UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/001
Judgment No.: UNDT/2015/125
Date: 31 December 2015
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

WILSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Marisa Maclennan, OSLA
Jiries Saadeh, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Senior Investigator with the Office of Internal Oversight Services ("OIOS") of the United Nations Secretariat, contests the decision of the Assistant Secretary-General ("ASG"), Office of Human Resources Management ("OHRM"), Department of Management, not to grant him an exception to sec. 6.1 of ST/AI/2010/3 (Staff selection system), which provides that staff members are "not eligible to apply for positions more than one level higher than their personal grade". The Applicant is at the P-5 level and applied for the D-2 level position of Director, Ethics Office. He seeks rescission of the decision and compensation in the form of six months' net base salary for a violation of his rights and loss of opportunity to be considered for the D-2 level post.

Background

2. The Applicant joined the Organization in 2005 and, at the time of the filing of his application before the Tribunal, held a continuing appointment in OIOS at the P-5 level, step 8. Since 14 May 2014 and at least as of the date of his application, the Applicant was performing the duties and functions of Deputy Director of Operations, Investigations Division, OIOS, in New York, at the D-1 level.

3. The job opening for the D-2 level post was issued on 26 September 2014, with a closing date of 25 November 2014. It required, *inter alia*, 15 years of progressively responsible professional experience in the field of public administration.

4. On 17 October 2014, the Applicant applied for the position.

5. On 29 October 2014, the Applicant was notified by OHRM that he was not eligible to apply for the post on the ground that the level of the advertised post was more than one level above the level of his fixed-term post, which was at the P-5 level. OHRM's email stated:

> It is confirmed that you are not currently eligible for D2 posts because you are currently holding a fixed term contract at the P5 level. According to our AI [administrative instruction ST/AI/2010/3 on the staff selection system], you may only apply for up to one level higher than your current personal level. I hope this helps to clarify your eligibility for higher level positions.

6. On 30 October 2014, prior to the deadline of 25 November 2014 for applications to the post, the Applicant requested that an exception be made to sec. 6.1 of ST/AI/2010/3, pursuant to staff rule 12.3(b), which allows for exceptions to Staff Rules in certain circumstances, on the grounds, *inter alia*, that he meets the required competencies as well as educational and work experience requirements; that he has been placed on a D-1 roster since 19 July 2013; that he has been performing duties at the D-1 level since May 2014; and that this opening may be one of his last opportunities to be promoted to the D-2 level prior to his mandatory retirement age, which is only five and a half years away.

7. By email dated 17 November 2014, the ASG denied the Applicant's request in the following terms:

> This refers to your interoffice memorandum of 30 October 2014 on your request for exemption as a candidate for the position of Director Ethics, D-2: JO 14-ETH-Ethics Office-37595-D-New York (G).
>
> …
>
> I have carefully reviewed your request to be exceptionally considered as a candidate for the position of Director Ethics, D-2 notwithstanding your personal grade and fixed-term appointment at the P5 level.

To give full consideration to your case I made reference to the Article 101.3 of the Charter that provides: "The paramount consideration in the employment of the staff and the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity".

I have also taken note of the Staff Rule 112.2(b) [sic] in regard with exceptions. "Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion [of] the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members".

Additionally I considered the ST/AI/2010/3 as it applies 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 up to and including the D-2 level. The appointment at the level of ASG and USG [Under-Secretary-General] are political appointments and would not be comparable with the provisions set out in the scope of the AI on the Staff selection system.

Under the applicable pre-screening and assessment criteria (Section 7) and eligibility requirements (Section 6 of the ST/AI/2010/3) applicants applying to job openings are pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements as stated in the job opening including their current personal grade.

