing the decision to transfer Ms. CP further suggests that there was no real need for an expedited recruitment, as required for a lateral transfer. The Tribunal also notes that in the present case, the then ASG/C exercised her discretion and opted for the lateral transfer procedure without, apparently, giving any consideration to selecting a candidate from the roster, which is the expedited procedure established by ST/AI/2010/3. The transfer procedure created an advantage for Ms. CP, who had not previously been in a position to apply for the Post because of her involvement in the creation of the job opening, and the Administration failed to ensure the appearance of fairness of the lateral transfer process.

124. In *Kamal* 2012-UNAT-204, the Appeals Tribunal ruled that the delay itself, in the absence of negligence or a violation of specific rules by the Administration, cannot be considered a valid ground for compensation.

125. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated (emphasis in original):

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may of *itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee [footnote omitted].

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

126. In *Ivanov* UNDT/2014/117, the Tribunal awarded the Applicant compensation in recognition of the delay by an Investigation Panel in submitting its report. The Tribunal stated:

49. The Tribunal notes that the [Under-Secretary-General, Department of Management] recognized that the three months delay in appointing the Investigation Panel resulted in a breach of sec. 5.14 [of ST/SGB/2005/21 (Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations)] and awarded the Applicant compensation in the amount of USD1,000 (approximately USD300/month). The Tribunal, in the light of the particular circumstances of the present case, will therefore grant the Applicant an additional award of

compensation in the amount of USD1,300 for the additional delay of four months that it took the Investigation Panel to submit its report following the expiration of the three month time period by which it was required to submit its report following its appointment. Taking into consideration that the Applicant refused to accept the initial payment of USD1,000, it results that the Respondent is to pay to the Applicant a total compensation of USD2,300.

127. The Tribunal concludes that the Administration's failure to restart the selection process by creating a new job opening after JO 24760 was cancelled violated specific mandatory steps of the selection procedure in the case of cancellation of a job opening—creation of a job opening, requested also for a transfer, delayed the future selection process for the vacant post for eight months (from February 2013 when the lateral transfer was decided until 31 December 2013 when the decision effectively implemented on 1 July 2013 expired) and breached the Applicant's right to be fully, fairly and timeously considered for the Post, which has a fundamental nature. Consequently, the Applicant's request for compensation is granted in part and the Respondent is to pay USD2,400 as compensation to the Applicant (see previous para.).

128. Taking into consideration the particular circumstances of the present case, the Tribunal considers that the findings of the present judgment, together with the compensation awarded, represent reasonable and equitable relief.

129. The Tribunal notes that in *Muratore* UNDT/2011/129, it was stated that it is not for the Dispute Tribunal to order priority consideration of a candidate in future selection processes, as this would go against the right to fair and equal consideration of other candidates. Therefore, the Tribunal rejects the Applicant's request to order the Respondent to give priority to her candidacy within PPBA/OPPBA.

130. In light of the foregoing, the Tribunal DECIDES:

131. The Applicant's contention regarding the administration failure "to give full, fair and timely consideration to [her] candidacy to fill several vacancies for P-4 Programme Budget Officer as follows [vacancy announcement, "VA"]# 422344, 10-

FIN-DM-OPPBA-15424 ... 11-FIN-DM-OPPBA-21967, 11-FIN-DM-OPPBA-20766 ... ” is rejected as non-receivable.

132. The application is granted in part and the Respondent is to pay compensation of USD2,400 to the Applicant for the breach of her fundamental right to be fully, fairly and timeously considered for the Post.

Observations

133. The Tribunal observes that there are no specific provisions in ST/AI/2010/3 or guidance in the manuals to ensure a fair exercise of managerial discretion during the creation of the job opening and before the decision to publish the job opening in the compendium on Inspira. During this period, the hiring manager and the head of department may exercise their discretion and end the selection process without publishing the job opening by recommending and selecting a roster candidate or by laterally transferring a staff member who has requested, before or after the job opening was created, to be transferred within the department.

134. ST/AI/2010/3 does not set out any rules or procedure to be followed by the head of department to guide him or her in lawfully exercising his or her discretion and determining whether he or she should select a candidate from the roster or approve the request for transfer, and/or how to prioritize these two options during the creation of the job opening by the hiring manager, but before he or she decides to publish it on Inspira.

135. The Tribunal underlines that, in accordance with secs. 3.1, 3.2, 14.1 and 14.2 in ST/AI/2010/4/Rev.1 (Administration of temporary appointments), a temporary job opening must be issued when there is a need for service initially for more than three months, but less than one year. A temporary appointment for less than one year can be renewed only in exceptional situations up to a maximum of 729 days, but cannot be used to fill needs that are expected to last up to one year or more.

136. The lateral move defined in sec. 1(q) has a mandatory duration of “at least one year”. It is not a temporary appointment and therefore none of the provisions from ST/AI/2010/4/Rev.1 are applicable to a lateral move. A temporary appointment does not qualify as a lateral move unless it reaches one year.

137. ST/AI/2010/3 (Staff selection system) is not applicable to lateral moves and to transfers which are expressly excluded in accordance with sec. 3.2(l), but there are no other regulations, rules or issuances regulating the procedure for these important modifications of the employment contract. Also, even if they represent movements of the staff, they are excluded from ST/AI/2010/3.

138. The Tribunal observes that ST/AI/2010/3 has special and mandatory eligibility requirements (two prior lateral moves) for staff recruited at the P-4 level to become eligible for promotion to the P-5 level and exceptions (see sec. 6.3).

139. In order to ensure that both the staff selection process and the procedure for lateral moves and transfers are substantively fair, and perceived to be so, and to prevent any potential confusion and/or abuse of discretion by hiring managers and/or heads of department in not applying the selection system as it is intended (including the roster system) by using parallel procedures to select/appoint staff members for vacant posts, procedures which are in direct relation not only with the important contractual right of a staff member to be considered for vacant posts, but also with P-4 level staff members’ right to be considered eligible for P-5 posts based on previous lateral moves, the Tribunal recommends that new procedural provisions be adopted in the area of lateral moves and transfers as soon as possible.

140. The Tribunal also underlines that selection from the roster, being part of the staff selection system, must always follow art. 101.3 of the United Nations Charter (emphasis added): “The paramount consideration in the employment of the staff and in the determination of the conditions of service *shall* be the necessity of securing the highest standards of efficiency, competence and integrity”.

(Signed)

Judge Alessandra Greceanu

Dated this 15th day of April 2015

Entered in the Register on this 15th day of April 2015

(Signed)

Hafida Lahiouel, Registrar, New York