Exceptions to the above mentioned eligibility requirements on current personal grade (paragraph 6.1) are allowed for and communicated in paragraph 6.5 of the same ST/AI, which sets out that a staff member holding a permanent, continuing, probationary or fixed-term appointment (with no appointment limitation) assigned from a headquarters location, including regional commissions, to a position one level higher than his/her current grade in a peacekeeping operation or special political mission, where a lien is maintained against a position at the parent duty station, may temporarily be promoted to the level of the position in the peacekeeping operation or special political mission for the duration of the assignment. A staff member temporarily promoted may apply during his/her assignment in a peacekeeping

> operation or special political mission to job openings one level higher than his/her temporary grade level, provided that he/she has spent more than 12 months continuously in the peacekeeping operation or special political mission.
>
> This is the exception to the rule and the determination made in the best interest of the Organisation to ensure transparency, and opportunity for those serving in locations of PKOs [peacekeeping operations] or SPMs [special political missions].
>
> I would also like to highlight that every effort is made to ensure equity and fairness in recruitment and ensure equitable treatment of staff.
>
> Having analysed your request and the ruling in this matter, I regret to inform you that I am unable to grant an exception to the eligibility requirements as set out in ST/AI/2010/3 in order for you to apply for the post of Director Ethics, D-2; JO 14-ETH-Ethics Office-37595-D-New York (G). The exception would be considered as prejudicial to the interests of any other similarly situated staff member or group of staff members for [sic] other positions in the same and other categories advertised across the Secretariat that have not applied to the same similar [sic] positions following the paragraph 6.1 of the ST/AI/2010/3.
>
> I hope this helps to clarify your eligibility for higher level positions.

8. On 26 November 2014, the Applicant sought management evaluation of the ASG's decision not to grant an exception under staff rule 12.3(b) to allow the Applicant to apply for a position more than one grade above his post.

9. On the same date, the Applicant filed an application for suspension of action with the Dispute Tribunal (Case No. UNDT/NY/2014/068), seeking the suspension of the decision denying him the exception as well as the suspension of the recruitment exercise pending management evaluation.

10. By Order No. 327 (NY/2014), dated 28 November 2014, the Tribunal rejected the application, finding that the ASG's decision not to grant the requested exception did not appear *prima facie* unlawful on the documents presented.

11. On 23 December 2014, the Management Evaluation Unit upheld the contested decision.

12. On 27 January 2015, the Applicant filed the present application before the Tribunal. The Respondent's reply was duly filed on 2 March 2015.

Consideration on the papers

13. In his application, the Applicant requested an oral hearing to testify as to his current duties and prior experience, as well as to call the ASG to provide evidence on factors that were considered in reaching her decision. The Applicant further requested the disclosure of "any and all internal notes and correspondence related to the Applicant's request for an exception and to the ASG/OHRM's response".

14. With regard to the Applicant's duties and prior experience, the issue of whether the Applicant had sufficient experience and would be qualified for a D-2 is not before the Tribunal. It is not the function of the Tribunal to act as a selection or interview panel in determining whether the Applicant's qualifications match the competencies and requirements of any particular post (*Fröhler* 2011-UNAT-141; *Ljungdell* 2012-UNAT-265). Further, with regard to the factors considered in reaching the ASG's decision, the Tribunal is satisfied that the email of 17 November 2014 is a contemporaneous record of the contested decision and the reasons for said decision, as notified to the Applicant at the time of the events. In these circumstances, the Tribunal finds that this case may be determined on the papers before it.

15. Although the Applicant requested a hearing and any internal documentary evidence regarding the contested decision, the Respondent neither addressed these points in his reply nor requested a hearing or disclosed any documentation. Thus, the Respondent's submission stands on its own as presented in the reply,

the Respondent being satisfied with the documentary evidence tendered before the Tribunal. Accordingly, the Tribunal made no order for a hearing on the merits.

Applicable law

16. Sections 6.1, 6.5, and 6.6 of ST/AI/2010/3 (Staff selection system) state that (footnotes omitted):

> **Section 6**
>
> **Eligibility requirements**
>
> 6.1 Staff members holding a permanent, continuing, probationary or fixed-term appointment shall not be eligible to apply for positions more than one level higher than their personal grade. …
>
> …
>
> 6.5 A staff member holding a permanent, continuing, probationary or fixed-term appointment (with no appointment limitation) assigned from a headquarters location, including regional commissions, to a position one level higher than his/her current grade in a peacekeeping operation or special political mission, where a lien is maintained against a position at the parent duty station, may temporarily be promoted to the level of the position in the peacekeeping operation or special political mission for the duration of the assignment. A staff member temporarily promoted may apply during his/her assignment in a peacekeeping operation or special political mission to job openings one level higher than his/her temporary grade level, provided that he/she has spent more than 12 months continuously in the peacekeeping operation or special political mission. At the end of his/her assignment in the peacekeeping operation or special political mission, the staff member will revert to his/her original level at the former duty station and may henceforth only apply to job openings one level above his/her original level.
>
> 6.6 The provisions of section 6.5 above also apply to staff members appointed to a peacekeeping mission or special political mission (with no appointment limitation) who are selected for an assignment to a position one level higher than their current grade at a headquarters location or regional commission.

17. Staff rule 12.3(b) states:

> **Rule 12.3**
>
> **Amendments of and exceptions to the Staff Rules**
>
> …
>
> (b) Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

18. In its resolution 63/250 (Human resources management), adopted on 24 December 2008, the General Assembly stated (emphasis in original):

> **VIII**
>
> **Career development and support**
>
> …
>
> 3. [The General Assembly] *[r]equests* the Secretary-General to make full use of the grade structure and to submit a concrete proposal to the General Assembly at the sixty-fifth session on how and where P-1 positions might be used more effectively.

Submissions of the parties

19. The Applicant's principal contentions may be summarized as follows:

> a. The contested decision is unlawful because the ASG did not fully consider his request for an exception under staff rule 12.3(b) and incorrectly fettered her discretion. The Applicant's case is similar to that of *Hastings* UNDT/2009/030 (on liability) and *Hastings* UNDT/2010/071 (on relief) (both affirmed in *Hastings* 2011-UNAT-109) in that the ASG failed to properly consider the applicant's request;

b. The ASG summarily dismissed the Applicant's request without proper consideration of its merits and, particularly, without giving due regard to his personal situation. An individualised consideration of the request for an exception was not exercised and the contested decision represents, in the Applicant's words, "a mechanical regurgitation of preapproved reasons on which such a request can be denied";

c. The ASG disregarded the fact that the Applicant was performing duties only one grade level below the grade of the advertised D-2 level post;

d. Notwithstanding the ASG's statement that she had given "full consideration to" and had "carefully reviewed" the Applicant's case, there is no factual analysis of how the legal provisions referred to had actually been applied to the Applicant's case and why the granting of an exception was not deemed appropriate;

e. The ASG's over-reliance on sec. 6.5 of ST/AI/2010/3 suggests that no other exception could be considered;

f. The ASG failed to explain how other similarly situated staff members would be prejudiced if an exception were to be granted to the Applicant.

20. The Respondent's principal contentions as set out in the reply may be summarized as follows:

a. The *Hastings* case is distinguishable from the Applicant's case in that in *Hastings* the decision-maker believed mistakenly that no exception was legally possible, whereas in the present case the ASG turned her mind

to the matter, considered the request, and lawfully exercised her discretion in denying it;

b. Consistent with the principle of equal treatment of staff (which is a principle of general application as set out in *Chen* 2011-UNAT-107 and *Tabari* 2011-UNAT-177), the ASG correctly observed that fairness and transparency in recruitment exercises must be ensured;

c. The ASG correctly assessed whether secs. 6.5 and 6.6, which allow for exceptions to sec. 6.1 of ST/AI/2010/3, could be applied in the Applicant's case. The ASG found that the Applicant did not meet the requirements for exceptions under secs. 6.5 and 6.6 because the advertise D-2 level position was located in the United Nations Headquarters in New York and not within a peacekeeping operation or a special political mission, as required by secs. 6.5 and 6.6;

d. The ASG examined several legitimate reasons when considering the request, including gender equality, whether the Applicant was from an entity that was being downsized, and whether the Applicant was from an under-represented country or a victim of a malicious act;

e. The requirement established in sec. 6.1 of ST/AI/2010/3 seeks to preserve the General Assembly's request in resolution 63/250 to make full use of the grade structures within the Organization;

f. The ASG did consider the entirety of the Applicant's contentions before rejecting his request for an exemption.

Consideration

Contested decision

21. The issue in the present case is whether the ASG properly considered the Applicant's request for an exception to sec. 6.1 of ST/AI/2010/3 in determining that the conditions set out in staff rule 12.3(b) for the granting of the requested exception were not met.

General law on exceptions

22. Although staff rule 12.3(b) refers to exceptions to the Staff Rules, the Dispute Tribunal and the Appeals Tribunal have ruled that the same rule applies to legal instruments of subsidiary nature, including administrative instructions (*Hastings* UNDT/2009/030 and *Hastings* UNDT/2010/071 (affirmed in *Hastings* 2011-UNAT-109); *Villamoran* UNDT/2011/126 (affirmed in *Villamoran* 2011-UNAT-160).

23. For an exception to be granted under staff rule 12.3(b), the following conditions must be met:

a. Such an exception must be consistent with the Staff Regulations and other decisions of the General Assembly;

b. Such an exception must be agreed to by the staff member directly affected; and

c. Such an exception, in the opinion of the Secretary-General, must not be prejudicial to the interests of any other staff member or group of staff members.

24. Consideration of a request for an exception is, in and of itself, an administrative decision. Every administrative decision entails a reasoned determination after consideration of relevant facts since there is a duty on institutions to act fairly, transparently and justly in their dealings with staff members (*Obdeijn* UNDT/2011/032 (affirmed in *Obdeijn* 2012-UNAT-201, with a variation of compensation orders)).

25. Thus, each request for an exception has to be considered on its particular circumstances. As the Tribunal stated in *Villamoran* UNDT/2011/126 (emphasis in original),

> [t]he right to request and to be properly considered for an exception is a contractual right of every staff member … (see *James* UNDT/2009/025 and *Goddard* UNDT/2010/196). Under staff rule 12.3(b), any request for an exception to the Staff Rules—and, by extension, to administrative issuances of lesser authority (see *Hastings* UNDT/2009/030)—*must* be properly considered in order to determine whether the three parts of the test established by staff rule 12.3(b) are satisfied. Failure to do so would result in a violation of the contractual rights of the staff member requesting the exception.

26. The rejection of the Applicant's request for an exception was based on the third part of the test under staff rule 12.3(b), namely the finding that the requested exception would be "prejudicial to the interests of … other staff". Thus, before examining whether the Applicant's request was considered properly, it is necessary to reflect, in particular, on the meaning of the terms "prejudicial" and "interests".

Meaning of the word "prejudicial"

27. With regard to the word "prejudicial", the Tribunal (Judge Adams) observed in *Applicant* UNDT/2010/115 (affirmed in *Appellant* 2011-UNAT-124) that:

> Part of the difficulty with the word "prejudice" is that it can have at least two meanings or, perhaps more precisely, two applications. The first is the sense of personal judgment or attitude, a prejudice about someone; the second is in the sense of an adverse situation or even decision, where the individual is prejudiced or harmed by what has occurred. The two applications are very different.

28. It is obvious that, in the context of staff rule 12.3(b), the word "prejudicial" is used to mean "harmful". See also Bryan Garner, *A Dictionary of Modern Legal Usage* 2nd Ed. (Oxford University Press, 2001), p. 684, defining "prejudice" as "a legalism for harm" and "prejudicial" as "tending to injure; harmful", and adding that "[t]he meaning of a sentence can frequently be made clearer by using *harmful* in place of *prejudicial*" (emphasis in original).

29. Thus, the third part of the test under staff rule 12.3(b)—that the exception "is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members"—means that the exception, in the opinion of the decision-maker, must not be *harmful* to the interests of other staff.

"Interests" v. "rights"

30. The word "interests" in staff rule 12.3(b) ("prejudicial [i.e., harmful] to interests of any other staff") also requires interpretation. This term has several meanings, both in common non-legal parlance as well as in various specific areas of law (for instance, the law of real property and the law of remedies). It has been said that "interest" is generally understood "to denote a right, claim, title, or legal share in something" (*Black's Law Dictionary* 6th Ed. (West Publishing, 1990), p. 812).

31. Notably, the Staff Regulations and Staff Rules use the terms "interest" and "interests" throughout the text in a broader context as compared to "right" or "rights". See, for instance, references to the "interests of the Organization" (e.g.,

staff regulations 1.1(b), 1.1(f), 1.2(e), 1.2(f), 1.2(p)); "financial interests of the Organization" (staff rule 1.7); "conflict of interest", "staff member's personal interests" and "the interests of the staff member and his or her family" (staff regulation 1.2(m)–(n); staff rule 5.2(h)); and "interest of the good administration of the Organization" (staff regulation 9.3).

32. The references to "right" and "rights" in the Staff Regulations and Staff Rules are too numerous to mention, and in this instance are unnecessary to list, but it is clear that the Organization's legislative framework treats "interests" and "rights" as two distinct terms, with the first term being more general in nature.

33. Having used both the terms "interests" and "rights" in the same Staff Rules, it is obvious that the legislative choice of the term "interests" in staff rule 12.3(b) was not accidental. As stated in *Awad* UNDT/2013/071,

> it is well-settled that where the legislative body "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed" (*Morissette v. United States*, 342 U.S. 246, 263 (1952)).

34. Thus, in staff rule 12.3(b), the term "interests" of other staff is used in the broader sense than the term "rights" of other staff. The determination of whether the granting of an exception would be "prejudicial" (i.e., harmful) to "interests" is an exercise of discretion, and, as any other administrative decision, it entails a reasoned determination arrived at after consideration of relevant facts (*Obdeijn*).

35. The decision-maker must keep in mind that having one's request for an exception properly considered is a *legal right* of every staff member. As part of the consideration process, the decision-maker has to determine identifiable and

sufficiently comparable interests of other staff, so as to determine that, "in the opinion of the Secretary General", the exception is not prejudicial to these interests. Failure to do so would mean that the consideration of the request for an exception was based on improper or inadequate considerations, and the final decision may be impugned.

Exercise of discretion in this case

36. In her response of 17 November 2014, the ASG describes the assessment of her review as "careful" and "full", commencing her reasoning by reference to art. 101.3 of the Charter and former staff rule 112.2(b) regarding exceptions. The ASG then discusses the difference between appointments at the ASG/USG levels and lower levels. The decision then refers to sec. 7 (pre-screening procedure) and to sec. 6.5 (promotions in peacekeeping operations and special political missions) of ST/AI/20103. The ASG also refers to the need to ensure "equity and fairness in recruitment" and concludes by making a finding that the requested exception could not be granted under the third component of staff rule 12.3(b) because it would be "prejudicial to the interests of any other similarly situated staff … [sic] for other positions … that have not applied to the same similar [sic] positions following [sec] 6.1".

Reference to the Staff Rules

37. The Tribunal notes at the outset that reference to former staff rule 112.2(b) in the ASG's decision was erroneous as the edition of the Staff Rules referred to was abolished more than five years earlier. It is not clear whether the incorrect reference was a mere oversight or an indication of a formalistic template-based approach, as suggested by the Applicant. In any event, nothing follows from this as the language of former staff rule 112.2(b) and current staff rule 12.3(b) is identical.

Discussion of which types of exceptions to sec. 6.1 are allowed

38. In the reference to the pre-screening and assessment criteria (sec. 7 of ST/AI/2010/3), the ASG states that applicants to job openings are pre-screened on the basis of information provided in their application to determine whether they meet the minimum requirements as stated in the job opening, including the current personal grade. This statement is then followed in the reasoning by the "exceptions" communicated in sec. 6.5 of ST/AI/2010/3, reinforcing the suggestion that, in the mind of the decision maker, it was the only applicable exception. The reasoning makes no reference to the case of *Hastings*, particularly para. 25 of Judgment No. UNDT/2009/030, which was raised by the Applicant and which reads as follows:

> The imperative of the paramount considerations for the employment of staff in article 101.3 of the Charter and staff regulation 1.1(d) means that it is conceivable that in certain circumstances an exception would have to be made to meet those paramount considerations. For example, where an otherwise ideal candidate with the highest standards of efficiency, competency and integrity does not meet the pre-requisites for the position in the staff rules, rule 112.2(b) could be invoked for the paramount considerations to prevail in order to enable an exception to be made to the otherwise strict rule.

39. In the longest paragraph of the contested decision, there follows a detailed discussion of sec. 6.5 of ST/AI/2010/3 governing promotions in peacekeeping operations and special political missions. The ASG referred to sec. 6.5 as "the exception to the rule" in the following terms (emphasis added):

> Exceptions to the above mentioned eligibility requirements on current personal grade (paragraph 6.1) are *allowed for and communicated in paragraph 6.5* of the same ST/AI …
>
> …

> *This is the exception to the rule* and the determination made in the best interest of the Organisation to ensure transparency, and opportunity for those serving in locations of PKOs or SPMs.

40. The language and text of the email of 17 November 2014 strongly suggests that the ASG considered that the only exceptions that could be granted to sec. 6.1 were under the provisions of sec. 6.5, which would in turn suggest that no other exceptions outside of sec. 6.5 of ST/AI/2010/3 were possible. In particular, the ASG's comments on prescreening for meeting minimum requirements and that "[e]xceptions to the above mentioned eligibility requirements on current personal grade (paragraph 6.1) are allowed for and communicated in paragraph 6.5 of the same ST/AI," together with the statement that "[t]his is the exception to the rule", express the construction that no exceptions other than under the conditions in sec. 6.5 were possible.

41. If that was indeed the construction given to secs. 6.1 and 6.5 by the ASG, that interpretation was incorrect. Section 6.5 (or sec. 6.6, as suggested in the Respondent's reply) is not *the exception* to sec. 6.1 to but rather a specific rule governing promotions in peacekeeping and special political missions. In other words, sec. 6.5 applies to specific circumstances, and when it applies, an exception under staff rule 12.3(b) is not required. However, sec. 6.5 does not preclude the possibility of exceptions being granted to sec. 6.1 under appropriate circumstances.

Determination that the exception would be "prejudicial to interests" of other staff

42. The Tribunal considers that, to make a proper finding that the granting of an exception would be "prejudicial" (harmful) to the "interests" of other staff, the decision-maker must make a reasoned case-by-case assessment of the circumstances in each particular case, determine identifiable and sufficiently comparable interests of other staff that might be prejudiced by the exception, and

make his or her decision bearing in mind the right of staff to have their requests for exception properly considered. This process, however, was not followed in this case.

43. The final justification for rejecting the Applicant's request for an exception is expressed in conclusion as follows (emphasis added):

> The exception would be considered as prejudicial to the interests of any other similarly situated staff member or group of staff members for [sic] other positions in the same and other categories advertised across the Secretariat *that have not applied* to the *same similar* [sic] *positions* following the paragraph 6.1 of the ST/AI/2010/3.

44. Thus, the ASG's finding of "prejudice" was made in relation to staff members who have *not* applied for "*same similar" positions* in the *past*. (It is somewhat unclear what the reference to "*same similar* positions" is, but, in all likelihood, the ASG meant to say "same *or* similar positions").

45. This justification was flawed for several reasons, as explained below.

46. It is hard to see how the Applicant's request for an exception could be *retroactively* prejudicial to the interests of unidentified staff who, in the past, chose not to request exceptions and not apply for some positions. If that were the standard of reasoning to be applied in the consideration of exceptions, then, in reality, no exception could ever be granted.

47. An exception, by its nature, is a deviation from the rule, as it treats the staff member in whose favour it is being made differently to the rest of staff. To find that an exception is not possible due to the mere fact that would result in a differential treatment of a staff member as compared to others is a logical fallacy, because it faults the instrument of exception precisely for what it is.

48. The Tribunal notes that a more appropriate consideration for the ASG to have taken into account would have been whether any prejudice would have been caused to other candidates applying for the *same* post. However, this appears not to have been a consideration at all, since it was not mentioned in the reasoning for the decision. As this was not a factor deemed relevant by the ASG, it is difficult to see how the far more removed issue of staff applying for *other* positions would be relevant, let alone staff who did *not to apply* for other similar positions across the Secretariat in the *past*—which was nevertheless one of the main considerations relied upon by the ASG.

49. The Tribunal observes that, in any event, even if the ASG relied upon prejudice caused to other candidates for the same post, it is unclear whether that alone—in the absence of a finding of prejudice to other interests—would have justified rejection of the request for an exception. The Tribunal would have to examine the reasoning on which such a rejection would be based. Arguably, the mere fact that an additional candidate would be added to the pool of candidates under justifiable circumstances, would not, in and of itself, be prejudicial (i.e., harmful) to other candidates as it would not affect their right or interest in being fully and fairly considered. Vacancies published by the United Nations are generally available not only to current United Nations staff, but also to the public at large. In any given selection exercise, candidates generally would not know how many candidates they are competing against and may in fact compete against dozens of other candidates. It may be argued that this is not prejudicial to any of the candidates in and of itself, but is merely a reflection of the competitive and publically accessible nature of the recruitment system in place at the United Nations. In any event, the Tribunal need not make any determinative pronouncements on this point as this was not among the considerations listed by the ASG in her decision.

Failure to consider Applicant's personal circumstances and attributes

50. The Tribunal finds that the contested decision failed to consider and discuss any of the personal circumstances and attributes raised by the Applicant as warranting an exception in his case—that is, it failed to properly consider the request on the merits of his particular case. Namely, no consideration was given, *inter alia*, to the Applicant's qualifications and prior work experience; the fact that he has been rostered at the D-1 level since July 2013; and the fact that since May 2014 he has been performing temporary functions of a D-1 post.

51. The Tribunal notes that, in para. 22 of his reply, the Respondent asserted that the ASG "considered each of the Applicant's contentions". However, no documentary evidence to substantiate these alleged considerations was attached to the reply, nor has the Respondent sought to adduce any oral evidence to support these unsubstantiated averments. In any event, the language of the ASG's decision of 17 November 2014 is clear. That decision simply did not consider or discuss the reasons provided by the Applicant, including his personal circumstances and attributes.

Respondent's submission regarding General Assembly resolution 63/250

52. The Respondent submits that the requirement established in sec. 6.1 of ST/AI/2010/3 seeks to preserve the General Assembly's request to "make full use" of the grade structure, as expressed in sec. VIII of General Assembly resolution 63/250 , which states:

> 3. [The General Assembly] *[r]equests* the Secretary-General to make full use of the grade structure and to submit a concrete proposal to the General Assembly at the sixty-fifth session on how and where P-1 positions might be used more effectively.

53. The exact meaning and intended application of the reference to the "full use of the grade structure" in General Assembly resolution 63/250 is somewhat

unclear. It appears to be in reference to use of P-1 positions in the context of the grade structure. The Respondent's suggestion that it precludes the granting of exceptions to sec. 6.1 of ST/AI/2010/3 is untenable. Nothing in the text of that resolution suggests that the phrase "to make full use of grade structures" should be interpreted as a general proscription against exceptions to any provision of ST/AI/2010/3.

54. In any event, the Tribunal notes that the contested decision of the ASG contained no reference to that resolution and there is no evidence that it was even considered at the time of the events.

Conclusion

55. Having considered the reasoning provided by the ASG, the Tribunal finds that the request was not properly considered in that irrelevant factors were taken into consideration whereas relevant factors were not. In particular, no proper consideration was given to the individual circumstances and attributes that may have warranted a legitimate exception in this case. Further, the reasoning supporting the decision was flawed. In effect, no reasonable explanation has been provided as to why the granting of this exception would have been prejudicial to other staff.

56. Having found that the Applicant's request for an exception was not given proper consideration, the Tribunal now turns to the issue of relief.

Relief

57. The Applicant seeks the following heads of relief:

> The Applicant respectfully requests that 1) the decision not to grant an exception be rescinded and that he be allowed to compete for the [job opening] in question; and/or 2) that he be compensated six months' net base salary for a violation of his due process rights and

> the right to be subject to a fair procedure and consideration, in addition to the loss opportunity to be considered for the [D-2] position.

58. With respect to the Applicant's request to "be allowed to compete for the [job opening] in question", the Tribunal finds that, even if the selection process were still ongoing—which would be surprising given the passage of time—it would not be for the Tribunal to decide whether the request for an exception should be granted.

59. The Tribunal does not find that the Applicant's request for six months' salary for "violation of his due process rights and the right to be subject to a fair procedure and consideration" is justified or substantiated. As the Appeals Tribunal stated in *Antaki* 2010-UNAT-095, "not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages". In the present case, the Applicant has not even submitted that he suffered emotional distress or any other type of non-pecuniary loss.

60. However, the Tribunal finds that the Applicant did suffer some pecuniary harm as a result of not having his request properly considered and the resultant loss of chance of promotion.

61. In determining compensation in promotion-related cases, the Tribunal must be guided by two primary considerations: the nature of the irregularities that led to the contested administrative decision and the chance that the staff member would have been recommended for promotion had the correct procedure been followed (*Solanki* 2010-UNAT-044). As the Appeals Tribunal stated in *Lutta* 2011-UNAT-117, there is no pre-determined, automatic way for the first instance court to set damages for loss of chance of promotion. Each case must turn on its facts. When a staff member has suffered a loss of chance/opportunity, compensation may be measured under the "percentage" method affirmed by the

Appeals Tribunal in *Hastings* 2010-UNAT-106, or it may be determined according to the trial judge based on the facts of the individual case (*Lutta*).

62. Due to the particular circumstances of this case and the uncertainties involved, the pecuniary harm suffered by the Applicant as a result of the loss of chance of promotion is difficult to quantify under the "percentage" method. The Tribunal cannot speculate as to the likelihood of the exception being granted had the Applicant's request been properly considered, nor can the Tribunal speculate about the Applicant's chances of being selected had he been allowed to submit his candidacy. However, it is clear that the Applicant did sustain some loss.

63. The Tribunal took note of the nature of the breach and the awards made in matters involving comparable cases of loss of chance of promotion or appointment. For instance:

a. In *Hastings* UNDT/2010/071 (affirmed with variation of award in *Hastings* 2011-UNAT-109), the final award for loss of chance of promotion was 10 percent of the two-year difference between the applicant's salary and the salary she would have received at the D-2 level. The final payment was USD2,971.74 (see Secretary-General's Report on the Administration of justice at the United Nations A/66/275, Annex III.B (Monetary compensation awarded by the United Nations Dispute Tribunal and United Nations Appeals Tribunal in the period of 1 July 2009 to 31 May 2011));

b. In *Marsh* UNDT/2011/035 (affirmed in *Marsh* 2012-UNAT-205), the final award was EUR5,000, including the sum of EUR2,500 for loss of chance of promotion to the P-4 level and loss of chance of being placed on a roster of pre-approved candidates for similar positions;

c. In *Mezoui* UNDT/2011/098, the Dispute Tribunal found that the applicant was not properly considered for a promotion at the D-2 level. The Tribunal estimated pecuniary harm stemming from the lost chance of promotion at USD5,500, having found that the applicant had one-in-four chance of being selected, as she was one of the four final candidates. The Tribunal was also satisfied that the Applicant demonstrated non-pecuniary harm, for which the Tribunal assessed the amount of compensation at USD2,000. However, the Tribunal made no compensation orders because it found that compensation previously paid to the applicant by the Secretary-General based on the recommendation of the Joint Appeals Board exceeded the amount that the Tribunal would have ordered. The Dispute Tribunal, however, ordered costs against the Applicant in the amount of USD2,000 for abuse of process. In *Mezoui* 2012-UNAT-220, the Appeals Tribunal affirmed the Dispute Tribunal's judgment but struck down the order on costs against the applicant;

d. In *Asariotis* UNDT/2013/144 (affirmed in *Asariotis* 2015-UNAT-496), the Dispute Tribunal found that, had the proper recruitment procedures been followed, the Applicant would have had one-in-seven chance of being promoted to the D-1 level. The Tribunal, among other orders, assessed compensation for the loss of chance of promotion at USD8,000.

64. The Tribunal has considered the circumstances of this case, the range of sums awarded in similar cases, and the uncertainties inherently involved in these types of matters. The Tribunal is satisfied that the amount of USD3,000 is sufficient to compensate the Applicant for the breach of his right to proper consideration of his request for an exception and for the resultant loss of chance of promotion.

Order

65. The application succeeds.

66. The Respondent shall pay the Applicant the sum of USD3,000. This sum is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If this sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 31st day of December 2015

Entered in the Register on this 31st day of December 2015

(*Signed*)

Hafida Lahiouel, Registrar, New York